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NAFTA Chapter 11 and Professional Sports in Canada

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ABSTRACT

Modern professional sports leagues are significant economic enterprises, the most prominent of which span the political border between the United States and Canada. In recent decades, local governments in the United States have invested heavily in professional sports franchises by building stadiums and arenas, hoping either to prevent the home team from moving out or to entice someone else's home team to move in. The willingness to pay of U.S. local governments, coupled with apparently disadvantageous economic conditions in Canada, has resulted in a net loss of professional franchises for Canadian cities, in particular franchises in Canada's national game, hockey. This Note inquires whether this process harms Canadian investors in professional sports franchises in a way that implicates the North American Free Trade Agreement (NAFTA), specifically the Agreement's rules governing investment. Although there is a growing body of adjudications under NAFTA Chapter 11, U.S. local assistance to professional sports franchises has not, to date, been the subject of a claim. This inaction may result from the inertia of U.S. municipal investment in professional sports, the confusion created by the unique economic structure of the professional leagues, or the perception that the professional sports industry is somehow less worthy of attention. Based on a survey of the types of aid provided by local governments to professional franchises, the recent movements of teams in the three relevant leagues, and a close examination of the economic relationship between franchises in a single league, this Note argues that Chapter 11 is a potentially relevant, if overlooked, part of the regulatory landscape. After sketching a hypothetical claim under Chapter 11, the Note concludes with an examination of the NAFTA's Cultural Exception in light of the steady migration of National Hockey League franchises out of Canada.

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I. INTRODUCTION

During the mid 1990s, Rod Bryden, owner of the Ottawa Senators franchise of the National Hockey League (NHL) watched two of Canada's eight NHL franchises relocate to U.S. cities.[1] The departing teams found that as player salaries and other operating expenses increased, their 50-year-old arenas could not produce enough revenue in small Canadian towns like Winnipeg and Quebec City to make the franchises profitable.[2] At the same time, U.S. cities seeking franchises offered to team owners inducements of every stripe—publicly-funded arenas full of luxury boxes and modern amenities, favorable leases on these facilities, and relocation bonuses worth as much as $20 million.[3] In stark contrast to the incentives

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1. William Houston & David Shoalts, *Small Market Teams Feel Pinch*, PITTSBURGH POST-GAZETTE, Jan. 16, 1994, at D1. In 1995, the Quebec Nordiques moved from Quebec City, Quebec to Denver, Colorado and became the Avalanche, and in 1996, the Winnipeg Jets left Winnipeg, Manitoba, and became the Phoenix Coyotes. Canada's six remaining franchises are the Toronto Maple Leafs, the Montreal Canadiens, the Vancouver Canucks, the Ottawa Senators, the Calgary Flames, and the Edmonton Oilers. Richard Sandomir, *Canada Kills Subsidy Plan for 6 N.H.L. Teams*, N.Y. TIMES, Jan. 22, 2000, at D1.
2. *See* Houston & Shoalts, *supra* note 1.
3. Tim Crothers, *The Shakedown*, SPORTS ILLUS., June 19, 1995, at 78.

offered by many U.S. cities, Bryden's Senators franchise labored under an immense tax burden imposed by both the Canadian federal government and the provincial government in Ottawa.[4] Viewed together, the playing field for North American professional sports seemed to be something short of even.[5]

Bryden's concerns about the financial health of his franchise and the basic economics of the NHL were even more immediate when the Senators filed for bankruptcy protection in January 2003.[6] Despite having one of the lowest payrolls in the league,[7] and leading the NHL in points,[8] the Ottawa franchise buckled under the weight of more than $100 million in debt, including $14 million owed to the NHL itself.[9] Most critically for the future of hockey in Ottawa, the Canadian bankruptcy filing left only a short window of time in which Bryden could make a bid to purchase the team.[10] Bryden's plan to purchase the team fell apart in late February 2003 when the main investor backed out, citing concern over the limited partnership that was at the heart of Bryden's proposal.[11] Bryden told reporters that despite his inability to retain control of the franchise, he didn't expect it to be relocated when sold,[12] but sale on the open market introduces significant uncertainties about where the Senators will play their home games in 2004.[13]

In 1994, Bryden told reporters that "[i]t would be nice if free trade would include professional sports in what constitutes a subsidy."[14] "If we were making paper instead of entertainment, we'd trot off to the local tribunal and say this is unfair competition."[15] But

4. Rachel Alexander, *Canada's National Game is Heading South*, WASH. POST, June 2, 1999, at D1.

5. Houston & Shoalts, *supra* note 1.

6. Thomas Heath, *Senators' Future Unclear After Bankruptcy Filing*, WASH. POST, Jan. 10, 2003, at D6.

7. Joe Lapointe, *Hockey: A Financial Sign of the Times*, N.Y. TIMES, Jan. 28, 2003, at D1.

8. *Bankrupt Senators Take Over Points Lead*, N.Y. TIMES, Mar. 9, 2003, Section 8, at 9. In the NHL, a team earns two points for each game won, and one point for each game tied. Thus, leading the legaue in points is tantamount to having the best record during the regular season.

9. Heath, *supra* note 6.

10. *Id.*

11. Shi Davidi, *Senators Are Up For Sale Again*, TORONTO STAR, Feb. 28, 2003, at C1.

12. *Id.*

13. Of the two principal suitors for the franchise, one is a Canadian investor, pharmaceutical billionaire Eugene Melnyk. *Id.* The other possible buyer is the investor who pulled out of Bryden's deal, U.S. financier Nelson Peltz. Rick Westhead, *Tycoon Peltz to Bid for Senators*, TORONTO STAR, Mar. 6, 2003, at C1.

14. Houston & Shoalts, *supra* note 1.

15. *Id.*

to date, neither Rod Bryden nor the ownership of any other Canadian professional sports franchise has sought relief under an international trade agreement. No Canadian investor has filed a claim alleging that significant and ongoing financial assistance by U.S. local governments to the operation of U.S. franchises violates basic principles governing international investment under the North American Free Trade Agreement (NAFTA). But why not?[16] This Note addresses that question by considering the relevant events of the past 20 years of municipal investment in sports, the economic structure of the professional sports leagues, and the relevant provisions of the NAFTA. These topics relate generally to three barriers that might explain the absence of arbitration claims in this industry.

The first possible barrier to a claim under the NAFTA chapter on investment in this context is the sheer inertia of municipal investment in professional sports facilities.[17] So much money has flowed from U.S. cities to professional sports franchises in recent decades that it is easy think that it cannot be stopped.[18] But a few recent events suggest that transfers from U.S. local government to professional sports franchises are not inevitable,[19] and responsible public policy-making demands consultation with every relevant body of law and regulation before committing public resources to such a

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16. The notion of seeking redress against U.S. cities and franchises through NAFTA's rules on investment has been before Canadian government and presumably team ownership at least since 1998 when attorneys Barry Appleton and Marjan Neceski made a proposal to the Canadian House of Commons Standing Committee on Canadian Heritage, Sub-Committee on the Study of Sport in Canada regarding the remedies available to Canadian investors in professional sports franchises under the NAFTA chapter on investment. *See* Barry Appleton & Marjan Neceski, *NAFTA & Sports, available at* http://www.naftalaw.com/casees/nafta&sports.pdf.

17. *See infra* Part II.

18. *See* Brett Smith, *If You Build It, Will They Come? The Relationship Between Public Financing of Sports Facilities and Quality of Life in America's Cities*, 7 GEO. PUB. POL'Y REV. 45 (2001) (reporting a 1998 estimate the "total public funds spent on professional sports facilities to be an average of $500 million per year, with $7 billion slated to be spent by 2006"). *Id.*

19. Taxpayers and some local politicians in U.S. cities have balked at the notion of committing public funds to the construction of new stadiums. *See Financing New Stadiums*, N.Y. TIMES, May 7, 1998, at A30. In some cases, San Francisco and MLB's Giants for example, public refusal to subsidize professional sports facilities has led to private stadium financing. *Id.* In other situations, a lack of public funding has caused a vagabond franchise to move on to greener pastures. For example, the NHL's Jets—formerly of Winnipeg—were unable to obtain public financing in Minneapolis, and as a result moved on to Phoenix. Al Strachan, *Jets to Rise in Phoenix After Getting Cold Shoulder in Winnipeg and Minneapolis*, TORONTO SUN, Nov. 24, 1995, at Sports 17.

project. This Note promotes the proposition that NAFTA is a relevant, if overlooked, part of the regulatory environment.

The second possible barrier is the confusion possibly created by the unique economic structure of the professional leagues.[20] The mix of competition and cooperation necessary to carry forth the enterprise of professional sports has led to a complicated jurisprudential and regulatory context.[21] In the proposed application of the NAFTA to professional sports franchises, there is an important question whether the teams in professional sports leagues participate in any market that is sufficiently competitive that municipal assistance to one franchise can reasonably be considered a detriment to other franchises. Because in many cases U.S. antitrust law requires a definition of relevant product and geographic markets,[22] this Note addresses the question of intra-league economic competition by reference to the body of judicial decisions considering whether federal antitrust law should apply to the actions of professional sports leagues.

The third possible barrier is the perception that such a claim is less worthy of attention because the investment is in a professional sports franchise and not an "ordinary" industry.[23] The paucity of published arbitration history under NAFTA's Chapter 11 does nothing to dispel this misperception,[24] nor does the fact that it seems difficult to analogize to previous NAFTA claims in the areas of hazardous waste disposal,[25] the production and sale of gasoline

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20. *See infra* Part III.A.

21. *See* Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 892 (1999) (noting that "[t]he federal courts' failure to develop a consistent theory regarding the economic behavior of sports leagues has prevented them from effectively regulating the leagues' abuses of monopoly power").

22. *See* CHARLES J. GOETZ & FRED MCCHESNEY, ANTITRUST LAW: INTERPRETATION AND IMPLEMENTATION 130-31 (1998) (The "[d]efinition of relevant product and geographic markets is an essential, and often outcome-determinative, part of [Sherman Act] § 1 litigation under the Rule of Reason").

23. Recall Rod Bryden's distinction between making paper and making entertainment, *supra* notes 14-15 and accompanying text; *see also infra* Part III.

24. Access to arbitration documents is actually improving through the efforts of the Parties to the agreement and a few attorneys who are actively involved in NAFTA arbitrations. The Canadian Department of Foreign Affairs and the U.S. Department of State offer many of the arbitration decisions and related filings. *See* Canadian Dep't of For. Aff., *Dispute Settlement*, *at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp; U.S. Dep't of State, *NAFTA Investor-State Arbitrations*, *at* http://www.state.gov/s/l/c3439.htm. Attorney Todd Weiler has also created a web portal that greatly simplifies the search for documents related to NAFTA arbitrations. *See* NAFTA Claims, *at* http://www.naftaclaims.com.

25. *See* Metalclad Corp. v. United Mexican States, Final Award, International Centre for Settlement of Investment Disputes (ICSID), Case No. ARB(AF)/97/1, Aug.

additives,[26] or softwood lumber.[27] But the perception that professional sports are in some way less serious business matters is outdated,[28] and a close review of the Agreement and prior arbitrations indicates that there is a claim to be made on behalf of Canadian franchise owners.[29]

At the outset, it is important to articulate the limits and purpose of a claim based in the investment protections of the NAFTA. This Note is not intended to suggest that such a challenge could or would have an injunctive effect in the case of any particular franchise that faces possible relocation. Rather, this Note envisions the addition of the NAFTA's substantive guarantees to the regulatory context in which municipal governments provide assistance to professional sports franchises. If successful, the argument requires local governments to mind the terms of the Agreement, hopefully leveling the playing field between franchises in the United States that receive these benefits and franchises in Canada that do not. Additionally, it follows that if U.S. local governments were more constrained in their ability to provide assistance to professional sports franchises, then, all other things being equal, Canadian franchises would be less likely to move south.

In Part II, this Note describes the nature of the economic relationship between local government and professional sports, culminating in a discussion of current movements in the three relevant leagues.[30] Part III discusses pertinent portions of the NAFTA chapter on investment and identifies the elements of a NAFTA claim as developed by prior arbitral proceedings. Part IV outlines a cause of action under the chapter on investment and considers whether the collusive features of the North American professional sports leagues thwart an individual owner's invocation of the substantive protections of NAFTA's Chapter 11. Finally, Part V examines the Canadian cultural exception to the NAFTA and

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30, 2000, *at* http://www.worldbank.org/icsid/cases/mm-award-e.pdf [hereinafter Metalclad Final Award].

26. *See* Methanex Corp. v. United States of America, Notice of Arbitration, July 2, 1999, *at* http://www.state.gov/documents/organization/8773.pdf.

27. *See* Pope & Talbot, Inc. v. Government of Canada, Interim Merits Award, June 26, 2000, *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc1.pdf [hereinafter Pope & Talbot Interim Merits Award].

28. *See* Paul Sweeney, *Sports Lending Looms as Big Hit*, U.S. BANKER, July 1998, at 37 (quoting the director of Fleet Financial Group's Sports Lending Group as saying "[s]ports business is no longer a hobby" when describing a $450 million financing his group arranged with Major League Baseball).

29. *Id.*

30. At present, the National Hockey League (NHL), Major League Baseball (MLB), and the National Basketball Association (NBA) have franchises in Canada. The National Football League (NFL) does not.

attempts to explain the failure to utilize this unique aspect of the NAFTA despite hockey's national importance to Canadians.

II. MUNICIPAL INVESTMENT IN PROFESSIONAL SPORTS FACILITIES

Professional sports facilities have evolved as much as the games they house. During the first decade of professional baseball, the 1870s, the parks were "primitive,"[31] with modern baseball historians doubting that any single park could accommodate more than 5,000 fans.[32] The enclosed ballpark actually evolved contemporaneously with the professionalization of baseball,[33] and it evolved to serve a few specific purposes.[34] First, an enclosed ballpark permitted only paying ticket-holders to watch the game.[35] Second, the structures themselves were intended to impress talented free-agent players.[36] Not surprisingly, as the earliest professional baseball leagues began to form, such as the National Association established in 1871, owners of enclosed parks were substantially more likely to receive franchises.[37]

Typically, franchise owners or other private entrepreneurs owned the early ballparks,[38] but in modern professional sports this is

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31. BILL JAMES, THE BILL JAMES HISTORICAL BASEBALL ABSTRACT 13 (1985). James notes that "to state the matter without hyperbole, the finest ballpark in the U.S. in 1879 would today be considered inadequate for the Florida State League," which is a member of the lowest of the three primary levels of the minor league system. *Id.* at 21.

32. *Id.* at 12. James recalls, "if a team drew 4,000 people, it looked like an enormous number; people would be spilling off the bleachers and standing along the foul lines to watch the game." *Id.* at 21.

33. DEAN V. BAIM, THE SPORTS STADIUM AS A MUNICIPAL INVESTMENT 1 (1994). *See also* JAMES, *supra* note 31, at 21 (discussing the "gentlemen's clubs that had dominated baseball in the 1850s and 1860s" who were organized but were not professional ballplayers).

34. BAIM, *supra* note 33, at 1; JAMES, *supra* note 31, at 21. The first "enclosed ballpark was the Capitoline Grounds, commonly known as the Union Grounds, in Brooklyn, built in 1864 by William Cammeyer. It seated about 1,500 people on long benches." *Id.*

35. BAIM, *supra* note 33, at 1.

36. *Id.* Far from the system of long-term contracts in place in professional sports now, the first professional baseball league, the National Association of Baseball Players (in existence from 1871-75), "was plagued with 'revolvers,' players who jumped from one team to another." James, *supra* note 31, at 10.

37. BAIM, *supra* note 33, at 1. Baim points out that some of the same concerns are still very much at the heart of the stadium issue. Although no longer preoccupied with excluding non-paying passers-by from the audience, "[t]oday, one of the common ways of demonstrating an interest in hosting a professional sports franchise is to possess a facility in which the team can play." *Id.*

38. JAMES, *supra* note 31, at 36 (discussing the appreciable improvement in the ballparks of the second decade of professional baseball. James catalogs wealthy

rarely the case.[39] Since the early 1960s, city and state governments have contributed the vast majority of the cost of building new stadiums and arenas.[40] The transition from private ownership to public funding is a contentious, ongoing debate, and is the economic phenomenon at the heart of this Note.

A. *Modern Stadium Finance and Economics*[41]

In order to consider whether municipal assistance to professional sports franchises creates a cause of action under the NAFTA chapter on investment, Part II.A.1 provides a brief overview of the kinds of assistance state and local governments in the United States are providing or offering to provide. Part II.A.2. then briefly discusses the empirical and normative debate surrounding the claimed returns on municipal investment in professional sports facilities. Finally, Part II.B. catalogues the important events in the three relevant leagues,[42] with particular emphasis on the movement of NHL franchises from Canada to the United States.

1. Stadium Finance: Transfers from Local Governments to Professional Sports Franchises

a. Direct Payments

The most obvious form of assistance is a cash payment to a franchise in return for a decision to relocate.[43] For instance, the city of Nashville had a standing offer of a $20 million direct payment to any NHL or NBA team willing to relocate to Music City.[44] In 1995,

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individuals like Albert Spalding (Chicago), Alfred Reach (Philadelphia) and Henry Lucas (St. Louis) who recognized the need for increased capacity and committed their own resources to the construction of new ballparks, in some sense speculating on the continued economic viability of baseball in the U.S.).

39. BAIM, *supra* note 33, at 1.

40. *Id.*

41. Roger G. Noll & Andrew Zimbalist, *Build the Stadium—Create the Jobs!*, *in* SPORTS, JOBS AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS 6 (Roger G. Noll & Andrew Zimbalist eds., 1997). Noll and Zimbalist differentiate between the often-conflated topics of stadium economics ("how the stadium and the events inside it affect aggregate economic welfare") and stadium finance ("the expenditures and revenues directly associated with building and operating the stadium"). This Note observes this distinction in terminology.

42. *See supra* note 30.

43. MARK S. ROSENTRAUB, MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO'S PAYING FOR IT 120-22 (1997).

44. *Id.* at 121. Rosentraub reports that the offer was intended to sweeten an offer made to the NHL's New Jersey Devils by covering any costs associated with

Irwindale, California—home at the time to the NFL's Raiders—gave the franchise $10 million to stay "in the running" as a long-term home for the Raiders while ownership mulled over the possibility of relocating.[45] Ultimately the Raiders returned to Oakland, and Irwindale never saw a return on its investment.[46]

b. Favorable Lease Agreements

More common than outright cash payments are favorable lease agreements structured so that the franchise owner captures most of revenue generated by the facility.[47] For instance, the premiums charged for skybox or other luxury seating create a revenue stream that can be shared between a franchise and the governmental entity that builds the stadium.[48] However, the distribution of these revenues varies from deal to deal, and in most instances, favors the franchise.[49] For instance, the MLB's Texas Rangers' stadium is owned by a unique unit of the Arlington, Texas government.[50] In the agreement between that city and the Rangers, the team received 115 percent of the revenue from rental of luxury suites during the first year, 95 percent in years two through four, and 100 percent from year five forward.[51] Not all such arrangements are so lopsided in favor of the franchise. The public agency responsible for the construction of the RCA Dome in Indianapolis, Indiana (home to the NFL's Colts) receives $2.2 million from the rental of luxury seating, while the team receives only $500,000.[52]

c. Advertising and Other Revenue

Additional revenues spring from advertising opportunities within the stadiums, including naming rights to the facilities

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moving the team or getting out of the team's existing lease. *Id.* However, any money remaining after these expenses were paid would go to the Devils' owners. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 92-107.

48. *Id.* at 94.

49. *See id.*

50. *Id.*

51. *Id.* Note that for the first year of this agreement, the Arlington government actually made a direct payment of 15% of the total revenue from the rental of luxury suites, 100% of which had already been captured by the Rangers. Thus, although characterized as a lease agreement, the lease agreement created an obligation that is indistinguishable from the direct payments discussed *supra*.

52. *Id.*

themselves,[53] as well as billboards and placards throughout the buildings,[54] some of which are even visible to viewers at home over television.[55] As with seat licenses, the distribution of these revenues is a significant term of negotiations between a city and a franchise.[56] Concessions sold at the stadium on game day also generate significant revenues, and the split of these revenues varies from 100 percent of proceeds accruing to the franchise[57] to more egalitarian distributions between the municipality and the franchise.[58] Similar distributions are negotiated regarding revenues from event parking and proceeds from use of the facility for non-sporting events such as concerts and other exhibitions.[59]

d. Loans and Additional Facilities

In addition to the direct payments and beneficial lease terms, local governments may offer the home team or a relocating team loans to support the construction of a new facility or to defray other

53. The point can be illustrated by reference to the teams that play in the neighboring cities of San Francisco and Oakland, California: MLB's Giants play at Pacific Bell Park, and the Oakland Athletics play at Network Associates Coliseum; the NFL's 49ers play at 3Com Park; and the NHL's San Jose Sharks play at the HP (Hewlett Packard) Pavilion. Only the NBA's Golden State Warriors play in the unsponsored—and somewhat generically named—Arena in Oakland.

54. For example, the aisle seat on each row in Houston's formerly-Enron Field was emblazoned with the infamous corporation's logo. John Williams, *Sign of the Times: Exemption in '93 City Law Will Allow Enron's Name to Shine All Over Downtown*, HOUSTON CHRON., November 21, 1999, at A37.

55. Advertising is perhaps most visible to television viewers on the outfield walls of baseball fields and underneath the ice in hockey arenas, but is present in every stadium and arena in some form or another. *See generally* ROSENTRAUB, *supra* note 43, at 96-97.

56. *Id.* at 97.

57. The MLB's Cleveland Indians, the NBA's Cleveland Cavaliers, and the NFL's St. Louis Rams each retain all of the concession revenues in their new facilities. *Id.* at 98.

58. The Baltimore Orioles hand over a small percentage of revenues to the Maryland Stadium Authority, and the NBA's Orlando Magic split the concession receipts evenly with the City of Orlando. *Id.*

59. *Id.* at 99-100. Rosentraub also points out that the availability to team ownership of local television and radio broadcasting contracts, although not a term of lease agreements, can have a profound effect on the level of public assistance sought by the franchise. *Id.* at 103. Income from television and radio is generally not a part of revenue sharing in leagues in which there are such measures, and a franchise that realizes significant revenue in this way may demand less from the municipality in the terms of its lease agreement. *Id.* Note that the converse is also true—franchises that lack a strong revenue stream from local broadcasting will be even more dependent on a municipality for assistance, creating a context either for dramatically expanded public investment or franchise relocation described in Part II.B., *infra*.

costs.[60] Another fairly common offer is the construction of practice facilities for the team to use apart from the primary facility.[61] For example, developers of the buildings in Cleveland that are home to MLB's Indians and the NBA's Cavaliers built and furnished fully-functioning restaurants with views of the action, then handed the restaurants over to the team owners to operate, with profits accruing not to the city or to private developers but to the team ownership.[62] Some new facilities even offer team owners the opportunity to lease out portions of the stadium as office space.[63]

2. Stadium Economics: Returns on Municipal Investment in Professional Sports Franchises

Expensive stadiums built with public money were originally justified as a centerpiece of economic development.[64] Every new job created by the team and the stadium—from the construction of the facility to the sale of beer in its aisles—has a stimulating economic effect.[65] So long as these developments do not simply displace some other type of construction or employment that would have occurred anyway, these jobs are a net benefit to a municipality.[66] There are also a variety of tax revenues available to the municipality as a result of stadium construction that help defray the stadium's costs.[67] For example, additional taxes may be levied by a municipality on attendees at the sporting event—a revenue stream clearly not available prior to construction.[68] Similarly, taxes paid by individuals who, without a professional sporting event to attend, would have gone to the movies or some other attraction *outside city limits*, are a new source of revenue for a municipality.[69]

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60. *Id.* at 104.
61. *See id.*
62. *Id.* at 121.
63. *Id.* at 103-04.
64. *See* Noll & Zimbalist, *supra* note 41, at 6. The leading examples of stadiums as economic development remain Camden Yards in Baltimore, Maryland and Jacobs Field in Cleveland, Ohio. For a full accounting of the economic costs and benefits associated with these stadiums, see Bruce W. Hamilton & Peter Kahn, *Baltimore's Camden Yards Ballpark*, and Ziona Austrian & Mark S. Rosentraub, *Cleveland's Gateway to the Future*, *in* SPORTS, JOBS AND TAXES, *supra* note 41.
65. BAIM, *supra* note 33, at 4.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* Baim notes that "[t]ypical errors" in assessing the benefits of new construction include the assumption that "everyone who attends a sporting event would have spent their money outside the city limits if the stadium is not built." *Id.*

But to whatever extent the cost to local government exceeds the total of these new revenues, there will still be a subsidy of professional sports by the municipality, and most economic research suggests that subsidies are common because economic development and tax revenues have not increased as typically projected.[70] Economists Roger Noll and Andrew Zimbalist suggest that this is primarily because standard methods of evaluating economic impact of professional sports facilities overestimate both the new business created by a franchise and the indirect benefits that result from the new business.[71] Although new stadiums may create some new employment, economists point out that public investment in professional sports is an "ineffective and costly" means of job creation.[72] And because a substantial portion of the gains to be realized from the operation of a professional sports facility go to players, managers, coaches, and executives, public subsidization works a regressive redistribution of income from taxpayers to these wealthy individuals.[73] Thus, subsidies from local governments to professional sports franchises raise thorny normative issues

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He suggests that this mistake often leads to overestimation of the economic benefits of a new facility. *Id.*

70. For a thorough review of the last decade of empirical analysis refuting assertions about "economic growth, job creation and increased tax revenue," see Smith, *supra* note 18, at 48-49. In addition to a thorough literature review, Smith conducts his own empirical analysis concluding that "increasing the percentage of a new stadium financed with public funds" did not lead to improvements in "individual wealth, crime and unemployment rates." *Id.* at 58. On the contrary, Smith found that the increase in public funds actually led to a decline in the variable used to track economic growth. *Id.*; *see also* Noll & Zimbalist, *supra* note 41, at 30.

> [F]or the most part, an industry as localized as a sports team is not likely to generate much local economic development, especially in an entire metropolitan area rather than a city within that area. Stadium subsidies facilitate building expensive monuments to sports that benefit no one and transfer income from ordinary people to highly paid players, owners and executives.

Noll & Zimbalist, *supra* note 41. *See also* Robert A. Baade & Allen R. Sanderson, *The Employment Effects of Teams and Sports Facilities*, *in* SPORTS, JOBS AND TAXES, *supra* note 41, at 112 (indicating that "the results of this study do not support a positive correlation between professional sports and job creation. This finding suggests that professional sports realign economic activity within a city's leisure industry rather than adding to it.").

71. Roger G. Noll & Andrew Zimbalist, *Economic Impact of Sports Teams and Facilities*, *in* SPORTS, JOBS AND TAXES, *supra* note 41, at 87.

72. Baade & Sanderson, *supra* note 70, at 112.

73. Noll & Zimbalist, *supra* note 71, at 87.

completely apart from whether these transfers violate the investment rules of the NAFTA.[74]

B. *Overview of Relevant Events in the Professional Sports Leagues*

During the 1990s, thanks mostly to the expansion of the four major professional leagues—Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL)—and "agitation" by existing franchises, 21 new stadiums and 30 arenas were erected.[75] Many of these facilities relied in some way on public funding. Part II.B. is a brief overview of the relevant events in the three professional sports leagues where local government played a role in the development of new facilities. Of particular importance to this Note is the relationship between offers of public assistance by U.S. cities and the relocation of NHL teams from Canada to the United States.

74. Noll and Zimbalist suggest that the "consumer benefits presumably are the real reason that cities are willing to spend so much on attracting and keeping a team," but that these consumer benefits are difficult to quantify and rarely incorporated into the economic analysis. *Id.* at 87. In fact, the primary justification for continued public contribution to new facilities is based on the extent to which "beneficiaries are more likely to be 'consuming' this 'good' in a myriad of indirect ways." *See* Allen R. Sanderson, *Sports Facilities and Development: In Defense of New Sports Stadiums, Ballparks and Arenas*, 10 MARQ. SPORTS L. J. 173, 187-90 (2000). Viewed in this way, it is possible that sports facilities are public goods that might justify municipal investment in a new facility. *Id.* However, the public goods rationale justifies only an "efficient, well-informed decision on the part of a municipal government to provide subventions to a team owner or professional sports league." *Id.* at 190. As such, the theory of public goods is inappropriate as a broad and undifferentiated justification for uneconomic public projects.

75. Richard Sandomir, *Stadium Building Boom Bypasses New York*, N.Y. TIMES, Jan. 17, 2001, at A1.

1. Major League Baseball (MLB)

Baltimore's Camden Yards, home to the Baltimore Orioles, was widely considered to be the model of the modern stadium, with its fan amenities,[76] single-purpose use,[77] and its revenue-generating skyboxes and luxury seating.[78] Camden is also, however, an early example of public investment by local government to prevent the emigration of a beloved sports franchise.[79] It is reported that the project became a reality because of the combined effect of the team owner's unwillingness to sign a long-term lease in the team's former facility, and the 1984 departure of the city's NFL franchise, the

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76. Modern stadiums offer patrons significantly more entertainment options than just the game on the field. Many if not most stadiums now feature some sort of restaurant with a view of the game, and Toronto's Sky Dome boasts a hotel high above center field with windows overlooking the diamond. Joe Lapointe, *They Built a Dome, and the All-Stars Will Come*, N.Y. TIMES, July 7, 1991, § 8, at 3. Bank One Ballpark in Arizona features a swimming pool just beyond the center field fence, which can be rented by small groups. Dave Anderson, *Take Me Out to the Ballgame (With a Swimming Pool)*, N.Y. TIMES, Oct. 26, 2001, at S3. Thanks to greatly expanded concessions for food and souvenirs, the new stadiums have been dubbed "mallparks." *See* Blair Kamin, *Home Field Advantage*, CHI. TRIB., July 22, 2001, at C1.

77. Dedication to a single purpose is a major element of the push for new facilities. The wave of publicly-funded construction that passed over North America in the 1960s largely resulted in the creation of multi-purpose facilities that housed both baseball and football franchises. These buildings, like the Kingdome in Seattle (home to MLB's Mariners and the NFL's Seahawks), Three Rivers Stadium in Pittsburgh (used by the MLB's Pirates and the NFL's Steelers), and 3COM Park—formerly known as Candlestick Park—in San Francisco (MLB's Giants and NFL's 49ers). The Kingdome and Three Rivers Stadium have been demolished and replaced with separate facilities for both of its former residents. Candlestick now hosts only the 49ers, as the Giants now play their home games at Pacific Bell Park. *See* Murray Chass, *Goodbye to Green Monster as a Hello to Progress?*, N.Y. TIMES, June 7, 1995, at B15.

78. The availability of luxury suites and other premium seating is of paramount importance to team owners seeking new accommodations. *See* ROSENTRAUB, *supra* note 43, at 92-96. Unlike the revenue from regular ticket sales, which must be split with the visiting team as part of the leagues' revenue-sharing policies, receipts from the rental of luxury suites and premium or "Club" seats are not shared. *Id.* at 93. Camden Yards was built with 66 luxury boxes and 3,800 club seats out of total capacity of 48,262. *Id.* at 95. Camden's contemporaries, Jacobs Field (with 129 Suites and 2,058 club seats out of 42,400 total) and the Ballpark at Arlington (120 Suites and 4,099 club seats out of 49,292 total) even further capitalized on this revenue stream. *Id.*

79. *See* Crothers, *supra* note 3, at 78.

Colts.[80] Faced with the perceived threat of losing its ballclub, the City of Baltimore financed the construction of Camden Yards.[81]

This same sequence of events describes many MLB cities that have built new stadiums in the last 15 years. With a credible threat of relocation, often to a city that either already has built or is willing to build,[82] MLB franchises have moved into new homes at an astounding rate. Mark Rosentraub reports that as of 1997, 12 of MLB's franchises made threats to relocate as part of their bargaining to obtain new facilities.[83] Of those 12, 10 have succeeded, with the Cincinnati Reds being the latest to move into their new ballpark on opening day 2003.[84] The notable exceptions on this list—teams that at some point threatened relocation but have not received new ballparks—are the New York Yankees[85] and the Montreal Expos.

The Montreal Expos play their home games in Olympic stadium, a multi-purpose facility built primarily for the 1976 Olympic Games

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80. *Id.*

81. *Id.* Baseball stadiums in Cleveland, Ohio and Arlington, Texas (for the Cleveland Indians and Texas Rangers respectively), were built soon after, and appear to have been the product of "similar threats, real or imagined." *Id.*

82. Prior to receiving an expansion franchise in 1998, St. Petersburg, Florida was the unsuccessful suitor to several MLB franchises, including the Chicago White Sox and the Seattle Mariners, both of which ended up with new facilities in their home cities rather than moving to the already-constructed Tropicana Field in downtown St. Petersburg. *See id.*; Murray Chass, *A New Field of Dreams or Just a Dream?*, N.Y. TIMES, Sept. 19, 1995, at B9; Murray Chass, *Some Movement in Midst of Strike: Talk of a Rival League*, N.Y. TIMES, Sept. 11, 1994, at B9.

83. ROSENTRAUB, *supra* note 43, at 19.

84. John Fay, *Changes on Deck for Reds Opener: Later Start, National Audience*, CINCINNATI ENQUIRER, Jan. 4, 2003, at 1A. *See also* ROSENTRAUB, *supra* note 43, at 19. The nine teams that have already moved in to their new homes are the Chicago White Sox, the Cleveland Indians, the Detroit Tigers, the Houston Astros, the Milwaukee Brewers, the Pittsburgh Pirates, the San Francisco Giants, the Seattle Mariners, and the Texas Rangers. *Id.* Of these, San Francisco's PacBell Park is an important exception because it was almost entirely privately funded after the residents of that city repeatedly voted down referendums for public financing. *See Financing New Stadiums*, *supra* note 19.

85. Yankees owner George Steinbrenner has been in negotiations with the New York City government regarding the possibility of a new stadium since the mid-1980s, considering, alternatively, the west side of Manhattan, new construction in the Bronx (where the stadium is presently located), and a move to New Jersey. Sandomir, *supra* note 75; Charles V. Bagli, *Mets and Yankees Asking State for $300 Million in Transit Work*, N.Y. TIMES, July 4, 2001, at B1. In his well-documented enthusiasm for baseball, and the Yankees in particular, former Mayor of New York City Rudolph Guiliani obtained preliminary approval for new stadiums for both the Yankees and the city's other MLB franchise, the New York Mets. *Id.* This proposal was quickly scuttled by New York's new mayor, Michael Bloomberg. Diane Cardwell, *Mayor Calls Budget Too Tight for New Stadiums and Other Construction*, N.Y. TIMES, Feb. 14, 2002, at B5.

and costing more than Can. $1 billion to construct.[86] The stadium's most prominent (and expensive) feature is what was intended to be a retractable roof, allowing the Expos to play outside in good weather and inside in bad weather.[87] But the roof was not ready for the building's opening in 1976—in fact, Olympic Stadium's roof was not retractable until 1988, some 12 years later.[88] Worse yet, the system only functioned for three seasons, and every Expos' home game since 1992 has been indoors.[89] Too expensive to replace or repair, "the stadium's most imposing or defining element is a symbol of failure."[90] It is not surprising that the Province of Quebec was, and continues to be, hesitant to make additional commitments to support professional sports franchises in baseball and other sports while continuing to pay for Olympic Stadium nearly 30 years after it was built.[91]

The lack of a modern facility,[92] a television contract,[93] any significant fan support,[94] or the possibility of generating a profit in Montreal led Major League Baseball in the fall of 2001 to vote to contract two franchises, one of them presumably being the Expos.[95] Later that offseason, the owners of MLB franchises that collectively comprise the league itself decided that contraction for the 2002 season was not feasible.[96] To accommodate the business interests of

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86. Robert Whelan & Mark S. Rosentraub, *Sports and Economic Development North of the Border: Baseball Subsidies with a Canadian Flavor and a French Accent*, *in* MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO'S PAYING FOR IT 321-22 (Mark S. Rosentraub ed., 1997). Even controlling for the exchange rate between the United States and Canada, Olympic Stadium was the most expensive on record. *Id.* Sadly, Toronto's Skydome is just behind Olympic Stadium as the second most expensive facility, costing the city and the province of Ontario more than $625 million. *Id.*

87. *Id.* at 338.

88. *Id.*

89. *Id.* at 338-39.

90. *Id.* at 339.

91. *Id.* at 339-40.

92. Some commentators wonder why, despite its glaring failures, there is any need to replace Olympic Stadium. *Id.* at 340 (discussing the useful aspects of the structure). Those who support the continued existence of Major League Baseball in Montreal argue that a new facility is necessary. *See* Michel C. Auger, *Montreal's Field of Dreams*, TORONTO SUN, May 26, 2000, at Editorial/Opinion 16.

93. The Expos are the only MLB team without a television contract for the local and regional broadcast of its games. Auger, *supra* note 92, at 16.

94. The Expos 2001 attendance of 619,451 was less than half the attendance of the next worst club in Major League Baseball. Murray Chass, *Baseball Won't Drop Teams in 2002*, N.Y. TIMES, Feb. 6, 2002, at D1.

95. *Id.* Major League Baseball never officially announced its intention to contract the Expos, but most observers were convinced that, as the team with the lowest revenue, Montreal's team was the primary target of the contraction process. *Id.*

96. Contraction in 2002 was halted in part by an injunction issued by the Minnesota Supreme Court that ordered that the Twins must at least play out their

Expos ownership—which desired to sell its interest in Montreal and purchase a different franchise[97]—and to make a less cumbersome transition to contraction or relocation, the league purchased the Montreal franchise in 2002 and remains at the helm for the 2003 season.[98] MLB's departure from Montreal seems imminent,[99] as the franchise has been unable to secure funding for a new stadium that would produce the revenue necessary to make it profitable.[100]

2. National Basketball Association (NBA)

The NBA expanded into Canada with franchises in Toronto, the Raptors, and in Vancouver, the Grizzlies.[101] From roughly the same beginnings, the franchises have charted dramatically different courses.[102] The handwriting may have been on the wall when the

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lease with the Hubert H. Humphrey Metrodome, which ran through the end of the 2002 season. *See* Metro. Sports Facilities Comm'n v. Minnesota Twins P'ship, 638 N.W.2d 214, 229-30 (Minn. 2002) (affirming lower court's injunction requiring the Twins to play out the 2002 season).

97. *Expos Get Four Years of New Life*, N.Y. TIMES, Aug. 31, 2002, at D2.

98. *Id.* This is an unorthodox transaction, presenting serious concerns for on-field competitiveness. *See* Derek Zumsteg, *Marooning Montreal, at* http://www.baseball prospectus.com/news/20011227daily.html. The arrangement also has implications on the thesis here advanced—namely, if the franchises do not compete meaningfully, evidenced by the fact that the Canadian franchise can, even for a time, come to be owned by a consortium of its "competitors," it is not clear that NAFTA's trade regulations can be reasonably applied to the subsidy of baseball franchises by local government in the United States. Note, however, that the application of the investment principles to municipal subsidies and benefits to NHL and NBA franchises is not similarly burdened.

99. Although the Expos were not contracted after the 2002 season, MLB is still in control of the team, and rather than play all its home games in Montreal in 2003, the team will host 22 games in San Jan, Puerto Rico. Murray Chass, *San Juan Approved for Expos' Home Games*, N.Y. TIMES, Dec. 7, 2002, at D7. Many believe this decision is a prelude to moving the team, and that Portland, Oregon, Washington D.C., and Northern Virginia are the primary suitors. *Virginia's Plan: Team, Then Stadium*, N.Y. TIMES, Jan. 30, 2003, at D7. However, under the terms of the 2002 collective bargaining agreement between the league and the players' association, there can be no contraction before the 2007 season. *Expos Get Four Years of New Life*, *supra* note 97.

100. The Montreal Expos took in only $6.4 million in ticket sales, $536,000 in media and marketing revenue, and other income of only $2.8 million. Richard Sandomir, *Dodgers Lost $69 Million, Selig Says*, N.Y. TIMES, Dec. 6, 2001, at S1. By MLB's calculations, the Expos lost $10 million in 2001 even after receiving a $28.5 million revenue-sharing check from the league. *Id.*

101. Clifton Brown, *Now Playing in the N.B.A., the Raptors and the Grizzlies*, N.Y. TIMES, Nov. 3, 1995, at B13. The Canadian franchises played their first games in 1995. *Id.*

102. Thanks in large part to the play and personality of the team's star, Vince Carter, the fan support he has attracted, and the luxury of a relatively new, income-generating facility in Toronto, the Raptors are among the league's most successful and popular franchises. *See* Harvey Araton, *Grizzlies' Relocation Reveals N.B.A.'s Fault Lines*, N.Y. TIMES, Mar. 25, 2001, at B11.

Grizzlies' first draft pick in 1999, Steve Francis, an outstanding guard from the University of Maryland, refused to play for the Canadian franchise and forced a trade before ever stepping foot on the professional hardwood.[103] Two years later, the franchise sardonically referred to on late-night sports television programs as "the Grizzle" relocated to Memphis, Tennessee, but not before competition among Memphis, New Orleans, and Louisville drove Memphis' offer up to $250 million in new construction and other benefits.[104] The generosity of the offer reflected the city administration's belief that having a professional sports franchise would enhance the town's prestige.[105]

However, subsequent to the NBA's approval of the Grizzlies' planned relocation to Memphis, disgruntled taxpayers in that city filed suit under the state constitution to prevent the city from using public funds to build a new arena for the franchise without a public referendum on the subject.[106] The taxpayers' claim succeeded at the Chancery Court but was overturned by the Western Section of the Tennessee Court of Appeals.[107] Plaintiffs appealed the decision but the Tennessee Supreme Court refused to hear the case, clearing the way for public financing without a referendum.[108]

3. National Hockey League (NHL)

Hockey is a far more significant part of Canadian cultural life than baseball or basketball.[109] "Hockey is our game," one columnist writes, adding that it's "much more than that, it's part of our

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103. William C. Rhoden, *Francis Works Hard to Remake His Image*, N.Y. TIMES, Feb. 14, 2000, at D4.

104. *Worth Repeating*, COM. APPEAL (Memphis, Tenn.), Nov. 1, 2001, at G18; Josh Peter, *Financial Numbers Grizzly for N.O.*, NEW ORLEANS TIMES-PICAYUNE, Apr. 15, 2001, at Sports 4.

105. Milan Simonich, *Teams Squeeze Cities to Finance New Arenas; But in Some Places, Officials Have Squeezed Back*, PITTSBURGH POST-GAZETTE, June 26, 2001, at A1. Gale Jones Carson, executive assistant to Memphis Mayor Willie Herenton, told reporters before the Grizzlies' move that "there are no major league teams here, and we are the eighteenth largest city in the country. Getting an NBA team would be another amenity to the city that would benefit us over a long period." *Id.* Compare this reasoning to Jerry Colangelo's business-oriented strategy in purchasing the Winnipeg Jets and relocating them in Phoenix, Arizona, *infra* notes 140-42 and accompanying text.

106. *Memphis May Need a Referendum*, N.Y. TIMES, July 12, 2001, at D7.

107. Ragsdale v. City of Memphis, 70 S.W.3d 56, 74 (Tenn. Ct. App. 2001) (dissolving the injunction issued by the Chancery Court).

108. *See* Tedra DeSue, *Legal Victory for Memphis Arena Sets Stage for Pre-Spring Bond Sale*, BOND BUYER, Dec. 14, 2001, at 40.

109. Kate Zernike, *A Nation Worries and Waits for Gold: Canada Seeks End to Hockey Drought*, N.Y. TIMES, Feb. 20, 2002, at D1.

history. . . ."[110] Canadian playwright Rick Salutin wrote that hockey was "the sole assurance we have a culture."[111] Similar attestations abound, suggesting that if any professional sport has a future in Canada, it is professional hockey. Wayne Gretzky, (arguably the game's greatest player, now an NHL franchise owner and a Canadian national) has even assured Canadians that they "should feel safe in that hockey will always be a Canadian sport."[112]

Despite what would appear to constitute widespread civic dedication to the game as a part of the nation's heritage, there has been significant movement of NHL franchises from Canada to the United States since the middle of the last decade, as two of the eight teams that called Canada home in 1990 now play in the United States.[113] The six remaining Canadian teams play on, but they suffer under tax burdens that are simply not comparable to U.S. teams.[114] For example, between 1991 and 1999 the Ottawa Senators franchise paid more than Can. $160 million to the provincial and federal governments in Canada.[115] The franchise paid Can. $36.6 million in taxes in 1998 while total ticket revenue was Can. $34 million.[116] Additionally, property taxes on the $200 million, privately-financed Canadian Corel Centre in which the Senators play—estimated prior to construction to be Can. $1.1 million annually—climbed to Can. $4.5 million in 1999.[117] The Province of Ontario levies an additional "amusement tax" on franchises of an additional Can. $3 million,[118]

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110. Michel C. Auger, *To Hab and to Hold*, OTTAWA SUN, June 30, 2000, at Comment 15.

111. Michael Farber, *Giant Sucking Sound: That's the Noise Distraught Canadian Hockey Fans Hear as their Game Heads South*, SPORTS ILLUSTRATED, Mar. 20, 1995, at 104.

112. *Id.* Although it might give the reader some pause to note that Wayne Gretzky, "The Great One" himself, has an ownership interest in not only a U.S. franchise (the Phoenix Coyotes), but that this franchise was formerly known as the Jets, played its home games in Winnipeg, and left that small Canadian market when the city and province were unable to match the financial opportunities available in U.S. cities like Phoenix, Arizona. *See* Jason Diamos, *Gretzky Era Begins in Phoenix*, N.Y. TIMES, Feb. 16, 2001, at D7.

113. Relocating recently have been the Winnipeg Jets (becoming the Phoenix Coyotes) and the Quebec Nordiques (becoming the Colorado Avalanche). Sandomir, *supra* note 1.

114. Calgary and Edmonton have both refurbished their arenas and Montreal, Ottawa, and Vancouver all moved into new buildings by the end of 1996. Farber, *supra* note 111.

115. Don Brennan, *Tax Breaks for Senators? Owner to Sell Unless Feds Make Concessions*, OTTAWA SUN, Apr. 29, 1999, at Supplement 9.

116. *Id.*

117. *Id.*

118. *Id.* Interestingly, the "amusement" tax only applies to the Senators because some portion of the performers in professional ice hockey—the players on the Senators and opposing teams—are not Canadian nationals. *Id.* Musical performances

and the team pays out Can. $2.5 million annually to cover the cost of a public highway interchange constructed by the provincial government so patrons can reach the arena conveniently.[119] Other accounts from the NHL (which is active in its advocacy for lower tax rates for Canadian franchises) suggest that the Montreal Canadiens and the Senators "each pay more in municipal taxes than all 21 U.S. teams combined, and the tax bill for each Canadian team averages four times that of a U.S. team."[120]

Not only do U.S. franchises pay significantly less taxes than their Canadian counterparts, U.S. municipalities provide local franchises with significant economic benefits. The city of Nashville, Tennessee offered representatives from the New Jersey Devils and the Winnipeg Jets $20 million to relocate to that city in the mid-1990s.[121] In addition to the cash, Nashville offered the teams a $750,000 annual lease on the arena it had already built with $132 million in public funds—a rental payment that would not appear to cover the cost of construction during the useful life of the building.[122] In addition, the City was willing to hand over all revenues from radio and television contracts and 97.5 percent of luxury suite rental fees, as well as other financial considerations, including generous cuts of advertising and concession revenues.[123]

It also came as a surprise to hockey advocates in Nashville local government that the arena the city was building,[124] which is now known as the Gaylord Entertainment Center, would be built in violation of a local law prohibiting beer sales within 100 feet of a church, residence, school, or park.[125] The arena's location is 85 feet from Nashville's First Baptist Church.[126] In June of 1995, the Nashville City Council, by a vote of 26-10, approved a bill that exempted the arena from the ordinance, and also unanimously

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and figure skating exhibitions taking place in the Corel Centre and featuring all Canadian talent are not subject to this tax. *Id.*

119. *Id.* This construction project is "the only privately funded, government-owned expressway exit in Canada . . . ." *Id.*

120. Alexander, *supra* note 4.

121. ROSENTRAUB, *supra* note 43, at 135.

122. *Id.* at 136 (reporting the details of the lease agreement and a total construction cost of $120 million to the City of Nashville); Richard Sandomir, *1995 N.H.L. Playoffs; Devils Reject Offer on New Lease*, N.Y. TIMES, June 8, 1995, at B17 (reporting the total construction cost to be $132 million).

123. ROSENTRAUB, *supra* note 43, at 136.

124. Nashville built an arena in preparation for the acquisition of a team by relocation or by expansion—but the construction was underway with no tenant to speak of. Richard Sandomir, *Devils on Ice? Is it a Country Band?*, N.Y. TIMES, June 5, 1995, at C4.

125. Sandomir, *supra* note 122.

126. *Id.*

approved a second ordinance that exempted the entire downtown commercial area.[127] Although unsuccessful in luring a franchise from New Jersey or Winnipeg, Nashville was ultimately rewarded for its generosity with an expansion franchise, the NHL's Predators, in 1997.[128]

Nashville wasn't the only suitor for the Canadian hockey franchises, however. Denver, Colorado became the new home of the Quebec Nordiques in 1995 after the franchise had been a fixture in Quebec City, Quebec for more than 20 years.[129] Earlier that year, the Nordique ownership claimed that the team's departure could be prevented only by the construction of a new facility, proposed to be funded by the proceeds from a government-run casino, as well as a commitment by the province to help defray future losses.[130] But Canadian politicians were unable to sustain the negotiations under a tight budget and increasingly negative public opinion.[131]

Once in Denver, the team began to heal financially.[132] The team's arena in Quebec City was built in 1949 and lacked the luxury boxes that are profit centers for the franchises.[133] Nichols Arena in Denver, which the former Nordiques, now the Colorado Avalanche, shared with the NBA's Denver Nuggets until the Pepsi Center could be built, already had these luxury boxes and, perhaps more importantly, persons and corporations ready and willing to pay for them.[134]

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127. *Id.* The exemption of the entire downtown commercial area likely garnered the support of the unanimous city council because it appeared to be a less arbitrary measure than simply exempting the Gaylord Entertainment Center from operation of the ordinance.

128. *N.H.L. Names 4 Cities for its New Franchises*, N.Y. TIMES, June 18, 1997, at B13.

129. Lars Anderson, *The Climb to the Top*, SPORTS ILLUSTRATED, June 20, 2001, at 10.

130. Bernard Simon, *Canada Ice-Hockey Malaise Brings a Political Headache*, FIN. TIMES, May 20, 1995, at 3.

131. *Id.* Former President of the Nordiques, Marcel Aubut, reported that moments before signing the agreement that transferred ownership and location of the Nordiques, he telephoned the Quebec Premier Jacques Parizeau to make one last plea for assistance that would allow the team to stay in Canada. Parizeau was unable to respond in the affirmative, and Aubut said, "Mr. Prime Minister, you've just lost a hockey team." *Id. See also* Anderson, *supra* note 129.

132. *See* Anderson, *supra* note 129.

133. *Id.*

134. *Id.* The team's then-President, Marcel Aubut, said,

> We needed a new building that had luxury boxes, and we needed the corporations to fill them. But there just weren't enough corporations. When we looked into getting a new building [in Quebec City], we found we could fill ten luxury boxes. But we needed seventy-five. We were sixty-five short. Then

The Winnipeg Jets franchise also relocated from its Canadian home to warmer climes in Phoenix, Arizona.[135] Despite valiant efforts on the part of citizens of Winnipeg to "Save Our Jets,"[136] the Jets left town citing the inability to be profitable and stay competitive without a new arena that generated revenue through luxury seating and modern concessions.[137] Jets ownership considered Minneapolis for its new home, but city and state legislators balked at the team's request for $20 million in improvements to the St. Paul Civic Center where the Jets were slated to play, and were unwilling to make significant concessions for the Jets to share Minneapolis' Target Center with the NBA's Timberwolves.[138] Ultimately the franchise landed in Phoenix, Arizona, both because the move lacked this "political element,"[139] and because of the seamlessness of the transaction offered by Arizona investor Jerry Colangelo.[140] Colangelo, who also owns part of the NBA's Phoenix Suns and MLB's Arizona Diamondbacks, put the deal together in about two weeks, and slotted the Jets into the already built and functional America West Arena.[141] Hardly the political handwringing of its flirtation with Minneapolis, Colangelo's offer to the Jets was a purely economic proposition—bringing the NHL to Phoenix meant that there were an additional 40 days each year that the arena (of which he is manager) would be in use.[142]

> you look at Denver. They sold out all of their ninety-five suites before they even put the shovel in the Pepsi Center dirt.

Id. Quebec City was the smallest by population of all North American cities with NHL franchises. Farber, *supra* note 111.

135. Sandomir, *supra* note 1.

136. The initials "SOJ" were "spray-painted on walls and etched into telephone poles" all over Winnipeg in the months leading up to the Jets relocation. Dejan Kovacevic, *Winnipeg Out in the Cold without Jets*, PITTSBURGH POST-GAZETTE, April 28, 1996, at D1. More substantively, citizen groups raised $13 million to put toward the purchase of the franchise through events like a gathering of 35,000 fans in front of Manitoba's legislature, the largest such rally in that province in half a century. *Id.*

137. Houston & Shoalts, *supra* note 1.

138. Jay Weiner, *Jets' Final Destination: Phoenix*, MINNEAPOLIS STAR TRIB., December 5, 1995, at 1A. Some observers believed that local politicians in the Minneapolis area "were operating under the impression [that] the Jets had no choice but to move there," and this perception of having a strong negotiation position led them to refuse to agree to plans that required significant public investment. Strachan, *supra* note 19.

139. Weiner, *supra* note 138.

140. Richard Alm, *Valley of the Suns' King*, DALLAS MORNING NEWS, Jan. 23, 1996, at 13B.

141. *Id.*

142. *Id.* Colangelo told reporters, "Here's how I look at hockey: It's good business." *Id.* Colangelo is also on record as opposing the process by which franchises shop themselves to a number of cities in search of the best package. "I'm totally

All of this leads to an inevitable question about the future of the NHL in Canada, particularly its smaller remaining markets. Although NHL officials remain positive about the future of Canadian hockey,[143] the trend is irrefutably southward.[144] The remaining franchises may have structural advantages that simply weren't available in Quebec City and Winnipeg (new or refurbished arenas, larger base of wealthy individuals and corporations to purchase luxury seating, etc.), but as long as there are cities like Nashville—willing, for the sake of civic pride, to make troubled franchises an offer they can hardly refuse—the same concerns are likely to arise time and again.

III. REGULATION OF INVESTMENT UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT

A. *Basic Elements of a Claim under the NAFTA Chapter 11*

The North American Free Trade Agreement (NAFTA or Agreement),[145] effective January 1, 1994, is an agreement between Canada, Mexico, and the United States mandating free trade in goods.[146] In order "to achieve the benefits of economic liberalization," the NAFTA addresses "investment barriers as comprehensively as [it addresses] trade barriers."[147] The rules governing investment are set out in Chapter 11 of the Agreement.[148] The following discussion summarizes the aspects of Chapter 11 that would be crucial to

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against carpetbagging," he said. "If it's simply a matter of who can pay the highest price, that's an abomination." *Id.*

143. NHL President Gary Bettman has remarked, "We're the national sport of Canada, not the national sport of the U.S. No matter how large we grow, we won't turn our back on our roots. And our roots are up in Canada." And that "the issue is a well-run NHL, not Canada versus the U.S." Farber, *supra* note 111. But when the Canadian government opted not to provide even modest subsidies to its remaining franchises in 2000 as a result of overwhelming popular opposition to the proposal, Bettman said "We as a league will do everything we can to keep the six teams in Canada and keep them competitive. [But] I'm not as optimistic today. . . . This is a point where we have to step back and almost on a club-by-club basis reassess and decide what we have to do and if the club has a viable future." Steven Pearlstein, *Canada's Subsidy Plan Put on Ice*, WASH. POST, Jan. 22, 2000, at D1.

144. *Id.*

145. North American Free Trade Agreement, Dec. 8-17, 1992, 31 U.S.T. 4919, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

146. Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L L. 727, 727 (1993).

147. *Id.*

148. NAFTA ch. 11.

making out a claim under the NAFTA on behalf of Canadian sports franchises.

The Investment Chapter has three goals: (1) to stabilize and secure the "investment environment" by creating "clear rules of fair treatment of foreign investment and investors"; (2) to eliminate existing restrictions on investment between NAFTA Parties,[149] thereby encouraging such investment; and (3) to provide an effective and efficient process for the resolution of disputes that arise under the NAFTA.[150] The Investment Chapter has broad application, governing treatment of both "investors of another Party" as well as "the investments of investors of another Party in the territory of the host Party."[151] Put more simply, the rules apply not only to investment by a Canadian investor within the United States, but also to Canadian investors within Canada.

To make out a claim under the NAFTA Chapter 11, the text of the articles and previous adjudications indicate that a claimant must allege and prove the following five elements:[152] (1) the claimant must be an "investor" within the meaning provided by the Article; (2) the claim must be related to an "investment" within the meaning provided by the Article; (3) the claimant must identify a government "measure" affecting the investor or investment; (4) the claimant must allege that by this measure the government has breached a substantive guarantee of the chapter on investment; and (5) the claimant must show a rational connection between the breach and some harm suffered by the claimant.[153]

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149. A NAFTA "Party" is any one of the nations that are signatories to the agreement. *See generally* NAFTA.

150. Price, *supra* note 146, at 727.

151. NAFTA art. 1101(a), (b).

152. In addition to these elements, a plaintiff should also be aware that under Articles 1116 and 1117, an investor may not bring a claim under Chapter 11 "if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." NAFTA art. 1116(2). This limitation, combined with procedural requirements requiring 90 days written notice before submitting a claim to arbitration (Article 1119), and requiring 6 months to elapse between the claim and the events giving rise to a claim (Article 1120(1)) may leave potential NAFTA plaintiffs with a relatively narrow opportunity to bring a claim under Chapter 11.

153. Todd Weiler, *The Ethyl Arbitration: First of its Kind and a Harbinger of Things to Come*, 11 AM. REV. INT'L ARB. 187, 190 (2000). *See also* Ian A. Laird, *NAFTA Chapter 11: NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INT'L L. 223, 227 (2001) (articulating a similar set of main requirements confronting a potential Chapter 11 plaintiff).

1. The Claimant Must Be an "Investor"

Interestingly, the NAFTA treats "investors" and "investment" separately in this chapter.[154] The Agreement defines an "investor of a Party" as "a Party or a state enterprise thereof, or a national or an enterprise of such party, that seeks to make, is making or has made an investment."[155] Providing separate definitions for "investor" and "investment" most directly impacts provisions such as Article 1105, which extends a "Minimum Standard of Treatment" only to "investments of investors," instead of directly to "investors" as in other articles of the chapter on investment.[156] This bifurcation, it is thought, was a response to concerns that such a grant directly to investors "might simply give rise to personal injury claims against the host government."[157]

2. The Claimant Must Have an "Investment"

A claimant must hold an "investment" within Chapter 11's broad definitions of these terms.[158] Article 1139 defines "investment" as:

> (a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise . . . (d) a loan to an enterprise, (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise, (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution . . . (g) real estate or other property, tangible or intangible . . . and (h) interests arising from the commitment of capital or other resources in the territory of a party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.[159]

Because of the expansiveness of this definition, the agreement explicitly provides an accounting of what is *not* protected as an investment by the chapter on investment.[160] Excluded from the definition of investment are

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154. NAFTA art. 1139.
155. *Id.*
156. *Id.* art. 1105.
157. Daniel M. Price & P. Bryan Christy, III, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, *in* THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 173 (Judith H. Bello et al. eds., 1994).
158. Price, *supra* note 146, at 727.
159. NAFTA art. 1139.
160. *Id.*

> claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction, such as trade financing . . . [and] any other claims to money, that do not involve the kinds of interests set out

in the section defining investment.[161]

3. There Must be a Government "Measure"

A claimant must allege that he has been harmed by "measures adopted or maintained by a Party."[162] The term "measures" is used throughout the Article to refer to the actions of a Party to the NAFTA relating to an investor or an investment.[163] The term itself is defined outside the Investment Chapter, in Article 201, and includes "any law, regulation, procedure, requirement or practice."[164] A number of published arbitrations have considered the type of government actions that can be scrutinized under the protections guaranteed by Chapter 11, with most panels articulating a broad definition of what constitutes a government "measure" under the Agreement.[165] For instance, arbitration panels have found that "measures" include "the acts of judicial as well as administrative organs"[166] as well as the decisions and actions of "municipal and state officials."[167] Another panel has held that "clearly something other than a 'law,' even something in the nature of a 'practice' which may not even amount to a legal stricture, may qualify."[168]

4. The Measure Must Breach One of the Substantive Guarantees of Chapter 11

The fourth element of a claim under NAFTA requires a claimant to allege that the government measure breaches one of the

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161. *Id.*
162. NAFTA art. 1101.
163. *Id.*
164. NAFTA art. 102.
165. Todd Weiler, *Substantive Law Developments in NAFTA Arbitration*, MEALEY'S INT'L ARB. REP., vol. 16, no. 12, at 71.
166. The Loewen Group, Inc. v. United States of America, Award on Jurisdiction, Jan. 9, 2001, ¶ 47, *at* http://www.international-economic-law.org.
167. Metalclad Corp. v. United Mexican States, Final Award, Aug. 30, 2000, ¶ 73, *at* http://www.international-economic-law.org/Metalclad/metalclad.pdf.
168. Ethyl Corporation v. The Government of Canada, Award on Jurisdiction, June 24, 1998, ¶ 66, *at* http://www.appletonlaw.com/cases/ejurisdiction.pdf [hereinafter Ethyl Award on Jurisdiction].

substantive guarantees of Chapter 11.[169] A Canadian franchise owner's strongest claim is that assistance by U.S. local government violates the requirement of national treatment.[170] Fortunately, previous arbitrations have created a useful, albeit limited, "jurisprudence of the NAFTA."[171] And although lacking the precedential force of U.S. judicial decision-making, commentators suggest that the "substantive provisions of NAFTA Chapter 11 are being interpreted in a conservative and thoughtful manner," making them a useful authority in the development of this cause of action.[172]

Described as the "fundamental obligation" of the Chapter of Investment, the national treatment requirement ensures that "a Party may not subject enterprises to different or more onerous operating conditions simply by virtue of foreign ownership."[173] Article 1102(1) states, "Each Party shall accord to investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors, with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments."[174] Article 1102(2) provides identical protection, except it refers to "investments of investors" rather than "investments."[175] Finally, Article 1102(3) describes the obligations of "sub-national" authorities (state and provincial governments), and provides the relevant basis of comparison in that context:

> The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to the investments of investors, or the Party of which it forms a part.[176]

A number of published arbitrations have examined the contours of the national treatment requirement in the context of the NAFTA chapter on investment. In *S.D. Myers, Inc. v. Government of Canada*,

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169. Weiler, *supra* note 165, at 72.

170. NAFTA art. 1102. Although this Note focuses on the violation of the principle of national treatment, Appleton and Neceski have also advanced the proposition that U.S. local governments violate Article 1106's prohibition on performance requirements when public assistance is contingent upon the requirement that the franchise play its games in a local arena. *See* Appleton & Neceski, *supra* note 16, at 9-14. Under Article 1106, NAFTA Parties may not require an investor to use goods or services produced within its territory. NAFTA art. 1106.

171. Weiler, *supra* note 165, at 83.

172. *Id.*

173. Price & Christy, *supra* note 157, at 174.

174. NAFTA art. 1102(1).

175. *Id.* art. 1102(2). For the distinction between "investments" and "investors" under Chapter 11, see *supra* notes 152-55 and accompanying text.

176. *Id.* art. 1102(3).

an Ohio firm specializing in the removal and destruction of the hazardous waste polychlorinated biphenyl (PCB) from oil and industrial equipment sought recovery for actions by Canadian officials that prevented the export of these wastes out of Canada to the Myers facility.[177] The arbitration revealed that the decision to close the border to these wastes and thereby prevent Myers from doing business with Canadian PCB producers was the result of intense lobbying by Canadian PCB disposal firms,[178] the most prominent of which was located in northern Alberta, several thousand miles farther from most of the PCB waste producers than the Myers operation in Ohio.[179] The proximity of the Myers facility to the Canadian waste producers gave the U.S. firm "a significant cost advantage" against both its Canadian and other U.S. competitors.[180]

Myers brought a complaint under NAFTA Chapter 11, alleging, inter alia, that the Canadian measure violated the standard of national treatment.[181] The tribunal first considered whether Myers was "in like circumstances" as the Canadian investors who were favored by this measure.[182] The tribunal reasoned that

> [t]he interpretation of the phrase "like circumstances" in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investor. The Tribunal takes the view that the word "sector" has a wide connotation that includes the concepts of "economic sector" and "business sector."[183]

Next, the *Myers* tribunal considered whether the measure had "protectionist motive or intent"—that is, "whether the practical effect of the measure is to create a disproportionate benefit for nationals

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177. S.D. Myers v. Gov't of Canada, Final Merits Award, Nov. 13, 2000, ¶¶ 91-93, 123, *at* http://www.appletonlaw.com/cases/Myers%20-%20Final%20Merits%20 Award.pdf [hereinafter Myers Final Award].

178. *Id.* ¶ 122.

179. *Id.* ¶ 112.

180. *Id.*

181. *Id.* ¶ 238.

182. *Id.*¶¶ 243-51.

183. *Id.* ¶ 250. At least one commentator has likened this step of the analysis for national treatment to "defin[ing] the relevant market." Weiler, *supra* note 165, at 78. The search for the relevant market suggests that a plaintiff under Chapter 11 must be a participant in a competitive market along with the investor receiving better treatment.

over non-nationals," and "whether the measure, on its face, appears to favour nationals over non-nationals who are protected by the treaty."[184] The tribunal found that although it may have been a "legitimate" goal of the Canadian government to support the continued viability of this industry within Canada, its chosen means—banning export of PCBs—was an unacceptable breach of the requirement of national treatment.[185] Thus, the *S.D. Myers* tribunal seems to have applied a three-part test for national treatment where it (1) defines the relevant market; (2) determines whether the claimant has received treatment less favorable than a domestic investor; and (3) seeks proof by the NAFTA party that the measure had a reasonable policy justification.[186]

B. *The Canadian Cultural Exception to the NAFTA*

The Agreement does except certain industries and actions from the liberalization requirements in Chapter 11.[187] These exceptions, located in the Annexes to the Agreement, govern "existing measures of a Party that derogate from the national treatment . . . or performance requirement obligations," and prevent Parties from making these measures more restrictive than their current, or even a more liberalized, amended form.[188] The Annexes also include sectors, such as telecommunications, fishing, and aviation that are not subject to the provisions of the Investment Chapter.[189]

For present purposes, the most important exception to the NAFTA's regulation of investment is the Cultural Industries exemption, arising out of one of the only, and possibly the sharpest, points of debate and disagreement between Canada and United States in the negotiation of the several treaties to which the nations

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184. *Id.* ¶ 252. The tribunal observed, however, that

> Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produced no adverse effect on the non-national complainant. The word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.

Id. ¶ 254.

185. *Id.* ¶ 255.

186. *See* Weiler, *supra* note 165, at 77-78. Weiler distills this test from the reasoning of the panel in the Pope & Talbot arbitration, *supra* note 27, but it is clearly consistent with the Myers' tribunals analysis as well.

187. Price & Christy, *supra* note 157, at 176.

188. *Id.*

189. *Id.*

are Parties.[190] Canada, perhaps rightly, harbors significant concern about the "encroachment of U.S. influence and domination" through its popular culture.[191] This concern often is part of the Canadian position in negotiations over the liberalization of trade between nations.[192] One Canadian commentator analogized that "Americans, especially American lawyers, think culture is something that is grown in the refrigerator. They haven't the faintest idea of the problems of a mouse one-tenth the size of the elephant in retaining some semblance of independent Canadian television, an independent book industry, music industry or magazines."[193]

As a result of these concerns, the Canada-U.S. Free Trade Agreement (FTA) exempted "cultural industries" from the operation of the agreement.[194] The FTA defined "cultural industries" to include printed publications, film and video, music recording, music publishing, and broadcasting.[195] This exception was then made a part of the NAFTA through its incorporation of this and many other principles set forth in the FTA.[196] It is important to note, however, that the agreement does not give the Canadian government absolute authority to restrain trade in the protection of culturally-relevant industries.[197] Rather, the liberalization requirements of first the FTA and later the NAFTA simply do not apply to these industries, and the United States is free (by express reservation) to "take unilateral retaliatory steps when Canada harms U.S. interests through the exception."[198]

C. *Is the Chapter 11 Dispute Settlement Mechanism Constitutional?*

Any analysis of Chapter 11 would be incomplete without acknowledging the U.S. Constitutional debate regarding NAFTA's

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190. Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity, and Canada's Cultural Preoccupation*, 15 ARIZ. J. INT'L & COMP. L. 203, 203 (1998).

191. *Id.*

192. *See id.*

193. *Id.* at 204-05 (quoting Allen Fotheringham, *Free Trade? What a Joke!*, TORONTO SUN, Mar. 9, 1996, at 11).

194. Canada-United States Free Trade Agreement, Dec. 23, 1987, art. 2012, 102 Stat. 1851 (1988), 27 ILM 281.

195. An Agreement to Implement the Free Trade Agreement Between Canada and the United States, ch. 65, § 2012, 1988 S.C. 1999 (1988) (Can.).

196. NAFTA Annex 2106.

197. Goodenough, *supra* note 190, at 217.

198. *Id.* at 214, 217 (noting that the United States has shown a willingness to resolve disputes in this area under the terms of the General Agreement on Trade and Tarriffs (GATT) and to seek adjudication of these matters before the World Trade Organization (WTO)).

dispute resolution scheme. Chapter 11 provides not only a set of rules that protect foreign investment, but also grants standing to private plaintiffs to bring claims against a Party to the agreement for any alleged violations of the NAFTA's substantive guarantees.[199] Arbitrators, rather than international tribunals or the federal courts of the three NAFTA Parties, hear claims under the NAFTA.[200] This structure was intended to insulate the arbitral process from the heated internal politics of international trade, and bolster investor confidence that claims would be judged fairly.[201]

In both its substantive guarantees and its dispute-resolving procedures, Chapter 11 takes the form of a typical bilateral investment treaty (BIT), not at all uncommon to the experience of the Parties to the NAFTA.[202] What is unusual about the agreement is that for the first time, developed nations "demanded of themselves the same high standards of investment protection that they had traditionally demanded of developing countries."[203] Prior to the NAFTA, the vast majority of BITs had been between developing countries and developed nations, and the primary beneficiaries of those agreements have been investors from developed nations.[204] In this traditional model of a BIT, nations like Canada and the United States "simply have not had to worry that they would ever have to defend a claim in arbitration under a BIT."[205]

But in this new context—a BIT between developed nations—claims by an investor against Canada or the United States are seen as attacks on the ability of these sovereign nations and their governmental subdivisions to exercise regulatory authority for the

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199. Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law Under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 195 (2001).

200. *Id.*

201. *Id.*

202. Daniel M. Price, *NAFTA Chapter 11 Investor-State Dispute Settlement: Frankenstein or Safety Valve*, 26 CAN.-U.S. L.J. 107, *S3 (2001). Price notes that as of 2000, more than 1500 bilateral investment treaties have been signed, most of them featuring "provisions nearly identical to those found in NAFTA Chapter 11, including the feature of investor-state dispute settlement." *Id. See also* Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469 (2000) (estimating that as of 2000, more than 1300 BITs had been negotiated, "involving more than 160 countries in every region of the world"); Brower & Steven, *supra* note 199, at 194 (reporting that the United States, Canada, and Mexico, as of 2001, had negotiated 86 BITs with other nations, and that "Chapter 11 closely follows the U.S. Model BIT").

203. Price, *supra* note 202, at 3.

204. Brower & Steven, *supra* note 199, at 194-95.

205. *Id.* at 195.

promotion of public health, safety, or welfare.[206] These challenges have recently begun to take the form of expropriation claims brought under a standard provision of BITs that prevents nations from expropriating the investment of a foreign national without just compensation.[207] Moreover, the NAFTA extends this prohibition to "measures [that are] tantamount to nationalization or expropriation"[208]—language that critics claim will trigger an avalanche of adjudications.[209] Some commentators have also argued that the system of arbitration mandated by Chapter 11 violates Article III of the U.S. Constitution by deviating from "recognized methods for exerting federal adjudicatory power," and the Appointments Clause by delegating the appointment of arbitrators to persons outside the U.S. federal government.[210]

These are serious critiques,[211] but other authors caution that the situation may not be so dire.[212] After all, in the eight years after the NAFTA came into force, only 16 plaintiffs brought claims under Chapter 11, and of these, only two arbitrators decided against a Party to the NAFTA.[213] The paucity of adjudications posing a significant threat to national, state, or provincial sovereignty suggests to some

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206. James McIlroy, *Private Investment Claims Against State and Provinces—The Impact of NAFTA Chapter 11 on Sub-Federal Government Agencies*, 27 CAN.-U.S. L.J. 323, 324 (2001).

207. Brower & Steven, *supra* note 199, at 197.

208. *Id. See also* NAFTA art. 1110.

209. Laird, *supra* note 153, at 225. For example, critics point to the Loewen arbitration, in which a Canadian funeral services firm has alleged that the state judiciary of Mississippi has, through an excessive verdict, the denial of appeal and a coerced settlement, imposed government measures that are tantamount to expropriation. *See* Loewen v. United States, Notice of Arbitration/Statement of Claim, Oct. 30, 1998, ¶ 162, *at* http://www.international-economic-law.org/Loewen/ loewen.pdf [hereinafter Loewen Statement of Claim].

210. *See* Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1457 (1992) (examining the U.S.-Canada Free Trade Agreement, the immediate precursor between these nations to the NAFTA, containing similar arbitration provisions for dispute resolution).

211. For a thoughtful discussion of the precarious constitutional status of Chapter 11, see Steve Louthan, Note, *A Brave New Lochner Era? The Constitutionality of NAFTA Chapter 11*, 34 VAND. J. TRANS'L L. 1443 (2001) (raising serious constitutional questions about Chapter 11 under not only Article III but also the Eleventh Amendment).

212. *See* Laird, *supra* note 153, at 225-26 (noting that "NAFTA Chapter 11 is a relatively limited, although powerful in the correct circumstances, legal remedy that has not turned out to be the scourge against state sovereignty many continue to believe it will be"); Price, *supra* note 202, at 9 (opining that "[c]oncerns about [Chapter 11's] misuse—an hysteria over its compatibility with democratic governance—are at present without foundation").

213. Laird, *supra* note 153, at 225.

commentators that Chapter 11 may actually be "a relatively limited, although powerful in the correct circumstances, legal remedy. . . ."[214]

This Note does not take a position on the constitutionality of Chapter 11's provisions for dispute resolution except so far as required to make the positive claim that what has been enacted in the NAFTA and in thousands of similar agreements involving the NAFTA Parties and other nations is, for the time being, a binding and effectual agreement between the Parties. Coming to a conclusion about the interaction between these provisions and the sovereignty of the Parties to the agreement is a different—and much greater—endeavor than the one on which this Note has embarked. It would seem sufficient at this time and for these purposes to note that Chapter 11 is not without its critics on the broadest and most important of legal dimensions, yet its provisions remain in force.

IV. A HYPOTHETICAL CLAIM UNDER CHAPTER ELEVEN

After reviewing some representative transactions between municipalities and professional sports franchises,[215] and considering the relevant sections of Chapter 11,[216] there is sufficient background to consider whether Canadian franchises and the owners of Canadian franchises can make a successful claim against some or all of the cities and states that provide assistance to their local team or a team relocating to their town. Part IV applies the five elements of a NAFTA claim to the subsidization of professional sports franchises by units of local government in the United States. Perhaps not surprisingly, the most contentious element is likely to be whether the NAFTA Party has violated a substantive provision of the Investment Chapter, in this case the requirement of national treatment.

A. *Professional Sports Franchise Owners are "Investors" under Chapter 11*

The NAFTA Investment Chapter applies to those measures relating to investors of another party, defined as a "national or an enterprise . . . that seeks to make, is making or has made an investment."[217] Canadian investors in franchises located in either Canada or the United States would satisfy this definition (as would

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214. *Id.*
215. *See supra* Part II.
216. *See supra* Part III.
217. NAFTA art. 1139.

U.S. investors in franchises located in either the United States or Canada if the concern were measures promulgated by Canadian government). It is important to note, however, that some of the professional sports franchises located in Canada are owned at least in part by U.S. citizens,[218] who would not be entitled to relief under Chapter 11. The definition of enterprise to include those who own portions of an investment would probably enable the members of ownership groups who *are* Canadian to bring a claim under Chapter 11.[219]

B. *Professional Sports Franchises are "Investments" under Chapter 11*

As noted above, the Chapter 11 definition of "investment" is a broad one.[220] An investment in a professional sports franchise can satisfy the definition in any one of a number of ways. Most directly, an ownership interest in a professional sports franchise creates "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise."[221] "Enterprise" is defined in Article 201 as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association."[222]

It has also been suggested that Canadian professional sports franchises constitute investments under Chapter 11 as "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes,"[223] and as

> interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.[224]

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218. The Montreal Expos, for example, prior to becoming part of the portfolio of the league itself, were majority-owned by Jeffrey Loria, a U.S. businessman. BASEBALL PROSPECTUS 356-58 (Joe Sheehan, ed. 2002).

219. For most of its existence, however, some of the members of the Expos ownership group were Canadian, and these investors would appear to qualify under the definition of "investor" set forth in Article 201. *Id.*

220. *See supra* Part III.A.1.

221. NAFTA art. 1139(e).

222. *Id.* art. 201.

223. *Id.* art. 1139(g).

224. *Id.* art. 1139(h).

Thus, professional sports franchises in Canada that are members of leagues that operate in the United States can be considered branches of an enterprise as a result of their participation in a league that shares any revenue across member teams.[225] In addition, Canadian franchises can be considered enterprises in their own right as a result of their tangible and intangible property rights in the buildings and trademarks associated with the franchise.[226] However, as will become clear during the discussion of the national treatment claim, an investor may prefer to emphasize the independent aspects of professional sports franchises rather than participation in what is essentially a joint venture.

C. *Public Assistance to Sports Franchises Constitutes a Government "Measure"*

Recent tribunals have interpreted the government measure requirement broadly enough that it more than likely includes a decision by a municipality to provide assistance to a professional sports franchise.[227] Recall that the *Ethyl* tribunal's definition included "something other than a 'law', even something in the nature of a 'practice' which may not even amount to a legal stricture."[228] Other tribunals have found measures in the decisions of domestic courts[229] and the decisions and actions of "municipal and state officials."[230] Therefore there is a strong likelihood that most examples of municipal assistance to professional sports franchises will be considered government measures under the NAFTA.

One important difference between the conduct here described and the subjects of prior arbitration is that most cases involve burdens placed on investors of another Party. In *Ethyl*, plaintiffs sought relief from a Canadian regulation that banned the import and interprovincial trade of a substance plaintiffs produced.[231] In *Metalclad*, plaintiffs sought relief from post hoc requirements imposed by a local government impeding its lawful and previously licensed attempts to operate a waste treatment facility.[232] In *Pope & Talbot*, plaintiffs sought relief from an export control regime that

225. For example, the NHL pools television revenue, and MLB has an intricate system of revenue sharing based on individual team revenue. Appleton & Neceski, *supra* note 16, at 8.

226. *Id.*

227. *See supra* Part III.A.3.

228. Ethyl Award on Jurisdiction, *supra* note 168, ¶ 6.

229. Loewen Statement of Claim, *supra* note 209, ¶¶ 161-62.

230. Metalclad Final Award, *supra* note 25, ¶¶ 106-07.

231. Ethyl Award on Jurisdiction, *supra* note 168, ¶¶ 5-8

232. Metalclad Final Award, *supra* note 25, ¶ 50.

burdened the plaintiff's enterprise more severely than those located in other provinces.[233] In *SD Myers*, plaintiffs sought relief from an order by the Canadian Environment Minister that prohibited the export of hazardous waste after plaintiff's company demonstrated an ability to process the waste at a price significantly below that of its Canadian competitors.[234] In *Loewen*, plaintiffs argued that the decision of a Mississippi state court jury award was so significant a burden on their investment as to amount to expropriation.[235] In each arbitration, then, the government measure at issue has negatively burdened a plaintiff's investment through a substantive regulation or a procedural requirement.

Thus, the typical model of a measure that receives scrutiny under Chapter 11 is not mere government assistance to a favored domestic investor. Rather, most arbitrations are aimed at measures that specifically burden a particular claimant. This lack of precedent, although possibly disconcerting to a potential claimant, is probably not dispositive. Rather, a claim against such an affirmative "measure" will likely just make more difficult a plaintiff's required showing under the fourth and fifth elements of a Chapter 11 claim—the breach of a substantive guarantee of the chapter on investment, and the rational connection between the breach and some harm suffered by the plaintiff. If a claimant can make a sufficient showing on these elements, the fact that the measure was affirmative assistance to a competitor rather than a burden on the plaintiff should be immaterial.

D. *Does Public Assistance to Sports Franchises Violate the Substantive Protections of Chapter 11?*

The title of this Section is in the form of a question because, of all the elements, the claimant is likely to have the most trouble proving that a NAFTA Party has violated one of the substantive protections of Chapter 11. As suggested above, the investor's most plausible claim is that this assistance contravenes the principle of national treatment. This principle is intended to prevent a NAFTA Party from burdening enterprises with "different or more onerous operating conditions simply by virtue of foreign ownership."[236] The discussion

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233. Pope & Talbot Interim Merits Award, *supra* note 27, ¶¶ 6-7.

234. Myers Final Award, *supra* note 177, ¶132.

235. Loewen Statement of Claim, *supra* note 209, ¶ 162.

236. Price & Christy, *supra* note 157, at 174. At the outset, it is also important to note that the national treatment requirement under Article 1102 does not apply to "subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance." NAFTA art. 1108(7)(b). However, the

of national treatment in the context of the *S.D. Myers* arbitration in Part III suggests a useful three-part test: (1) is the claimant "in like circumstances" with the investors of the Party that the Party favored through this measure; (2) has the claimant been treated in a way "less favorable" than domestic investors; and (3) is there any reasonable policy justification for the less favorable treatment of an international investor?[237]

1. Is the Claimant "In Like Circumstances" with Favored Domestic Investors?

Resolution of this element requires inquiry into the unique economic structure of professional sports in North America—one that has confused courts[238] and amused economists for decades.[239] The leagues generally "exhibit a dual financial and decision-making structure," with clubs cooperating in some respects but competing in others.[240] Fortunately, the question of whether member franchises of professional sports leagues are in competition with one another is an oft-addressed (if not well-settled) area of U.S. antitrust law, and these decisions provide a useful framework for considering whether there are actual competitors against whose circumstances a Canadian claimant franchise can be compared.

The First Circuit Court of Appeals has noted that franchises of professional sports leagues "must cooperate in a variety of ways, and

national treatment requirement specifically applies to "all taxation measures, other than those on income," meaning that differential treatment of teams through, for example, abatement of property taxes, would be actionable. *Id.* art. 2103(4)(b). Further, a claimant might also challenge a local sales tax intended to generate revenue for assistance to a professional sports franchise, because although the subsidy is immunized by Article 1108(7)(b), the means of raising the funds is arguably not protected.

237. Weiler, *supra* note 165, at 77-78. *See also supra* Part III.A.4.

238. *See* Piraino, *supra* note 21, at 892 (noting that "[t]he federal courts' failure to develop a consistent theory regarding the economic behavior of sports leagues has prevented them from effectively regulating the leagues' abuses of monopoly power").

239. *See* Ethan Glass, *Slicing the Rent-Seeking Onion: Why Differential Rent-Seeking Explains the Competitive Disadvantage of United States Sports Franchises in Canada*, 9 MINN. J. GLOBAL TRADE 691, 691-92 (2000) (noting that "[e]conomists find professional sports to be an interesting model upon which to test their economic theories." This, Glass writes, is the result of the increasing importance and prominence of professional sports, the special positions professional sports occupy in the law, and the strong parallel between heavily regulated professional sports and "other international businesses in regulated or restricted industries.").

240. James L. Brock, Jr., *A Substantive Test for Sherman Act Plurality: Applications for Professional Sports Leagues*, 52 U. CHI. L. REV. 999, 1009 (1985).

may do so lawfully, in order to make the football league a success."[241] There can be no game without an opponent, no champion without an also-ran. As a result, "many critical league decisions are made collectively, and the economic consequences of those decisions are often distributed among the clubs in the form of shared revenues."[242] Thus, franchises should be concerned not only about the survival of other clubs, but also that they remain economically viable and able to compete "in order to maximize the interest of spectators and hence revenues from the sale of the product (the joint game)."[243] This cooperative concern for other league members is evident in many facets of league organization—mutual agreement on league rules and procedures, systems of revenue sharing,[244] league-wide broadcasting contracts, shared costs of operating the league organization, and so on.[245]

These cooperative aspects have led some economists and courts to conclude that members of professional sports leagues do not face antitrust liability where it cannot be proved that they are competitors in a particular product and geographic market. For instance, in 1983, the Third Circuit Court of Appeals found that NFL franchises competed only within "certain geographic submarkets," where league members might "compete with one another for ticket buyers, for local broadcast revenue, and for sale of the concession items like food and beverages and team paraphernalia."[246] The Third Circuit explicitly refused to find that "there can never be competition among league members,"[247] but asserted that this was precisely the conclusion reached by the Southern District of New York in *Levin v. National Basketball Association*.[248] In *Levin*, the court held that the Sherman Act did not apply to the NBA's refusal to allow plaintiffs to purchase the Boston Celtics franchise because "plaintiffs wanted to join with those unwilling to accept them, not to compete with them, but to be partners in the operation of a sports league for plaintiffs' profit."[249]

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241. Sullivan v. Nat'l Football League, 34 F.3d 1091, 1097 (3d Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995).

242. Brock, *supra* note 240, at 1009.

243. PETER J. SLOANE, SPORT IN THE MARKET? THE ECONOMIC CAUSES AND CONSEQUENCES OF THE 'PACKER REVOLUTION' 15 (London; Institute of Economic Affairs 1980).

244. Lee Goldman, *Sports, Antitrust and the Single Entity Theory*, 63 TUL. L. REV. 751, 757-58 (1989).

245. Brock, *supra* note 240, at 1009.

246. Mid-South Grizzlies v. Nat'l Football League, 720 F.2d 772, 787 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

247. *Id.* at 787 n.9.

248. Levin v. Nat'l Basketball Ass'n, 385 F. Supp. 149 (S.D.N.Y. 1974).

249. *Id.* at 152.

In some instances, the leagues have claimed to be "single-entities" incapable of conspiring with themselves to restrain trade,[250] and therefore not subject to liability under Section 1 of the Sherman Act. Section 1 prohibits only contracts, combinations, and conspiracies between two or more firms in restraint of trade.[251] If the leagues were to successfully characterize themselves as a single entity, then agreements among franchises would not be scrutinized under Section 1.[252] This particular line of antitrust jurisprudence is important to the present inquiry because if the leagues are single-entities, incapable of conspiring with each other for antitrust purposes, it seems unlikely that any particular franchise could be harmed by assistance to another franchise—municipal assistance to one franchise could be characterized as a benefit to the entire league.[253]

The U.S. Supreme Court provided a useful functional test for determining whether an antitrust defendant shows a plurality of economic interests in *Copperweld Corp. v. Independence Tube Corp.*, holding that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purpose of [Section 1] of the Sherman Act" because "the parent and its wholly owned subsidiary have a complete unity of interest."[254] Several commentators suggest that when applied to the professional sports leagues, this rule suggests that the leagues should be considered competitors for some purposes, and collaborators for others.[255] For instance, in areas where the league action "rest[s] on joint decisions not implicating teams' independent interests,"[256] such as those that produce shared revenues,[257] the leagues should be treated as single entities. In other areas, however, where "the member clubs have disparate economic interests in the results of their collective decisions," the franchises should not be considered single entities.[258] Therefore, the teams should be considered

250. Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 596-97 (7th Cir. 1996)

251. Sherman Antitrust Act, 15 U.S.C. § 1 (1997).

252. Note that even as "single-entities," the leagues might still face antitrust liability under Section 2 of the Sherman Act, which prohibits actions by parties with power in the relevant product and geographic markets from taking even unilateral actions that monopolize that market. 15 U.S.C. §2 (1997).

253. This seems particularly true when considering the resale value of ownership interests. The mere possibility of assistance from U.S. local governments increases the value of ownership interests and likely their resale price.

254. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).

255. Brock, *supra* note 240, at 1024; Goldman, *supra* note 244, at 795-96.

256. Goldman, *supra* note 244, at 796.

257. Brock, *supra* note 240, at 1024.

258. *Id.*

competitors in markets for inputs like players, coaches, and other employees, as well as for outputs like broadcasting revenue that is not shared equally among the teams, merchandise and trademark licensing, and the sale of ownership interests.

Perhaps not surprisingly, then, many federal courts have found the possibility of competition in many of these areas, relying on the instances where franchises are independent operations that bear the fiscal and competitive results of their own decision-making.[259] For instance, the Third Circuit, in *Sullivan v. NFL*, called it "well established that NFL clubs also compete with each other, both on and off the field, for things like fan support, players, coaches, ticket sales, local broadcast revenues and the sale of team paraphernalia."[260] Similarly, in *Los Angeles Memorial Coliseum Commission v. NFL*, the Ninth Circuit Court of Appeals agreed with the lower court's conclusion that NFL teams are "separate business entities whose products have an independent value,"[261] and reasoned that, "the NFL clubs do compete with one another off the field as well as on to acquire players coaches, and management personnel."[262] Finally, the court observed that "[i]n certain areas of the country where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space."[263]

One additional market where U.S. federal courts have found competition between franchises in a professional sports league is in the market for the sale of ownership interests. The Third Circuit in *Sullivan* concluded that the NFL's ownership policy reduces the available output of ownership interests.[264] The Eastern District of Pennsylvania reached a similar conclusion, refusing to dismiss a plaintiff's allegation that MLB "interfered directly and substantially with competition" in the "team franchise market [the market for ownership of professional baseball teams, and the market for ownership of the San Francisco] Giants in particular."[265]

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259. *Id.* at 1009.

260. Sullivan v. Nat'l Football League, 34 F.3d 1091, 1098 (3d Cir. 1994).

261. Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1389 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984) (quoting 519 F. Supp. 581, 584 (C.D. Cal. 1981)).

262. *Los Angeles Mem'l Coliseum Comm'n*, 726 F. 2d at 1390.

263. *Id.* Note that there is a reasonable argument to be made that the geographic market for fan support, television, and media space may be significantly larger now than at the time of the *Los Angeles Coliseum* decision in 1984 as a result of the broad dissemination of sports programming through national and international programmers that serve millions of customers throughout the continent through cable and direct-broadcast satellite.

264. *Sullivan*, 34 F.3d at 1100.

265. Piazza v. Major League Baseball, 831 F. Supp. 420, 430 (E.D. Pa. 1993).

Thus, there is a colorable argument to be made that professional sports franchises participate in competitive national and international markets for players, coaches, television revenues, the sale of ownership interests, and possibly other inputs and outputs. Competition between the franchises in these markets provides the basis for asserting that the franchises are in "like circumstances," and therefore are entitled to the benefit of national treatment.

2. Has the Claimant been Treated Less Favorably?

The second element of the national treatment analysis requires an examination of whether the government measure provides less favorable treatment to the claimant than a domestic investor. A claimant likely would argue that tax abatements and other unprotected public assistance to a franchise creates additional revenue with which a franchise may build a more competitive team.[266] A team that succeeds in competition on the field (1) may be more likely to succeed in the competitive market for players and coaches; (2) almost certainly will be more successful in the market for television revenues; and (3) likely will fetch a higher price in the competitive market for ownership interests. Franchises disfavored because they play their home games in Canadian cities lack this assistance and are arguably treated less favorably than their U.S. counterparts.

3. Is there a Reasonable Policy Justification for Less Favorable Treatment?

The third element of the national treatment analysis allows a NAFTA Party to prove that a reasonable policy decision justifies the less-favorable treatment of an international investor. A NAFTA Party confronted with such a claim might respond that the economic development that results from stadium construction and the civic benefit of having a professional sports franchise justify the differential treatment.[267] However, economists are moving toward a consensus that professional sports facilities simply have not

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266. The franchise may elect to improve competitiveness through the acquisition of expensive "star" players who, even if unable to improve the team competitively, may still draw fan interest and increase revenues at the ticket window. Note also that even a team that is unsuccessful on the field is in a better position to obtain talented players and coaches simply by virtue of being able to pay those employees a higher salary thanks to government assistance.

267. This is a common justification for public spending in the area of professional sports. *See supra* Part II.

generated the kinds of economic returns that were projected by their proponents.[268] One commentator recently concluded that "despite a series of studies over the past decade demonstrating the reality that new sports stadiums do not improve the qualities of life in the local areas that construct them," the facilities continue to be built.[269] Therefore, a NAFTA Party may encounter some difficulty resting its policy justification for public assistance to professional sports franchises on the projected benefits to economic development. Although the "consumer" benefits of hosting a professional sports franchise might justify use of a public-goods explanation for municipal investment, these benefits are difficult to capture, and likely would not be a strong foundation for an explanation of the less-favorable treatment.[270]

E. *U.S. Municipal Assistance Injures Canadian Franchises*

If successful in showing that (1) investors in Canadian professional sports franchises are within the scope of the NAFTA, (2) U.S. assistance to franchises is a "measure" within the meaning of the chapter on investment, and (3) there has been some violation of the substantive guarantee of national treatment, a claimant must still show economic injury and that the government measure caused the injury. This element may be surprisingly difficult to prove, as a plaintiff will have to establish a rational connection between U.S. measures and Canadian franchise losses.[271] One reason this is likely to be difficult is the extent to which Canadian tax policies are causing the Canadian franchises' financial distress.[272] Assessing the separate economic impact of these factors will not be easy, and the task is made even more difficult because the measures complained of cause harm to Canadian franchises indirectly (if at all), through the advantage conferred on domestic franchises and the manifestation of that advantage in competitive common markets. One way to frame this argument might be simply to say that Canadian franchises are harmed in the amount of the benefits given by U.S. local governments to favored domestic investors, yet the allegation of loss suffered by the investor seems to demand that the claimant prove some harm in

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268. *See supra* Part II.A.2 and accompanying notes.

269. Smith, *supra* note 18, at 58.

270. *See* Baim, *supra* note 69. "Consumer benefits" are the indirect ways cities and individuals might derive value from a professional sports franchise and from municipal investment in a facility. *See also* Noll & Zimbalist, *supra* note 71, at 87; Sanderson, *supra* note 69, at 190.

271. *See* Weiler, *supra* notes 165, at 69-78.

272. *See supra* notes 108-14 and accompanying text.

the competitive market as a result of the affirmative assistance to another investor.

V. WHY NOT PROTECT PROFESSIONAL HOCKEY FRANCHISES THROUGH THE CULTURAL EXCEPTION?

Hockey is culturally important to Canada. In the middle of the last decade it was estimated that more than five million Canadians (one out of five citizens at the time) were involved in hockey—playing, officiating, coaching, or as parents of a child in a youth league.[273] Canadian playwright Rick Salutin wrote,

> In a general sense hockey is one of the few things that makes this place coherent. In the U.S. there's no worry that the country will cease to exist. Here, there's a sense the country is falling apart. With free trade, the threat of Quebec separation, . . . [and] issues of national sovereignty, hockey assumes a sense of national loss.[274]

A U.S. journalist observed that "Canada is furious over the loss of two hockey franchises"—those formerly located in Quebec and Winnipeg.[275] And nearly half of Canadians polled by the Canadian national government agreed "hockey deserved as much attention as cultural industries."[276]

Canadian politicians have also responded to the emigration of its hockey franchises with claims about the game's cultural significance. Then Quebec City Mayor Jean-Paul L'Allier told reporters in 1995 that, "Hockey is part of the Canadian sports heritage. The federal government acts to protect cinema, books, [and] magazines. What have they done to save the hockey heritage?"[277] Dennis Mills, then a member of the Canadian Parliament, opined, "We've always talked about hockey's cultural role because Canadians are so emotionally involved with it," but added

> it's time we look at it as an industry. If we thought General Motors was going to pull a van plant out of Oshawa Ont[ario], we'd go crazy and make sure it didn't happen. We can tell you in forestry and automobiles how many jobs, skilled and unskilled, there are in every sector. Ask about hockey, and we draw a blank. If we, as

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273. Farber, *supra* note 111, at 104.

274. *Id.*

275. George Kantor, *Stadium Subsidy Dispute Takes Center Ice*, DETROIT NEWS, May 27, 1998, at A11.

276. Rick Gibbons, *Manley's Doomed Deal*, OTTAWA SUN, Jan. 21, 2001, at C3.

277. Farber, *supra* note 111. L'Allier went on to predict the NHL's departure not only from Quebec City, but also Winnipeg, which lost its franchise less than five years later. *Id. See supra* Part II.A.3.c.

> policymakers, lose hockey because we've been asleep at the switch, we're losing a big job-creation project.[278]

So why is professional hockey not among the industries that are protected under the Cultural Exception to the U.S.-Canada Free Trade Agreement later adopted by the NAFTA?[279] This Note argues that there are three possible explanations for the omission of professional hockey from the list of industries that do receive such protection. First, Canadian representatives likely focused on importation of threats to the Canadian culture rather than exportation of culturally relevant industries. Second, Canadian lawmakers and negotiators may have overlooked professional hockey in the cultural exception because it is so inextricably related to the culture that there was no apparent cause for concern. Third, and most likely, what is culturally important to Canadians is the game of hockey, and not the NHL or any other professional manifestation of the game.

First, in creating the exception to the Free Trade Agreement, Canadian policymakers anticipated the encroachment of United States popular culture, not the possibility that the U.S. might expropriate important elements of Canadian culture. This seems particularly true in light of the fact that all of the protected industries—books, magazines, periodicals, newspapers, film or video recordings, audio or video music recordings, music in print, and machine-readable form and radio communications[280]—can be generated in large quantities by the United States and distributed quickly and cheaply into the Canadian culture. Although the loss of professional hockey franchises may damage a cultural industry, it does so in a completely different way than that contemplated by the exception. Because the exception focuses on inflows of cultural material, it could not possibly have encompassed the instant concern.

Second, hockey may be so ingrained in Canadian culture that no one anticipated that the future of the NHL in Canada would be in serious jeopardy. The cultural exception to the U.S.-Canada Free Trade Agreement was crafted in 1988,[281] seven years before the Quebec Nordiques left Quebec City to play in Denver, Colorado,[282] six years before the Jets left Winnipeg to play in Phoenix,[283] and 15 years before the Ottawa Senators were put up for sale out of

278. *Id.*
279. For a description of the Cultural Exception, see *supra* Part III.B.
280. Canada-U.S. Free Trade Agreement art. 2012.
281. *Id.*
282. *See supra* note 129 and accompanying text.
283. *See supra* note 135 and accompanying text.

bankruptcy in 2003.[284] It is conceivable that Canadian lawmakers never imagined that their professional hockey franchises would leave Canada for the United States, and therefore that there was no reason to except professional hockey from the operation of the Free Trade Agreement.

Third, it may be that what is culturally important to most Canadians is the game of hockey, and not necessarily the NHL franchises that presently operate there. This explanation is consistent both with high participation in hockey and hockey-related activities,[285] as well as with general public disapproval of subsidies to Canadian NHL franchises. For example, Canadian Federal Industry Minister John Manley proposed a multi-million dollar bailout of the Canadian NHL franchises in 2000 and found that there was very little public support for the subsidies.[286] Described as a "gale-force public backlash," a poll found that only 36 percent of Canadians considered themselves hockey fans and 35 percent said they would not be troubled by the departure of several of the nation's remaining teams.[287] Perhaps most importantly, 79 percent of Canadians polled agreed that NHL franchises "should have no more expectation of government support than any other business in Canada."[288] In addition to explaining the omission of professional hockey in the Cultural Exception to the Agreement, this hypothesis may also explain the decision, to this point, of Canadian federal and provincial governments not to seek the relief described in this Note.

*Robert A. Schmoll**

284. Westhead, *supra* note 13.

285. *See supra* note 267 and accompanying text.

286. Gibbons, *supra* note 276. Note that this poll was conducted by the Canadian government and surveyed only 1,500 Canadians.

287. *Id.*

288. *Id.*

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