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NAFTA's Investment Chapter: Initial Thoughts About Second-Generation Rights

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NAFTA's Investment Chapter: Initial Thoughts About Second-Generation Rights

Charles H. Brower II*

ABSTRACT

In this Article Professor Brower argues that most observers of NAFTA's investment chapter have missed an important and surprising development: Although the treaty's text shares a philosophical affinity with civil and political rights, its application has revealed an astonishing level of support for economic and social rights (ESCRs) in North America. Professor Brower examines the practical implications of this development both for the presentation of claims in investor-state arbitration and for the better integration of ESCRs into the mainstream of international law.

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I. INTRODUCTION

Debates swirling around the North American Free Trade Agreement's (NAFTA's) investment chapter (Chapter 11)¹ manifest clashes among political, economic, and social values. Many observers describe Chapter 11 as a front in the struggle between trade and the environment.² Others view it as the setting for a dramatic conflict between sovereignty and the rule of law.³ While a few writers have

1. North American Free Trade Agreement, Dec. 17, 1992, 107 Stat. 2057, ch. 11 [hereinafter NAFTA].

2. See, e.g., HOWARD MANN & KONRAD VON MOLTKE, NAFTA'S CHAPTER 11 AND THE ENVIRONMENT: ADDRESSING THE IMPACTS OF THE INVESTOR-STATE PROCESS ON THE ENVIRONMENT 60 (1999) (identifying a conflict between "the reality" of Chapter 11 and "the ability to protect the environment"); Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 132 (2003) (recounting the "common charge" that Chapter 11 claims "will deter beneficial . . . environmental regulation"); Steve Charnovitz, *Reflections on North American Environmental Cooperation*, 28 CAN.-U.S. L.J. 489, 495 (2002) (stating that "[a]mong environmentalists today, Chapter 11 is perceived as the biggest threat in NAFTA to the environment"); Janine Ferretti, *NAFTA and the Environment: An Update*, 28 CAN.-U.S. L.J. 81, 84 (2002) (explaining that Chapter 11 cases "represent the most current and controversial area[] for NAFTA today" and "seem[] to confirm the fears . . . of the potential for paralysis in environmental protection caused by the trumping of environmental regulation by trade rules"); Joel C. Beauvais, Student Article, *Regulatory Expropriations Under NAFTA: Emerging Principles and Lingering Doubts*, 10 N.Y.U. ENVTL. L.J. 245, 247 (2002) (observing that the "majority" of expropriation claims "concern environmental measures"); Terri L. Lilley, Note, *Keeping NAFTA "Green" for Investors and the Environment*, 75 S. CAL. L. REV. 727, 728 (2002) (discussing the "[w]idespread concern . . . that the risk of crushing liability for regulatory action will hamstring environmental regulation"); Howard Mann & Konrad von Moltke, *Protecting Investor Rights and the Public Good: Assessing NAFTA's Investment Chapter 8* (Mar. 2002) (unpublished manuscript, prepared for Investment Law and Sustainable Development Tri-National Policy Workshops), available at http://www.iisd.org/trade/ilsdworkshop/pdf/background_en.pdf [hereinafter Mann & von Moltke, *Manuscript*] (referring to a "growing sense that the provisions of Chapter 11 put at risk the ability of governments to maintain a dynamic environmental management system").

3. See, e.g., Charles H. Brower II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 COLUM. J. TRANSNAT'L L. 465, 487 (2002); Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 81, 87-88 (2001) [hereinafter Brower, *Empire Strikes Back*]; see also Ari Afilalo, *Constitutionalization Through the Back Door: A European Perspective on NAFTA's Investment Chapter*, 34 N.Y.U. J. INT'L L. & POL. 1, 52 (2001) (identifying the "erosion of sovereignty" as the "lynchpin" of criticism against Chapter 11); Pierre Sauve, *Canada,*

examined Chapter 11 from a human rights perspective,⁴ virtually no one has acknowledged its transformation into the vehicle for a competition between civil and political rights (CPRs or liberty rights), on one hand, and economic, social, and cultural rights (ESCRs), on the other. As a result, no one has recognized the unexpectedly high level of support for ESCRs in North America, particularly in the United States. Neither has anyone examined the implications of this phenomenon, either narrowly for the presentation of investor-state disputes, or more broadly for the better integration of ESCRs into the mainstream of international law.

To fill these gaps in the literature, Part II of this article examines the content and philosophical structure of CPRs and ESCRs, as well as the United States' traditional hostility toward ESCRs. Part III discusses the contributions that CPRs have made to the text of NAFTA's investment chapter, as well as the contributions that ESCRs have made to debates about its application. Finally, Part IV explores the possible implications of the latter phenomenon both for the presentation of investment disputes and for the better incorporation of ESCRs into the mainstream of international law.

Free Trade, and the Diminishing Returns of Hemispheric Regionalism, 4 UCLA J. INT'L L. & FOREIGN AFF. 237, 244 (1999-2000) (stating that Chapter 11 "has come to be viewed by many as posing a potentially serious threat to domestic regulatory sovereignty"); Marcia J. Staff & Christine W. Lewis, *Arbitration Under NAFTA Chapter 11: Past, Present, and Future*, 25 HOUS. J. INT'L L. 301, 319 (2003) (stating that "[c]ritics in the United States and Canada complain the loudest that Chapter 11 threatens sovereignty"); Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 143-44 (2002) (observing that Chapter 11 raises "provocative and timely questions about state sovereignty," including "the ability of states to pursue domestic policy priorities unconstrained by external authority structures or requirements"); Justin Byrne, Comment, *NAFTA Dispute Resolution: Implementing True Rule-Based Diplomacy Through Direct Access*, 35 TEX. INT'L L.J. 415, 432 (2000) (explaining that the "most common critique leveled against the investor-state dispute mechanism is that it undermines national sovereignty"); Gregory M. Starner, Note, *Taking a Constitutional Look: NAFTA Chapter 11 as an Extension of Member States' Constitutional Protection of Property*, 33 LAW & POL'Y INT'L BUS. 405, 405 (2002) (asserting that the "continued debate turns on whether NAFTA represents a . . . step towards member countries relinquishing their sovereignty to a regional trade regime" that functions as a "type of regional constitution").

4. See José E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 304-12 (1997) [hereinafter Alvarez, *Critical Theory*]; Elizabeth M. Iglesias, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177, 196-97 (1997); Symposium, *The Multinational Enterprise as Global Corporate Citizen*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 1, 9 (2001) (remarks by José Alvarez) [hereinafter Alvarez Remarks]; see also Chantell Taylor, Note, *NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Workers' Rights*, 28 DENV. J. INT'L L. & POL'Y 401, 403, 408, 412 (2000) (examining Chapter 11 from the perspective of international workers' rights).

II. CPRs AND ESCRS: TRADITIONAL VIEWS AND BIASES

When discussing human rights, scholars commonly recognize the existence of a dichotomy (real or false) between CPRs and ESCRs.⁵ To ensure a basic understanding of CPRs and ESCRs, Part II(A) examines traditional views about their content and philosophical structure. Likewise, to provide a benchmark for evaluating the significance of reactions to the application of NAFTA's investment chapter, Part II(B) discusses the United States' longstanding record of hostility toward ESCRs.

A. Content and Philosophical Structure

Following the adoption of the Universal Declaration of Human Rights by the General Assembly in 1948,⁶ the U.N. Commission on Human Rights (Commission) undertook the task of transforming that set of aspirational, "common standard[s]"⁷ into a series of binding treaty obligations.⁸ Almost two decades later, in 1966, the Commission completed work on the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).⁹

5. Compare HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 246 (2d ed. 2000) (identifying "many differences" between the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), with Louise Doswald-Beck, *Human Security: Can It Be Attained?*, 97 PROC. AM. SOC'Y INT'L L. (forthcoming 2003) (referring to the "long-standing" and "false" dichotomy between the two sets of rights), and Donna E. Arzt, *Law Students' Attitudes About Economic Rights in the Post Cold War World*, 19 SYRACUSE J. INT'L L. & COM. 39, 40-41, 45 (1993) (referring to the "dichotomy in international law between civil and political rights, on the one hand, and economic, social and cultural rights on the other," but later suggesting that "the separation reflects an artificial dichotomy"). See also STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 39-40 (1999) (identifying the distinction "routinely drawn between negative rights and positive rights," and explaining the differing roles that the two sets of rights contemplate for the state); DAVID KELLEY, A LIFE OF ONE'S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE 21-23 (1998) (examining the distinctions between welfare rights and liberty rights); Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 437-38 (1981) (reviewing the historical development of "first" and "second" generation rights).

6. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 at 71 (1948) [hereinafter UDHR].

7. *Id.* pmb1.

8. See STEINER & ALSTON, *supra* note 5, at 138-39, 244-45 (stating that "[a]fter the adoption of the Universal Declaration in 1948, the next step was to translate the rights it recognized . . . into binding treaty obligations," and describing that process).

9. The General Assembly adopted both Covenants simultaneously by resolution in 1966. See International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 49, 52, U.N. Doc. A/6316 (1966), entered into force Mar. 23, 1976 [hereinafter ICCPR]; see also International Covenant

Although neither treaty entered into force until 1976,¹⁰ each now boasts more than 140 states parties.¹¹

Ever since their adoption, the United Nations has described the rights contained in the ICCPR and the ICESCR as “universal, indivisible, interdependent, and interrelated.”¹² Even though their preambles expressly reiterate this theme,¹³ the ICCPR and the ICESCR identify rights and adopt language that reflect fundamentally different (some would even say incompatible)¹⁴ views about the relationship between individuals and the states that they inhabit. For example, the ICCPR draws on the “first generation” of rights produced by the liberal philosophy of eighteenth-century Europe.¹⁵ Thus, the ICCPR prohibits torture, slavery, arbitrary arrest and detention, as well as arbitrary deprivation of the right to life.¹⁶ Likewise, it requires states parties to respect freedom of movement, thought, religion, expression, and association, as well as the rights to privacy and assembly.¹⁷ When setting forth these principles, the

on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), *entered into force* Jan. 3, 1976 [hereinafter ICESCR].

10. *Id.*

11. As of this writing, 149 states have ratified the ICCPR, and an additional 8 states have signed but not ratified the ICCPR. Office of the U.N. High Commissioner of Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* 9 (May 2, 2003), available at <http://www1.umn.edu/humanrts/instreet/auob.htm>. Likewise, 146 states have ratified the ICESCR, and an additional 7 states have signed but not ratified it. *Id.*

12. STEINER & ALSTON, *supra* note 5, at 237, 247; *see also* Vienna Declaration and Programme of Action, Part I(5), 32 I.L.M. 1663, 1665 (1993); A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN THE WORLD* 274 (4th ed. 1996); MALCOLM N. SHAW, *INTERNATIONAL LAW* 208 (4th ed. 1997); Brigit Toebes, *Towards an Improved Understanding of the International Human Right to Health*, 21 HUM. RTS. Q. 661, 661 (1999).

13. *See* ICCPR, *supra* note 9, pmb., cl. 4 (recognizing that “the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights”); ICESCR, *supra* note 9, pmb., cl. 3 (recognizing that “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”).

14. *See* KELLEY, *supra* note 5, at 21 (“Welfare rights are radically different from, and incompatible with, the classical rights to life, liberty, and property.”); Rosalyn Higgins, *The European Convention on Human Rights*, in *HUMAN RIGHTS IN INTERNATIONAL LAW* 495, 497 (Theodor Meron ed., 1984) (“The dilemma is that full achievement of . . . economic and social rights entails a loss of individual liberties which is unacceptable to the western liberal democracies.”).

15. *See* Marks, *supra* note 5, at 437 (discussing the evolution of “first-generation” rights).

16. *See* ICCPR, *supra* note 9, arts. 6-9.

17. *See id.* arts. 12, 17-19, 21-22.

ICCPR employs language that focuses attention on the individual (e.g., “every human being,” “no one,” “everyone,” “anyone,” and “all persons”).¹⁸ One may, thus, conclude that the ICCPR restricts state action in order to provide individuals with large zones of autonomy. In other words, it uses “negative” rights to promote liberty.¹⁹

In contrast, the ICESCR draws on the “second generation” of rights produced by the socialist philosophies of nineteenth-century Europe.²⁰ Thus, the ICESCR recognizes the rights to work under favorable conditions, to social security, to adequate food and shelter, and to the highest attainable standard of health, education, and participation in cultural life.²¹ Although writers commonly include environmental protection in an emerging, “third generation” of collective rights,²² the rights to health and adequate food may also require states to establish or maintain the environmental conditions necessary for their exercise.²³ When setting forth these principles, the

18. See *id.* arts. 6(1), 7, 8(1), 9(1)-(5), 10(1), 12(1)-(2), 17, 18(1)-(2), 19(1)-(2), 22(1); see also ROBERTSON & MERRILLS, *supra* note 12, at 277-78 (discussing the linguistic formulation of rights under the ICCPR); STEINER & ALSTON, *supra* note 5, at 246 (examining the terminology used in the ICCPR).

19. See HOLMES & SUNSTEIN, *supra* note 5, at 40 (observing that “[n]egative rights ban and exclude government” and that “[n]egative rights typically protect liberty”); Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties’ Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 159 (1987) (noting that “civil and political rights are characterized as negative in that they require only that governments should abstain from activities that would violate them”); Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS (Hague Academy Int’l L.) 21, 231 (1989-IV) (explaining that “civil and political rights are often described as negative rights: they are freedoms, immunities, which a State can respect by abstention, by leaving the individual alone”); Marks, *supra* note 5, at 437-38, 441 (discussing the “first generation” of “negative” rights, which “required the prohibition of interference by the state in the freedom of the individual” and citing Karel Vasak’s use of the first element of the French Revolution’s motto, “liberté,” to describe the aim of first-generation rights); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT’L L. 103, 122 (1991) (observing that the “first generation” of rights “define[s] a sphere of personal liberties into which the government cannot enter”).

20. See Marks, *supra* note 5, at 438 (discussing the evolution of “second-generation” rights); see also Louis Henkin, *International Human Rights and Rights in the United States*, in HUMAN RIGHTS IN INTERNATIONAL LAW, *supra* note 14, at 25, 33-34 (explaining that certain international human rights, which appeared “after various socialisms were established and . . . the welfare state was nearly universal,” require “a government that is activist, intervening, committed to economic-social planning for the society, so as to satisfy economic-social rights of the individual”).

21. See ICESCR, *supra* note 9, arts. 6, 7, 9, 11, 12, 13, 15.

22. See ROBERTSON & MERRILLS, *supra* note 12, at 292-93; Henkin, *supra* note 19, at 244, 246-47; Marks, *supra* note 5, at 442-44; Justice Albie Sachs, *Social and Economic Rights: Can They Be Made Justiciable?*, 53 SMU L. REV. 1381, 1384 (2000).

23. See Henkin, *supra* note 19, at 246-47 (recognizing that because environmental protection “is related to individual health and well-being,” one may argue that “a State party to the [ICESCR] is required to pursue a healthful environment progressively to the extent of available resources as part of its [treaty]

ICESCR employs language that focuses attention on the state (e.g., "States Parties . . . recognize," "States Parties . . . undertake," and "[t]he steps to be taken by the States Parties . . . shall include").²⁴ One may, thus, conclude that the ICESCR requires state action in

obligations"); see also Dinah Shelton, *International Decision*, 96 AM. J. INT'L L. 937, 942 n.35 (2002) ("In cases where human rights instruments do not include a specific 'right to environment,' . . . courts may nevertheless hold that existing environmental conditions violate other rights.").

When interpreting or applying the rights to health and to adequate food, two treaty-based institutions have concluded that those rights require states parties to take specific measures to protect the environment. See Comm. on Economic, Social and Cultural Rights, *The Right to the Highest Attainable Standard of Health*, gen. cmt. 14, ¶ 4, U.N. Doc. E/C.12/2000/4 (2000), available at <http://www1.umn.edu/humanrts/gencomm/econ.htm> (interpreting the right to health to include "access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment"); *id.* ¶ 11 (interpreting the right to health to include "access to safe and potable water and adequate sanitation, an adequate supply of safe food . . . [and] . . . healthy occupational and environmental conditions"); *id.* ¶ 15 (concluding that the right to health requires "an adequate supply of safe and potable water and basic sanitation[, as well as] the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health"); *id.* ¶ 36 (concluding that the right to health requires states "to adopt measures against environmental and occupational health hazards," including policies "aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline"); *id.* ¶ 51 (concluding that "the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries" would violate the right to health); Comm'n on Economic, Social and Cultural Rights, *Right to Adequate Food*, gen. cmt. 12, ¶ 4, U.N. Doc. E/C.12/2000/4 (2000), available at <http://www1.umn.edu/humanrts/gencomm.econ.htm> (affirming that the right to adequate food is "inseparable from . . . requiring the adoption of appropriate . . . environmental . . . policies"); *id.* ¶ 10 (defining the core content of adequate food to include "requirements for food safety . . . to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene"); see also African Comm'n on Human and Peoples' Rights, *Decision Regarding Communication No. 155/96*, ¶ 51 (May 27, 2002), available at <http://www1.umn.edu/humanrts/africa/comcases/allcases.html> (recognizing that environmental degradation harms physical health); *id.* ¶ 52 (concluding that the right to health obligates states to "desist from directly threatening the health and environment of their citizens"); *id.* ¶ 53 (asserting that compliance with the "spirit" of the right to health requires states to order or permit "independent scientific monitoring of threatened environments," to require and publicize "environmental . . . impact studies prior to any major industrial development," and to undertake monitoring of "those communities exposed to hazardous materials"); *id.* ¶ 65 (concluding that the "minimum core of the right to food" requires states neither to "destroy or contaminate food sources" nor to "allow private parties to destroy or contaminate food sources").

Although the rights to health and adequate food may require a certain level of environmental protection, the scope of that protection falls short of a general right to the environment because "environmental degradation is not itself a cause for complaint." Shelton, *supra* note 19, at 116.

24. See ICESCR, *supra* note 9, arts. 6, 7, 8(1), 9, 11(1), 12, 15; see also ROBERTSON & MERRILLS, *supra* note 12, at 278 (discussing the linguistic formulation of obligations under the ICESCR); STEINER & ALSTON, *supra* note 5, at 246 (examining the terminology used in the ICESCR).

order to provide individuals with a common minimum standard of material well-being.²⁵ In other words, it uses “positive rights” to promote equality.²⁶

Like the philosophies that produced them, the ICCPR and the ICESCR share the goal of improving the human condition. At a very general level, one can accept the two traditions as inseparable: Just as freedom of thought has little value for those threatened with starvation or exposure, food and shelter provide little comfort to those who live in fear of extra-judicial killing or disappearance.²⁷ At a more concrete level, the ICCPR and the ICESCR assign fundamentally different roles to the state. While the former restrains state action, intervention and reallocation of wealth, the latter demands it.²⁸ Thus, literally and figuratively, CPRs and ESCRs appear to be stuck in different centuries.

B. Biases

Judged by the formal criterion of ratification, the international community has shown overwhelming and virtually identical support for the ICCPR and ICESCR.²⁹ As a practical matter, however, states parties have shown much greater concern for CPRs than for ESCRs.³⁰

25. See KELLEY, *supra* note 5, at 22 (observing that “[w]elfare rights . . . are intended to guarantee success, at least at a minimum level”).

26. See HOLMES & SUNSTEIN, *supra* note 5, at 40 (asserting that “positive rights typically promote equality”); Marks, *supra* note 5 at 441 (citing Karel Vasak’s use of the second element of the French Revolution’s motto, “égalité,” to describe the aim of second-generation rights).

27. See Annotations on the Text of the Draft International Covenants on Human Rights, U.N. Doc. A/2929, at 7, ¶ 8 (1955) [hereinafter Annotations] (“Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic, social and cultural rights could not be long ensured.”).

28. See HOLMES & SUNSTEIN, *supra* note 5, at 40 (“Negative rights ban and exclude government; positive ones invite and demand government. The former require the hobbling of public officials, while the latter require their affirmative intervention.”); see also Alston & Quinn, *supra* note 19, at 159 (comparing CPRs, which require states to abstain from harmful action, with ESCRs, which require “active” state intervention); KELLEY, *supra* note 5, at 26 (recognizing that the “implementation of welfare rights requires a[n] . . . activist form of government” that typically becomes involved in “large-scale transfer programs”); Henkin, *supra* note 20, at 34 (indicating that social and economic rights “imply a government that is activist [and] intervening”); Iglesias, *supra* note 4, at 194 (recognizing that “second generation rights depend upon the programmatic interventions of the welfare state”); Marks, *supra* note 5, at 438 (acknowledging that the achievement of many social and economic rights would be “inconceivable without an active role by the state”).

29. See *supra* note 11 and accompanying text.

30. See Shedrack C. Agbakwa, *Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights*, 5 YALE HUM. RTS. & DEV. L.J. 177, 178 (2002) (noting that “in practice states have paid less attention to the enforcement and implementation of ESCR[s] . . . than other rights.”); Padideh Ala’i, *A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 GEO. WASH.

Western states, in particular, have emphasized CPRs³¹ and neglected ESCRs³² at every level of society. While the political and judicial arms of these states frequently invoke CPRs in professional discourse, they rarely use ESCRs to support their arguments and decisions.³³ Despite increasing criticism about the selective nature of their work,³⁴ non-governmental organizations (NGOs) dedicated to the promotion of human rights follow the same pattern of neglect.³⁵ Scholars with expertise in international human rights have likewise exhibited a disregard for ESCRs; one source found no more than a

INT'L L. REV. 537, 544 (2001) ("Economic, social and cultural rights . . . are being increasingly recognized as 'rights,' but have not traditionally enjoyed the same level of recognition as civil and political rights."); Toebes, *supra* note 12, at 661 (observing that "[a]lthough it is often asserted that both sets of rights are interdependent, interrelated, and of equal importance, in practice, Western states and NGOs, in particular, have tended to treat economic, social, and cultural rights as if they were less important than civil and political rights"); see also Shelton, *supra* note 19, at 121 (explaining that the U.S. government has "refused to give equal status" to ESCRs).

31. See ANTONIO CASSESE, INTERNATIONAL LAW 354 (2001) (describing the doctrine of Western states, in which "civil and political rights appear to be of primary importance"); SHAW, *supra* note 12, at 208 (discussing the "view adopted by the Western world," which tends "to emphasize the basic civil and political rights of individuals").

32. See Toebes, *supra* note 12, at 661; see also Joseph Oloka-Onyango, *Beyond the Rhetoric: Reinventing the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT'L L.J. 1, 1 (1995) (observing that the "arena of human rights discourse and practice has been dominated by attention to . . . civil and political rights" and that "economic, social and cultural rights are much less well known, and only rarely . . . form the subject of concerted political action, media campaigns or critical reportage").

33. See STEINER & ALSTON, *supra* note 5, at 238 (describing as "one of the puzzles in the field" the ICESCR's "rare invocation in the play of internal politics [and] in the judiciaries of most states," especially when compared with the "frequent invocation" of CPRs established by the UDHR and ICCPR).

34. See Katherine E. Cox, *Should Amnesty International Expand Its Mandate to Cover Economic, Social, and Cultural Rights?*, 16 ARIZ. J. INT'L & COMP. L. 261, 261 (1999) (criticizing the limited scope of Amnesty's work and suggesting that it take on a broader role).

35. See STEINER & ALSTON, *supra* note 5, at 268 (observing that "despite occasional affirmations of intent to adopt a broader focus," international human rights NGOs tend "to be pre-occupied with civil and political rights"); Agbakwa, *supra* note 30, at 201 (noting that "prominent transnational human rights groups have yet to rise fully to the occasion in the area of ESCR[s]"); Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 388-90 (1990) (arguing that human rights NGOs are "not at all well qualified" to lead the campaign for ESCRs because their record shows "virtually no policy advocacy" in this field); Cox, *supra* note 34, at 282 (expressing "no doubt" that human rights NGOs "have neglected economic and social rights" and suggesting that they bear partial responsibility "for the underdevelopment of these rights"); Toebes, *supra* note 12, at 661 (indicating the "Western . . . NGOs . . . have tended to treat economic, social, and cultural rights as if they were less important than civil and political rights").

“meager” body of relevant work produced by a “handful” of scholars.³⁶ Perhaps one may attribute the apparent lack of interest in ESCRs to lingering doubts about their compatibility with the traditional machinery of adjudication and enforcement.³⁷

While most states have merely neglected ESCRs, the United States has shown outright “hostility.”³⁸ Although Presidents Franklin D. Roosevelt, Jimmy Carter, and William J. Clinton expressed support for ESCRs as a matter of domestic or international law,³⁹ the administrations of Presidents Ronald Reagan and George H.W. Bush “categorically denied” the existence of ESCRs.⁴⁰ In a notorious decision, the U.S. Supreme Court appeared to agree:

36. See Alston, *supra* note 35, at 388; see also Barbara Stark, *Urban Dispair and Nietzsche's "Eternal Return": From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights*, 28 VAND. J. TRANSNAT'L L. 185, 194 (1995) (“Few scholars in the United States . . . really care about the philosophical, moral, or jurisprudential underpinnings of economic rights. Even those most concerned about economic justice generally avoid them.”).

37. See Annotations, *supra* note 27, at 7, ¶¶ 9-11 (recounting debates about whether ESCRs constitute justiciable, legal rights); David M. Trubek, *Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs*, in HUMAN RIGHTS IN INTERNATIONAL LAW, *supra* note 14, at 205, 211-12 (referring to doubts that the international community could create “court-like” structures to supervise ESCRs).

38. STEINER & ALSTON, *supra* note 5, at 249; see also Agbakwa, *supra* note 30, at 202-03 (identifying the “hostility of some Western states” to ESCRs and, in describing the tactics of those states, mentioning the United States in particular); Ala'i, *supra* note 30, at 545 (observing that the “United States has been, for the most part, opposed to the recognition of economic, social, and cultural rights as ‘rights’”); Alston, *supra* note 35, at 382, 391 (mentioning the “deep-seated reluctance on the part of the U.S. Government to embrace the concept of economic, social and cultural rights,” as well as the fact that “a significant segment of public opinion would be actively opposed” to ratification of the ICESCR); Alston & Quinn, *supra* note 19, at 158 (describing the efforts of the U.S. government further to strengthen the case against ESCRs); Iglesias, *supra* note 4, at 186 (asserting that “the United States recognizes only civil and political rights and continues to deny economic and social rights any legal status”); Marks, *supra* note 5, at 440 (recalling the “persistent reluctance in the United States to take economic, social, and cultural rights seriously”); Stark, *supra* note 36, at 225-26 (noting that, “[h]istorically, the United States has rejected economic rights”).

39. See STEINER & ALSTON, *supra* note 5, at 243, 249-50.

40. Alston, *supra* note 35, at 367; see also STEINER & ALSTON, *supra* note 5, at 250 (stating that the “Reagan and Bush Administrations . . . opposed the concept of economic and social rights”); Shelton, *supra* note 19, at 121 (explaining that “the Reagan Administration’s Deputy Assistant Secretary of State for Human Rights and Humanitarian Affairs called the idea that economic and social rights constitute human rights a ‘myth’”); Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an “Entirely New Strategy,”* 44 HASTINGS L.J. 79, 91 (1992) (concluding that the “federal government under the Reagan and Bush administrations has emphasized its hostility toward economic rights”); cf. Arzt, *supra* note 5, at 40 (indicating that, during the Reagan and Bush administrations, the United States “was almost unique among industrialized states in its virtual neglect of social welfare problems”).

The [Due Process] Clause is phrased as a limitation of the State's power to act, not as a guarantee of certain minimal levels of safety and security. . . . [T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.⁴¹

Thus, policy statements and judicial decisions establish a reluctance among the U.S. political leadership to embrace ESCRs.⁴² Furthermore, observers also have concluded that the U.S. public remains deeply suspicious of ESCRs,⁴³ describing them as "socialist"⁴⁴ or "un-American"⁴⁵ enterprises.

41. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195-96 (1989). *See also Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 160-61 (2d Cir. 2003) (recognizing the right to health as a "virtuous goal[]," but concluding that its "vague," "indeterminate," "amorphous," and "boundless" character prevents its application in adversarial proceedings).

42. *See Alston, supra* note 35, at 372-78, 382-83 (discussing policy statements, congressional testimony, and judicial decisions, and concluding that they provide "considerable evidence" of the U.S. government's "deep-seated reluctance to embrace the concept of economic, social and cultural rights").

43. *See id.* at 366 (observing that the ICESCR "has failed to attract any significant domestic support" and that "many Americans" still view the treaty "with suspicion"); *see also* NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY 43 (1986) (implying that the current "cultural consensus" does not include the proposition that "the basic economic conditions of human welfare are . . . due to persons by right"); Drew S. Days III, *Affirmative Action, in CIVIL LIBERTIES IN CONFLICT* 85, 99 (Larry Gostin ed., 1988) (concluding that "in the current United States political environment . . . the chances of mobilizing adequate public support for the establishment of comprehensive social welfare programs are almost nil").

44. *See International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong. 111 (1979) [hereinafter *Hearings*] (testimony of Phyllis Schlafly) (predicting that ratification of the ICESCR "would constitute a giant step toward a socialist state"); ROBERT W. LEE, *THE UNITED NATIONS CONSPIRACY* 108 (1981) (describing the ICESCR as a "socialist blueprint that encourages open-ended unlimited government meddling of the sort on which dictatorships thrive"); Alston & Quinn, *supra* note 19, at 160 (recognizing that ESCRs "are often perceived to be of a deeply ideological nature, to necessitate an unacceptable degree of intervention in the domestic affairs of states, and to be inherently incompatible with a free market economy"); *cf.* CASSESE, *supra* note 31, at 355 (mentioning the clear preference of socialist states for ESCRs); Stark, *supra* note 40, at 81 (opining that, "[d]uring the Cold War, the U.S. Department of State viewed [the] ICESCR as a socialist manifesto").

45. *See HOLMES & SUNSTEIN, supra* note 5, at 216 (expressing surprise at the persistence of claims that "'positive rights' are somehow un-American"); Alston, *supra* note 35, at 383 (observing that the ICESCR's ideological opponents "sometimes seem to portray it as an intrinsically un-American enterprise"); *cf. Hearings, supra* note 44, at 325 (statement of O. Garibaldi) (arguing that the ICESCR "is largely a document of collectivist inspiration, alien in spirit and philosophy to the principles of a free economy"); Higgins, *supra* note 14, at 497 (warning that the achievement of ESCRs "entails a loss of individual liberties which is unacceptable to western liberal democracies"); Stark, *supra* note 36, at 194-95 (concluding that "[e]conomic rights are

One need not search long for the roots of U.S. resistance to ESCRs. The Declaration of Independence, the Constitution, and the modern U.S. psyche all suggest that the United States has chosen autonomy⁴⁶ and individualism⁴⁷ as its central values. In U.S. society, liberty represents the primary need, and governmental interference represents the principal threat.⁴⁸ In contrast, one must work much harder to find an historical commitment to equality in the United States. While the Declaration of Independence recognizes that “all men are created equal,” Professor Henkin has observed that the concept of equality does not appear in the original Constitution or the Bill of Rights.⁴⁹ To the contrary, it appeared only in the Reconstruction Amendments and then applied only to the states.⁵⁰ Much more time passed before women received the franchise.⁵¹ Later still, the Supreme Court formally abolished racial segregation⁵² and, by sleight of hand, extended the constitutional requirement of equal protection to the federal government.⁵³

considered too marginal—too alien to U.S. culture and too remote from U.S. law—to be taken seriously”).

46. See Henkin, *supra* note 20, at 30 (observing that the Declaration of Independence rests on a political theory in which autonomy “is the basic right, the foundation for all others”), 46 (observing that U.S. constitutional standards serve the purpose of protecting individuals from harmful government action).

47. See Alston, *supra* note 35, at 384 (quoting Sheila B. Kamerman & A.J. Kahn, *Social Policy and Children in the United States and Europe*, in *THE VULNERABLE* 351, 375 (John L. Palmer et al. eds., 1988), for the proposition that the U.S. psyche reflects the selection of “individualism as a central value”); Days, *supra* note 43, at 86 (recounting the frequent description of the United States as a “classless society in which rugged individualism and self-reliance are highly rewarded”); see also MARY ANN GLENDON, *RIGHTS TALK* 48 (1991) (noting that the “American rights dialect” pays “extraordinary homage to independence and self-sufficiency”).

48. See KELLEY, *supra* note 5, at 16 (discussing the form of individualism produced by Enlightenment thinking).

49. See Henkin, *supra* note 20, at 41.

50. See *id.*; see also U.S. CONST. amend. XIV, § 1, cl. 2 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”). Even after the United States accepted a constitutional commitment to equality, practice lagged far behind theory. See e.g., Days, *supra* note 43, at 87 (explaining that “[w]ith relatively few exceptions[,] the Supreme Court construed the Civil War Amendments . . . restrictively, leaving blacks largely unprotected against . . . official efforts to reduce them once again to positions of subservience”).

51. See U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.”).

52. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (abolishing racial segregation).

53. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). Because the Supreme Court relied on the Due Process Clause—the same clause used to keep Dred Scott enslaved—to infer the federal government’s obligation to provide equal protection, Professor Henkin has described its reasoning as “historically and intellectually questionable.” Henkin, *supra* note 20, at 41.

Even though the United States has now developed some commitment to the principle of equality, that commitment remains conspicuously weak.⁵⁴ Although it extends to the principle of legal or formal equality, which requires procedural equality of opportunity, it does not extend to the principle of equality in fact, which requires substantive equality of outcomes.⁵⁵ Thus, the Supreme Court recently affirmed that state schools have no lawful interest in reducing the historic deficit of minorities in professional education or in remedying societal discrimination.⁵⁶ In fact, the Court upheld the consideration of race in admissions practices on the theory that diversity supports the exercise of *liberty rights*, such as freedom of speech, freedom of thought and “educational autonomy.”⁵⁷

Under the circumstances just described, one may understand the United States’ traditional aversion to ESCRs. While recognition of ESCRs would require active state intervention in private affairs to promote equality in fact, we live in a society that possesses a weak commitment to principles of equality, that deeply fears governmental intervention in private affairs, and that values liberty above all else. Therefore observers have suggested that the establishment of widespread public support for ESCRs “could not even be contemplated” in the United States.⁵⁸

54. See Henkin, *supra* note 20, at 42 (describing the U.S. conception of equality as “limited”). Stated conversely, our history of “discrimination has dropped roots deep into our culture that will be difficult to extirpate.” Days, *supra* note 43, at 99.

55. See *id.* As the Permanent Court of International Justice held in 1935:

It is perhaps not easy to define the distinction between notions of equality in fact and equality in law; nevertheless, it may be said that the former notion excludes the idea of a merely formal equality

Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.

It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact The equality between members of the majority and of the minority must be an effective, genuine equality; that is the meaning of [equality in fact].

Advisory Opinion, *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B) No. 64, at 19 (Apr. 6).

56. See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2336-37 (2003) (endorsing these views as previously articulated by Justice Powell in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306-07, 310 (1978)).

57. See *id.* at 2337-39.

58. Alston, *supra* note 35, at 377; see also Days, *supra* note 43, at 99.

III. INVESTOR-STATE DISPUTES UNDER NAFTA: THE CONTRIBUTIONS OF FIRST- AND SECOND-GENERATION RIGHTS

Strictly speaking, NAFTA's investment chapter does not address the topic of human rights.⁵⁹ As Part III(A) of this article explains, however, its text shares a philosophical affinity with CPRs. Furthermore, as Part III(B) suggests, debates surrounding its application establish an astonishing level of support among the media, civil society, scholars, and the U.S. government for principles that advance ESCRs at the expense of liberty rights. Thus, below the surface, Chapter 11 supplies the unexpected setting for a competition, in which ESCRs seem to be gaining ground.

A. Chapter 11: The Philosophical Contribution of CPRs

Although most observers trace the provenance of NAFTA's investment chapter to a network of approximately 2,000 bilateral investment treaties (BITs),⁶⁰ one may dig deeper. For example, the

59. See *Access to Transnational Justice*, 88 AM. SOC'Y INT'L L. PROC. 531, 533, 535 (1994) (remarks by Robert F. Housman) (observing that, in the case of human rights, the "NAFTA package provides . . . no access to transnational justice"); see also Julie Soloway, *NAFTA's Chapter 11: Investor Protection, Integration and the Public Interest*, CHOICES: CANADA'S OPTIONS IN N. AM., Mar. 2003, at 2, available at <http://www.irpp.org/choices/index.htm> (recognizing that "the NAFTA and its institutions were not designed to manage social welfare issues").

60. See Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT'L L.J. 531, 534, 537 (2002); see also S.D. Myers, Inc. v. Canada, Partial Award (Nov. 12, 2000), 40 I.L.M. 1408, ¶¶ 58-77 (2001) (separate opinion of Bryan Schwartz, NAFTA/UNCITRAL), available at <http://www.naftaclaims.com> [hereinafter *S.D. Myers*, Partial Award]; Michael P. Avramovich, *The Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD's Multilateral Agreement on Investment?*, 31 J. MARSHALL L. REV. 1201, 1240-41 (1998); Charles H. Brower II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 PEPP. L. REV. 43, 44 (2001) [hereinafter *Brower*, *A Tale of Fear and Equilibrium*]; Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 44 (2003) [hereinafter *Brower*, *Structure, Legitimacy and NAFTA's Investment Chapter*]; 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, 193-94 (2001); David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 653, 671 (2001) [hereinafter *Gantz*, *Potential Conflicts*]; David A. Gantz, *Resolution of Investment Disputes Under the North American Free Trade Agreement*, 10 ARIZ. J. INT'L & COMP. L. 335, 339 (1993); Lawrence L. Herman, *Settlement of International Trade Disputes—Challenges to Sovereignty—A Canadian Perspective*, 24 CAN.-U.S. L.J. 121, 133 (1998); Robert K. Paterson, *A New Pandora's Box?: Private Remedies for Foreign Investors Under the North American Free Trade Agreement*, 8 WILLAMETTE J. INT'L L. & DISP. RESOL. 77, 85 (2000); Julie A. Soloway, *NAFTA's Chapter 11: The Challenge of Private Party Participation*, 16 J. INT'L ARB. 1, 4 (1999);

network of BITs draws on the customary international law of state responsibility for economic injury to aliens,⁶¹ which also supplies a foundation for the modern international law of CPRs.⁶² Bearing in mind this legal genealogy, one may easily discern the characteristics of liberty rights in NAFTA's investment chapter.⁶³

Designed by U.S. negotiators to protect U.S. investors from arbitrary treatment by Mexican authorities,⁶⁴ Chapter 11's

Gus van Harten, *Guatemala's Peace Accords in a Free Trade Area of the Americas*, 3 YALE HUM. RTS. & DEVEL. L.J. 113, 137 (2000); David R. Adair, Comment, *Investors' Rights: The Evolutionary Process of Investment Treaties*, 6 TULSA J. COMP. & INT'L L. 195, 204 (1999); Christopher N. Camponovo, *Dispute Settlement and the OECD Multilateral Agreement on Investment*, 1 UCLA J. INT'L L. & FOREIGN AFF. 181, 195 (1996); Julia Ferguson, *California's MTBE Contaminated Water: An Illustration of the Need for an Environmental Interpretive Note on Article 1110 of NAFTA*, 11 COLO. J. INT'L ENVTL L. & POL'Y 499, 502 (2000); Samrat Ganguly, Note, *The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health*, 38 COLUM. J. TRANSNAT'L L. 113, 132-33 (1999); Tali Levy, Note, *NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Effective" Standard*, 31 STAN. J. INT'L L. 423, 445, 447 (1995).

61. See SHAW, *supra* note 12, at 582 (concluding that a British investment treaty reaffirms "traditional principles dealing with the conditions of lawful expropriation and the provision for compensation").

62. See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 104 (1999) (describing the law of state responsibility as "a precursor to international human rights law"); STEINER & ALSTON, *supra* note 5, at 82 (referring to the law of state responsibility as "a branch of international law that was among the important predecessors to contemporary human rights law").

63. Cf. Bernardo M. Cremades & David J.A. Cairns, *The Brave New World of Global Arbitration*, 3 J. WORLD. INV. 173, 177 (2002):

Human rights law and modern trade law share a common concern with the protection of nationals of one State within the jurisdiction of another . . . [T]here has been an increasing trend in favour of . . . the recognition of private rights of action by individuals against States, . . . [and] the right to arbitration of a foreign investor against a host State under a multilateral . . . investment treaty has its human rights counterpart in private petitions under the European Convention on Human Rights and the Inter-American Commission on Human Rights.

64. See MANN & VON MOLTKE, *supra* note 2, at 12; Brower, *A Tale of Fear and Equilibrium*, *supra* note 60, at 43; Gantz, *Potential Conflicts*, *supra* note 60, at 653; Tim Kennish, *NAFTA and Investment—A Canadian Perspective*, in NAFTA AND INVESTMENT 1, 7 (Seymour J. Rubin & Dean C. Alexander eds., 1995); Ian A. Laird, *NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INT'L L. 223, 224 (2001); Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes*, 2 NAFTA L. & BUS. REV. AM. 82, 83 (1996); Howard Mann, *NAFTA and the Environment: Lessons for the Future*, 13 TUL. ENVTL. L.J. 387, 402 (2000); Julie A. Soloway, *Environmental Trade Barriers Under NAFTA: The MMT Fuel Additives Controversy*, 8 MINN. J. GLOBAL TRADE 55, 88 (1999); Soloway, *supra* note 60, at 4; Tollefson, *supra* note 3, at 148; Ganguly, *supra* note 60, at 154; Lauren E. Godshall, Student Article, *In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter Eleven*, 11 N.Y.U. ENVTL. L.J. 264, 268 (2002); Ray C. Jones, Note & Comment, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?*, 2002 B.Y.U. L. REV. 527, 541 (2002); Levy, *supra*

substantive provisions create a wide zone of autonomy into which host states may not intrude. Thus, Chapter 11 forbids the NAFTA Parties to treat each others' investors unfairly and inequitably,⁶⁵ to impose certain performance requirements (such as requirements to export a certain percentage of goods or services, or to achieve a given level of domestic content);⁶⁶ to establish nationality requirements for senior management positions;⁶⁷ to restrict financial transfers;⁶⁸ or to expropriate investment property (except on a non-discriminatory basis, in accordance with due process of law, and upon prompt payment of fair market value plus interest).⁶⁹ Noting the similarities between these provisions and the liberty rights guaranteed by the principal human rights instruments,⁷⁰ several observers have described Chapter 11 as a "human rights treaty"⁷¹ or a "bill of rights"⁷² for foreign investors.⁷³ In other words, Chapter 11 displays a

note 60, at 444; Daniel R. Loritz, Comment, *Corporate Predators Attack Environmental Regulations: It's Time to Arbitrate Claims Filed Under NAFTA's Chapter 11*, 22 LOY. L.A. INT'L & COMP. L. REV. 533, 535 (2000); Starner, *supra* note 3, at 412, 419; Stephen L. Kass, *Regulatory Takings Debate Reopened: Surprising, Potentially Significant, Context Is NAFTA Chapter 11*, N.Y.L.J., Sept. 11, 2000 at § 2, col. 1.

65. See NAFTA, *supra* note 1, art. 1105(1).

66. See *id.* art. 1106.

67. See *id.* art. 1107(1).

68. See *id.* art. 1109.

69. See *id.* art. 1110.

70. See Alvarez, *Critical Theory*, *supra* note 4, at 307-08; Iglesias, *supra* note 4, at 196.

71. Alvarez, *Critical Theory*, *supra* note 4, at 307-08; see also Alvarez Remarks, *supra* note 4, at 9 (explaining that Chapter 11 "treats foreign investors essentially like bearers of human rights in regional human rights systems").

72. Been & Beauvais, *supra* note 2, at 40; Tollefson, *supra* note 3, at 148; Taylor, *supra* note 4, at 412; see also Joel P. Trachtman & Philip M. Moreman, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT'L L.J. 221, 225 (2003) (recognizing that "Chapter 11 protects private property from certain kinds of state actions, and thus is arguably consistent with natural rights"); Starner, *supra* note 3, at 417 (observing that "NAFTA exhibits characteristics typical of a constitution," including a "pre-commitment strategy" that attempts "to disable domestic political institutions from pursuing certain legislative goals").

73. Some writers apparently would disagree with these characterizations, either because they believe that human rights treaties and investment treaties serve different underlying policies, or because they believe that Chapter 11 creates no individual rights, but merely gives investors standing to assert treaty rights granted to their home states. See Legum, *supra* note 60, at 537 (asserting that "the policies underlying human rights and their protection differ significantly from those underlying investment protections"); J.C. Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433, 460 (2002) (describing investor-state arbitration as "an extraordinary elevation of a private party's standing to assert international legal rights owed to the state of which it is a part") (emphasis added). Because Chapter 11 grants to investors rights in addition to those granted to their home states, the latter proposition seems dubious. See NAFTA, *supra* note 1, art. 1115 (granting investors the right to bring claims "without prejudice" to the coordinate rights of states parties under Chapter 20); see also LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), ¶¶ 76-

hallmark of traditional U.S. doctrine:⁷⁴ the emphasis on liberty from governmental intervention.⁷⁵

Although some observers suggest that Chapter 11 “ignores”⁷⁶ or “excludes”⁷⁷ ESCRs, those claims seem unduly categorical. For example, instead of promoting liberty, certain provisions (such as the articles relating to national treatment and most-favored-nation treatment) promote equality,⁷⁸ a principle more consistent with ESCRs than with traditional U.S. understandings of CPRs.⁷⁹ Also, the prohibition of performance requirements remains subject to an exception sounding in the right to health (e.g., measures “necessary to protect human, animal or plant life or health,” as well as “for the conservation of living or nonliving exhaustible natural resources”).⁸⁰ Furthermore, although they may be of limited utility, Articles 1101(4) and 1114(1) authorize the NAFTA Parties to maintain and enforce measures that support ESCRs, such as the right to health, social security, education, and environmental protection,⁸¹ provided that

77. *available at* www.icj-cij.org (rejecting the United States’ argument that Article 36 of the Vienna Convention on Consular Relations grants rights only to states parties and concluding that the treaty also provides rights directly to individuals arrested or detained by states parties).

74. *See Alvarez, Critical Theory, supra* note 4, at 312 (suggesting that “much of the NAFTA investment chapter reflects U.S. laws and perspectives”).

75. *See Tollefson, supra* note 3, at 183 (concluding that “the paramount and overriding goal of Chapter 11 is to create a powerful . . . vehicle to ensure that governments eschew measures that might be construed as restricting foreign investment”).

76. *See Alvarez, Critical Theory, supra* note 4, at 308 (observing that Chapter 11 “ignores” many of the social and economic rights contained in the UDHR, including the rights to work and to an adequate standard of living).

77. *See Iglesias, supra* note 4, at 197 (complaining that Chapter 11 “only protects the human rights of . . . foreign investor[s],” but “blatantly exclude[s] . . . the social, economic, and cultural rights of the most vulnerable Latinas/os”).

78. *See NAFTA, supra* note 1, arts. 1102, 1103. Also known as the “minimum standard,” the obligation under Article 1105(1) to provide “fair and equitable treatment” essentially constitutes a prohibition against arbitrary treatment. Gantz, *Potential Conflicts, supra* note 60, at 678, 746. Although arbitrary governmental intervention may often violate the principle of individual liberty, the concept of arbitrary treatment also includes invidious discrimination. *See id.* at 747; *see also* Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT’L L. 259, 311 (1994) (construing “fair and equitable treatment” to prohibit discrimination against aliens). Therefore, unlike most provisions of Chapter 11, Article 1105 protects both liberty and equality.

79. *See supra* notes 26, 46-56 and accompanying text.

80. NAFTA, *supra* note 1, art. 1106(6); *see also* Tollefson, *supra* note 3, at 157 (explaining that, unique among the substantive provisions of Chapter 11, “Article 1106 specifically exempts environmental measures” from the disciplines on performance requirements).

81. *See NAFTA, supra* note 1, art. 1101(4) (permitting the NAFTA Parties to provide income security or insurance, social security or insurance, social welfare, public education, and health care); *id.* at art. 1114(1) (authorizing the NAFTA parties to adopt

they remain “otherwise consistent” with the obligations imposed by Chapter 11.⁸² Despite these important qualifications, however, Chapter 11’s text palpably emphasizes liberty rights as opposed to ESCRs.⁸³

Consistent with the textual emphasis on liberty and autonomy, investors have used Chapter 11 to challenge a variety of measures ostensibly designed to protect ESCRs. Arguably implicating the right to health,⁸⁴ investors have challenged restrictions imposed on the operation of a hazardous waste facility,⁸⁵ restrictions on cross-border

and maintain measures considered “appropriate to ensure that investment activity . . . is undertaken in a manner sensitive to environmental concerns”).

82. *Id.*; see also Been & Beauvais, *supra* note 2, at 44 (recognizing that parts of Article 1114(1) sound promising for environmental concerns, but explaining that Article 1114(1) does not, in fact, provide any exceptions to the investment disciplines because Article 1114(1) requires that environmental measures be “otherwise consistent with” Chapter 11). After parsing its language, many scholars conclude that Article 1114(1) lacks any substantive meaning. See INT’L INST. FOR SUSTAINABLE DEV. & WORLD WILDLIFE FUND, PRIVATE RIGHTS, PUBLIC PROBLEMS 12 (2001) (indicating that Article 1114(1) “is not particularly meaningful”) [hereinafter PRIVATE RIGHTS, PUBLIC PROBLEMS]; Paterson, *supra* note 60, at 105 (suggesting that Article 1114 is “largely meaningless”); Todd Weiler, *A First Look at the Interim Merits Award in S.D. Myers, Inc. v. Canada: It Is Possible to Balance Legitimate Environmental Concerns with Investment Protection*, 24 HASTINGS INT’L & COMP. L. REV. 173, 181-82 (2001) (describing Article 1114(1) as a “hortatory environmental provision” that cannot “override mandatory treaty obligations”); Jones, *supra* note 64, at 555 (asserting that the language of Article 1114(1) is “largely meaningless”). Others conclude, more charitably, that the provision has meaning, but does not lend itself well to interpretation. See Brower, *Structure, Legitimacy and NAFTA’s Investment Chapter*, *supra* note 60, at 41; David A. Gantz, *Some Comments on NAFTA’s Chapter 11*, 42 S. TEX. L. REV. 1285, 1297 (2001); Tollefson, *supra* note 3, at 151-52. At the very least, Article 1114(1) recognizes that *some* environmental regulations do not violate Chapter 11. Perhaps the provision even establishes a presumption that bona fide environmental regulations do not violate Chapter 11.

83. See *infra* note 93. This emphasis on liberty reflects traditional Western development theory, which assumes that economic liberalization will increase “economic growth,” which in turn will bring “increased access to health care, food, and shelter.” Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 HUM. RTS. Q. 735, 743 (1999); see also Trubek, *supra* note 37, at 226 (explaining how “Western development theory dealt with issues of social welfare in the Third World”).

84. Mindful of robust debates about the public-health implications of the substances and activities involved, the author emphasizes his use of the word “arguably” and does not, in this article, express any views about the scientific basis for public concerns.

85. See *Metalclad Corp. v. Mexico*, Notice of Arbitration (Jan. 2, 1997), available at <http://www.naftaclaims.com>. According to some authors, previous owners of the facility dumped 20,000 metric tons of hazardous waste at the facility, which caused serious health problems for local residents as well as a risk of explosion. See J.C. Thomas, *The Experience of NAFTA Chapter 11 Tribunals to Date: A Practitioner’s Perspective* 7 (Jan. 18, 2002) (unpublished manuscript, available at <http://www.carleton.ca/ctpl/chapter11>) (identifying a risk of explosion and equating the level of contamination with that found at Love Canal, New York, “the site that triggered the enactment of the U.S. Superfund legislation”); see also Lucien J. Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corp*

trade in polychlorinated biphenyls (PCBs),⁸⁶ restrictions on fuel additives thought to create health risks,⁸⁷ restrictions on chemicals used to treat seeds,⁸⁸ and restrictions on bulk exports of fresh water.⁸⁹ Likewise, arguably implicating the right to work or to social security, investors have challenged employment-boosting "Buy America" procurement rules,⁹⁰ as well as the operations of Canada Post,⁹¹ thereby creating a theoretical risk of layoffs for Canadian postal workers or unfavorable changes in the management of their

v. United Mexican States, 10 MINN. J. GLOBAL TRADE 209, 240 (2001) (describing allegations that the site "presented a serious risk of explosion" and caused "health problems . . . including the birth of malformed and brain-damaged children, chronic breathing disorders, and multiple abortions"); Godshall, *supra* note 64, at 279 (discussing allegations about health problems and the possibility of explosion).

86. See S.D. Myers, Inc. v. Canada, Statement of Claim, ¶ 37 (Oct. 30, 1998), available at <http://www.naftaclaims.com>.

87. See Methanex Corp. v. United States, Notice of Arbitration, ¶¶ 14-19 (Dec. 3, 1999), available at <http://www.naftaclaims.com> (challenging California's ban on MTBE, a fuel additive whose release from underground storage tanks into the environment arguably posed a significant threat of groundwater and drinking water contamination); Ethyl Corp. v. Canada, Notice of Arbitration, at 4 (Apr. 14, 1997), available at <http://www.naftaclaims.com> [hereinafter Notice of Arbitration (*Ethyl Corp.*)] (challenging a ban on the importation of and inter-provincial trade in MMT, a fuel additive the combustion of which purportedly threatened human health); see also Ganguly, *supra* note 60, at 150-51, 155 (citing studies which showed that MTBE caused tumors in lab rats and evidence linking the main ingredient of MMT to neurological problems); Lilley, *supra* note 2, at 731, 738 (mentioning that some studies link MTBE to the development of renal tumors in male (but not female) lab rats, observing that MTBE has "an unpleasant taste and odor" that make contaminated water "unsuitable for drinking," and noting the claims of environmentalists that MMT is hazardous to human health).

88. See Crompton Corp. v. Canada, Amended Notice of Intent to Submit a Complaint to Arbitration, at 3-5 (Sept. 19, 2002), available at <http://www.naftaclaims.com> (challenging restrictions on lindane-based seed treatments imposed by the Canadian Pest Management Regulatory Agency).

89. See Sun Belt Water, Inc. v. Canada, Notice of Claim and Demand for Arbitration, at 2-3 (Oct. 12, 1999, NAFTA/UNCITRAL), available at <http://www.naftaclaims.com> (challenging British Columbia's restrictions on bulk exports of fresh water). As noted above, the Committee on Economic, Social and Cultural Rights has interpreted the right to health to include an obligation for states to provide their people with access to adequate supplies of safe and potable water. See *supra* note 23. See also *International Covenant on Economic, Social and Cultural Rights: The Right to Water*, Comm. on Economic, Social and Cultural Rights, 29th Sess., gen. cmt. 15, ¶¶ 2, 12, 23, 44, U.N. Doc. E/C.12/2002/11 (2002), available at www1.umn.edu/humanrts/gencomm/escgencom15.htm (concluding that the rights to an adequate standard of living and to the highest attainable standard of health include the right of access to safe water in adequate amounts, as well as the state's obligation to prevent inequitable extraction of water resources); Ganguly, *supra* note 60, at 148 (observing that the "moratorium on bulk-water exports by British Columbia represented a move to protect a natural resource that is of the utmost importance to human health").

90. ADF Group, Inc. v. United States, Notice of Arbitration, at 8, 13-14 (July 19, 2000, NAFTA/ICSID AdJ Facility), available at <http://www.naftaclaims.com>.

91. United Parcel Serv. of Am., Inc. v. Canada, Notice of Arbitration, at 2-4 (Apr. 19, 2000, NAFTA/UNCITRAL), available at <http://www.naftaclaims.com>.

pension funds.⁹² Thus, on their face, many Chapter 11 claims reflect the traditional U.S. preference for CPRs over ESCRs.⁹³

B. Debates About the Application of Chapter 11: The Contribution of ESCRs

The first publicized use of Chapter 11 seemed to confirm the textual preference for liberty rights. Citing concerns about human health, Canada banned importation of and inter-provincial trade in MMT, a fuel additive made solely by Virginia-based Ethyl Corporation.⁹⁴ Rejecting the health concerns as unfounded,⁹⁵ Ethyl Corp. described the Canadian measure as a thinly-disguised trade barrier⁹⁶ and commenced a Chapter 11 arbitration seeking over \$250 million⁹⁷ for expropriation, imposition of performance requirements, and denial of national treatment.⁹⁸ Rather than defend itself on the merits, Canada settled the claim by withdrawing the restrictions on MMT⁹⁹ and by paying Ethyl Corp. \$19.3 million (Canadian) in compensation.¹⁰⁰ Despite the apparent vindication of liberty rights, this chain of events sparked widespread outrage by creating the perception that foreign investors could use those rights to frustrate protection of the right to health.¹⁰¹

92. See *United Parcel Serv. of Am. v. Canada*, Petition to Arbitration Tribunal, ¶¶ 25-27 (May 10, 2001, NAFTA/UNCITRAL), available at <http://www.naftaclaims.com>; *id.*, Petition to Arbitration Tribunal, ¶¶ 27-29 (Nov. 8, 2000, NAFTA/UNCITRAL), available at <http://www.naftaclaims.com>.

93. See Stephen Clarkson, *Systemic or Surgical? Possible Cures for NAFTA's Investor-State Dispute Process*, 36 CAN. BUS. L.J. 368, 384 (2002) (recognizing that "Chapter 11's new corporate rights" were not "balanced by a requirement to promote the public interest by protecting the environment or public health"); Beauvais, *supra* note 2, at 266 (observing that "NAFTA does not require these broadly-defined investor protections be balanced against competing social concerns, such as human rights, environmental protection, or public health").

94. See Notice of Arbitration (*Ethyl Corp.*), *supra* note 86, ¶¶ 8-11; see also Soloway, *supra* note 64, at 56 (identifying Canada's reasons for imposing restrictions on MMT).

95. See Notice of Arbitration (*Ethyl Corp.*), *supra* note 86, ¶¶ 7, 11, 50-52.

96. See *id.* ¶ 13.

97. See *id.* ¶ 19; Soloway, *supra* note 64, at 84.

98. See Notice of Arbitration (*Ethyl Corp.*), *supra* note 86, ¶¶ 14-69; Soloway, *supra* note 64, at 85-86.

99. See *International Law in Ferment: Recent Developments in Private International Law*, 94 AM. SOC'Y INT'L L. PROC. 11, 14 (2000) (remarks by Charles H. Brower II); Soloway, *supra* note 64, at 55, 84.

100. See Soloway, *supra* note 64, at 55, 56, 84.

101. See Frank E. Loy, *On a Collision Course? Two Potential Environmental Conflicts Between the U.S. and Canada*, 28 CAN.-U.S. L.J. 11, 19, 21 (2002) (asserting that the case "set off shock waves" and "raised a storm within the environmental community"); Lilley, *supra* note 2, at 730 (explaining that "[w]hen the Canadian government settled the Ethyl claim by rescinding the offending regulation and agreeing to pay some \$19.3 million (Canadian) to the claimant, the action outraged environmental protection proponents"); Kass, *supra* note 64 (reporting that the

The past few years have witnessed an escalation of public concern that the liberty rights of foreign investors under Chapter 11 endanger the right to health. Although environmental NGOs issue many of the relevant warnings,¹⁰² expressions of concern emanate from a wide variety of sources and appear in virtually every medium.¹⁰³ For example, in a PBS broadcast, respected television journalist Bill Moyers opined that “foreign companies are exploiting Chapter 11 to attack public laws that protect our health. . . . Here in California . . . [a] billion-dollar case has been filed against the United States because of an effort by the state government to protect the health of its citizens.”¹⁰⁴ Referring to the same case, an article in the *New York Times* reported that

[C]orporate victories have spawned . . . bolder and broader challenges, each one further undermining public policy. In a recent case that critics consider one of the most worrisome, the Methanex Corporation of Vancouver, British Columbia, is challenging California’s decision to phase out the use of a gasoline additive . . . [that] [t]he state considers . . . to be a health hazard when it enters the water supply.¹⁰⁵

Similar reports have appeared in the Canadian press.¹⁰⁶

Surveying the work of civil society, one finds widespread concern that investors will use their liberty rights to undermine the right to health.¹⁰⁷ In addition to publishing individual reports that contain

Canadian government’s decision to suspend the restrictions on MMT and to compensate Ethyl Corp. “sparked outrage from . . . U.S. and Canadian NGOs, which accused the government of capitulating to bullying tactics aimed at chilling Canada’s ability to protect its public health and environment”); *see also* Godshall, *supra* note 64, at 286-87 (suggesting that the claim and its settlement created “a chill that could arguably further grow into a minor ice age over much social, environmental and health-related regulation”).

102. *See* Jones, *supra* note 64, at 553 (identifying “environmental advocacy groups” as “Chapter 11’s most vociferous opponents”).

103. *See* Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365, 366 (2003) (observing “open criticism of investment arbitration has been voiced by significant elements of the media”).

104. *Bill Moyers Reports: Trading Democracy* (PBS television broadcast Feb. 5, 2002), transcript available at http://www.pbs.org/now/printable/transcript_tdfull_print.html.

105. Anthony DePalma, *NAFTA’s Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, § 3, at 1.

106. *See, e.g.*, David Runnalls & Howard Mann, *Still Time to Fix Flawed Trade Rule: NAFTA’s Chapter 11 Clear Sign of Excesses of Trade Agreements*, WINNIPEG FREE PRESS, Apr. 30, 2001, at A11, available at 2001 WL 16236366 (describing a “recent string of corporate victories” that “strik[e] down environmental and human health protection measures” and concluding that the challenge of environmental and public-health measures has become “Chapter 11’s most common use”).

107. *See* Cremades & Cairns, *supra* note 63, at 195 (“The broad-but-vague right of foreign investors to compensation for expropriations has and will continue to bring investor-State arbitrations into conflict with groups that use domestic regulation to advance their own political agendas, such as environmental and public health

dire warnings,¹⁰⁸ prominent advocacy groups (including Earthjustice, the National Wildlife Federation, the Natural Resources Defense Council, the Sierra Club, and the World Wildlife Fund) have formed a coalition which seeks to ensure that trade and investment treaties will “not weaken . . . international health or environmental standards.”¹⁰⁹ Also, the Joint Public Advisory Commission (JPAC), created under the auspices of NAFTA’s environmental side agreement,¹¹⁰ has admonished the NAFTA parties to sponsor research into the “potential existence of a ‘chilling effect’ on national laws . . . related to human health” and to improve Chapter 11 by bringing “environmental, social and cultural expertise . . . into the arbitration panels.”¹¹¹ Likewise, after calling for a greater emphasis on “cultural, economic and social rights” in the process of “[c]ontinental integration,”¹¹² the Canadian Conference of Catholic Bishops warned that Chapter 11’s “primary focus” has been to “limit government’s capacity to support . . . health and other public values in the face of commercial interests.”¹¹³

groups.”); Tollefson, *supra* note 3, at 158 (“Civil society critics fear that Article 1110 will deter governments from enacting regulations to protect public health and the environment.”); *see also* Gantz, *Potential Conflicts*, *supra* note 60, at 653-54 (discussing the criticism that Chapter 11 permits corporations to attack measures that protect human health).

108. *See* PRIVATE RIGHTS, PUBLIC PROBLEMS, *supra* note 82, at 2 (International Institute for Sustainable Development) (“Chapter 11 does indeed threaten governments’ ability to protect the public interest in terms of . . . human health and other social issues.”); J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465, 466 (1999) (Director of International Legal Programs, Earthjustice Legal Defense Fund) (“In an unprecedented move, companies have begun to use this protection to challenge measures promoted by governments as necessary to protect the environment and human health.”); Mann & von Moltke, *Manuscript*, *supra* note 2, at 8 (International Institute for Sustainable Development) (“The result is a growing sense that the provisions of Chapter 11 put at risk the ability of governments to . . . anticipate and forestall environmental and human health damages.”); *see also* Ferguson, *supra* note 60, at 519 (quoting the Executive Director of The Council of Canadians) (“Surely, even the U.S. government will now see that NAFTA gives outrageous powers to corporations, and jeopardizes human health.”); Jones, *supra* note 64, at 556 (“[E]nvironmental advocacy groups claim . . . that Chapter 11 tips the balance too much in favor of investors and exposes countries and their citizenry to potentially serious health and safety impacts.”).

109. Tollefson, *supra* note 3, at 185 n.242 and accompanying text.

110. For useful discussions of JPAC and the side agreement, *see id.* at 165-68; Francisco N. Nogales, *The NAFTA Environmental Framework, Chapter 11 Investment Provisions, and the Environment*, 8 ANN. SURV. INT’L & COMP. L. 97, 104-08 (2002).

111. Joint Public Advisory Committee of the Commission for Environmental Cooperation, Advice to Council No. 03-01 (Mar. 27, 2003), ¶¶ 1-2, *available at* <http://www.cec.org./files/PDF?IPAC?sr-03-01-EN.pdf>.

112. Permanent Council of the Canadian Conference on Catholic Bishops, Statement on the Occasion of the Summit of the Americas (Apr. 5, 2001), ¶ 17, *available at* <http://www.cccb.ca/PublicStatements>.

113. Episcopal Commission for Social Affairs, Trading Away the Future: Concerns Arising from the Investor-State Mechanism of the North American Free

Turning to academic literature, one might expect that the presence of greater expertise and the absence of an institutional mission might yield more moderate assessments of the situation. Yet, the literature seems awash in warnings that Chapter 11 threatens,¹¹⁴ or has the potential to threaten,¹¹⁵ the right to health. While some writers offer more optimistic views,¹¹⁶ one encounters them less

Trade Agreement and Its Extension throughout the Americas, at 2 (background paper prepared for the Conference on Humanizing the Global Economy, Jan. 28-30, 2002), available at <http://www.cccb.ca/Files/TradingFuture.html>; see also Canadian Conference on Catholic Bishops, Media Release (Feb. 5, 2002), available at <http://www.cccb.ca/MediaReleases> (stating that "the application of . . . Chapter 11 has meant limiting the capacity of governments to safeguard environmental, health and other social values when there are conflicting commercial interests").

114. See Clarkson, *supra* note 93, at 378 (stating that Chapter 11 "gives . . . NAFTA corporations the power to overturn the legislative outcomes of national political debates on the desirable regulatory regime to secure the health and safety of the citizenry"); Loy, *supra* note 101, at 18 (recognizing that Chapter 11 cases "raise starkly the question of whether NAFTA's efforts to protect investors has unacceptably compromised our nations' right . . . to protect the . . . health of their citizens"); Tollefson, *supra* note 3, at 156-57 (explaining that Chapter 11's provision on performance requirements "has been criticized as constraining the ability of governments to sustainably manage natural resources and to protect public health and the environment"); William T. Waren, *Paying to Regulate: A Guide to Methanex v. United States and NAFTA Investor Rights*, 31 ENVTL. L. REP. 10986, 10987 (2001) (contending that "[r]ecent decisions by NAFTA tribunals . . . show that . . . challenges to core governmental functions can succeed, particularly in the area of public health . . . regulation"); Ganguly, *supra* note 60, at 114, 153 (arguing that Chapter 11 claims "reveal[] an attack on the capability of sovereign governments to protect their citizenry" from investors who want to "force governments to compensate them for regulations which . . . protect public health . . . and . . . limit human exposure to carcinogens or neurotoxins"); Godshall, *supra* note 64, at 265 (claiming that the "use of Chapter 11 has cast an ominous shadow over any NAFTA partner's attempt to enact environmental, health, or safety regulations for the benefit of its own citizenry"); Jenny Harbine, Note, *NAFTA Chapter 11 Arbitration: Deciding the Price of Free Trade*, 29 ECOLOGY L.Q. 371, 373 (2002) (asserting that Chapter 11 "undermines efforts by local governments to protect human health and the environment"); see also Dhooge, *supra* note 85, at 213, 278-79 (discussing the fear that Chapter 11 claims "would deny the public its previously uninhibited right to clean water and air"); Chris Tollefson, *Metalclad v. United Mexican States Revisited: Judicial Oversight of NAFTA's Chapter Eleven Investor-State Claim Process*, 11 MINN. J. GLOBAL TRADE 183, 184-85 (2002) (discussing predictions about the impact of Chapter 11 claims on public health); Jones, *supra* note 64, at 545 (predicting that Chapter 11 "may have a chilling effect on the ability of governments to address pressing social or environmental issues"); Nogales, *supra* note 110, at 131 (identifying the increasing concern that "Chapter 11 can undermine efforts to enact new laws . . . to protect . . . human health"); Starner, *supra* note 3, at 421 (concluding that "NAFTA has usurped the regulatory authority of its member states").

115. See Beauvais, *supra* note 2, at 247 ("While the majority of Article 1110 claims to date concern environmental measures, their underlying rationale is equally applicable to other spheres of government regulation, including labor and public health.").

116. See Brower, *A Tale of Fear and Equilibrium*, *supra* note 60, at 85 (concluding that "Chapter 11 tribunals show every sign of maintaining an appropriate

frequently, as their confidence in the Chapter 11 process has become more qualified,¹¹⁷ and they clearly recognize the existence of widespread concern about Chapter 11.¹¹⁸ Thus, on balance, a review of academic debates may reinforce the perception that Chapter 11's liberty rights place "[a]t stake . . . states' ability to regulate effectively for the preservation of public health."¹¹⁹

In the wake of the *Ethyl Corp.* arbitration, the panorama of views articulated by the media, civil society, and academics shows an astonishing level of suspicion for Chapter 11's liberty rights and a correspondingly unexpected level of support at least for one ESCR, namely the right to health. Yet more surprising have been the reactions of the U.S. government. For example, in responding to a claim with at least superficial similarities to *Ethyl Corp.*, the United

balance between the rights of NAFTA investors to air their complaints and the obligations of NAFTA Parties to regulate in the public interest"); Brower & Steven, *supra* note 60, at 200-01 (praising the "high" quality of decisions rendered by Chapter 11 tribunals, seeing "every indication that the tribunals are properly balancing the legitimate interests of both investors and the NAFTA Parties," and finding "little substance to the argument that NAFTA empowers corporate interests at the expense of legitimate regulation"); Laird, *supra* note 64, at 227-29 (arguing that investors could not bring viable claims for the regulation of truly dangerous products and concluding that the "sky" is not "falling" on democracy or sovereignty); Daniel M. Price, *Some Observations on Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 421, 423, 424 (2000) (describing concerns about Chapter 11 as "unfounded" and finding "no reason to expect . . . that . . . tribunals will be receptive to attempts to turn the [minimum] standard into a weapon to attack bona fide regulatory behavior"); Julie Soloway & Jeremy Broadhurst, *What's in the Medicine Chest for Chapter 11's Ills?*, 36 CAN. BUS. L.J. 388, 403-04 (2002) (finding no "clearly established need for change" to Chapter 11 and discouraging precipitous actions based on a case of "early jitters").

117. See Brower, *Structure, Legitimacy, and NAFTA's Investment Chapter*, *supra* note 60, at 58-87 (identifying Chapter 11's structural flaws and acknowledging "growing pessimism" about its future); Charles N. Brower et al., *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT'L (forthcoming Oct. 2003) (explaining how Chapter 11 injects a "dimension of dysfunctionality in[to] the international adjudication system," thereby contributing to the latter's failure "to meet the essential criteria for legitimacy"); Soloway, *supra* note 59, at 2, 4 (recognizing that "the NAFTA and its institutions were not designed to manage social welfare issues" and acknowledging that Chapter 11's jurisprudence has revealed "a number of shortcomings . . . , calling into question the ongoing viability of its rules").

118. See Brower, *A Tale of Fear and Equilibrium*, *supra* note 60, at 51 (recognizing that Chapter 11 "has provoked an outcry against the perceived chilling effect on regulatory programs and the corresponding diminution of sovereignty"); Brower & Steven, *supra* note 60, at 193 (referring to "all the calumny heaped upon Chapter 11 . . . by opponents of globalization . . . think tanks, academics, and the NAFTA Parties themselves"); Laird, *supra* note 64, at 229 (warning that "hysteria" threatens to stifle "rational debate about free trade and investment"); Price, *supra* note 116, at 421 (explaining that Chapter 11 "has been the source of much controversy," with "aggressive critics" producing "greatly exaggerated" fears); Soloway & Broadhurst, *supra* note 116, at 388 (citing "widespread allegations from both inside and outside the trade law community that NAFTA is sick and in desperate need of very powerful medication").

119. Beauvais, *supra* note 2, at 296.

States took a position approaching endorsement of the right to health at the expense of liberty rights:

There is no merit to Methanex's claim that the NAFTA was violated by the California legislature's authorization of funding for a university study of the public health and environmental effects of methyl tertiary butyl ether ("MTBE") and the California Governor's subsequent executive order calling for certain state agencies to take preliminary steps toward a phase-out of the use of MTBE in California gasoline.

Methanex's claim does not remotely resemble the type of grievance for which the States Parties to the NAFTA created the investor-State dispute resolution mechanism of Chapter 11. Methanex's case is founded on the proposition that, whenever a state takes action to protect the public health . . . , the state is responsible for damages to every business enterprise claiming a resultant setback in its fortunes. . . . Plainly put, this proposition is absurd. . . .

The Tribunal should reject Methanex's novel claim to obtain compensation for public-health measures. Methanex may be disappointed that California decided to protect its drinking water supply . . . [b]ut the "NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment."¹²⁰

Likewise, concern about Chapter 11 "figured prominently in debates over the Trade Promotion Authority Act that President Bush recently pushed through Congress."¹²¹ As a result, Congress has instructed

120. *Methanex Corp. v. United States*, Statement of Defense, ¶¶ 1-3 (Aug. 10, 2000, NAFTA/UNCITRAL), available at <http://www.naftaclaims.com> (quoting award in *Azinian v. Mexico* (Nov. 1, 1999), 14 FOREIGN INVESTMENT L.J. 538, 562 (1999)); see also Dhooge, *supra* note 85, at 282 (observing that "[t]he United States also appears willing to consider the removal of public health, safety and welfare measures from the scope of Article 1110," which regulates the expropriation of investments); Price, *supra* note 116, at 422-23 (recognizing that "certain agencies in the U.S. government have become nervous that international investment rules will curtail their ability to adopt bona fide environmental, health, safety and other regulations").

Canada and Mexico also have advanced public-health and safety justifications for measures alleged to violate the liberty rights created by Chapter 11. See *Ethyl Corp. v. Canada*, Statement of Defense, ¶¶ 50, 58, 60, 67(g), 70, 72, 79, 92, 93, 95, 97 (Nov. 27, 1997, NAFTA/UNCITRAL), available at <http://www.naftaclaims.com> (emphasizing the public-health justifications for its ban on MMT); *S.D. Myers, Inc. v. Canada*, Statement of Defense, ¶¶ 7, 29-40, 52, 55 (June 18, 1999, NAFTA/UNCITRAL), available at <http://www.naftaclaims.com> (emphasizing the public-health justifications for Canada's ban on the export of PCBs); Thomas, *supra* note 85, at 7 (describing some of the public-health concerns that Mexico articulated to the *Metalclad* tribunal as justification for its restrictions on the operation of a hazardous waste facility). Their positions seem less remarkable than that of the United States because the Canadian and Mexican legal systems contemplate more vigorous governmental intervention to safeguard the public interest and a correspondingly smaller measure of individual liberty with respect to the use of property. See Wagner, *supra* note 108, at 510 (examining the Canadian legal system), 515 (examining the Mexican legal system); Lilley, *supra* note 2, at 749 (examining the Mexican legal system), 750 (examining the Canadian legal system).

121. *Been & Beauvais*, *supra* note 2, at 35-36. See also Alvarez & Park, *supra* note 103, at 385 ("Members of Congress . . . complain that NAFTA tribunals override health and labor laws.").

the President to “take into account . . . the protection of legitimate health or safety . . . interests” when negotiating future trade agreements.¹²² Subsequently, in negotiating agreements with Chile and Singapore, the United States has advanced the right to health by exempting completely the issuance of WTO-compliant compulsory licenses for pharmaceuticals from the article on expropriation and by emphasizing that, “except in rare circumstances,” non-discriminatory measures designed to protect “public health, safety, and the environment[] do not constitute indirect expropriations.”¹²³ Seeking, perhaps, to explain his employer’s growing support for the right to health at the expense of foreign investors’ liberty rights, the U.S. official with primary responsibility for defending Chapter 11 claims observed that

The last great era of international jurisprudence concerning States’ treatment of foreign investors and investments in their territory was in the late nineteenth and early twentieth centuries—before the rise of the modern regulatory state. Beginning in the 1930s, the United States and many other countries shifted toward a model of government that increasingly regulated daily economic life. The increased regulation of the modern state clashes with traditional views of property rights along a constantly changing battle line.¹²⁴

In other words, despite the strong textual preference for liberty rights, Chapter 11’s application has forced the people and the government of the United States to reweigh that preference and to reconsider their suspicion of ESCRs. At the very least, this reflects an historic erosion of U.S. hostility toward ESCRs¹²⁵ and a tacit move toward acceptance of the U.N.’s description of CPRs and ESCRs as “universal” and “indivisible.”¹²⁶

IV. PRACTICAL IMPLICATIONS

Describing the changing attitudes toward CPRs and ESCRs revealed by the application of Chapter 11 is a relatively simple task.

122. Trade Act of 2002, Pub. L. No. 107-210, § 2102(c)(6), 116 Stat. 933, 1002 (2002); *see also* H.R. CONF. REP. NO. 107-624, at 157 (2002) (listing as priorities the establishment of mechanisms “to strengthen the capacity of U.S. trading partners to develop and implement standards for environment and human health based on sound science,” and the protection of “legitimate health or safety . . . interests” when negotiating trade agreements).

123. *See* Draft Free Trade Agreement, Apr. 3, 2003, U.S.-Chile, art. 10.9(5), Annex 10-D, ¶ 4(b), *available at* <http://www.ustr.gov/new/fta/Chile/text/10text.pdf>; Free Trade Agreement, May 6, 2003, U.S.-Singapore, arts. 15.6(5), 15.26(b), Exchange of Letters on Expropriation (May 6, 2003), *available at* <http://www.ustr.gov/new/fta/Singapore/final.htm>.

124. Legum, *supra* note 60, at 539.

125. *See supra* notes 38-57 and accompanying text.

126. *See supra* note 12 and accompanying text.

Appreciating the general significance of this phenomenon, likewise, requires no great powers of imagination. Evaluating the practical implications for the presentation of Chapter 11 claims and for the incorporation of ESCRs into the mainstream of international law is a more difficult and speculative undertaking. Nevertheless, in an effort to provoke discussion, Parts IV(A) and IV(B) present some initial thoughts on these important topics.

A. Implications for Chapter 11 Disputes

Given the widespread opposition to the assertion of liberty rights in ways perceived to threaten ESCRs, one may first predict that Chapter 11 tribunals will address these anxieties and will do so in a way that provides the beneficiaries of ESCRs a measure of standing to express their concerns. The limited experience to date tends to confirm this thesis. Although tribunals have not given the NAFTA parties carte blanche to adopt public health measures,¹²⁷ they have recognized both the existence of public concern¹²⁸ and the wide latitude that international law affords to states to adopt public regulatory laws.¹²⁹ Likewise, in cases arguably involving the rights to health, work, and social security, tribunals have explicitly recognized the powerful interests at stake and have shown a willingness to receive amicus curiae submissions from groups seeking to defend

127. See *S.D. Myers*, Partial Award, *supra* note 60, ¶ 281 (rejecting Canada's categorical assertion that non-discriminatory regulatory measures never constitute an expropriation); *Pope & Talbot, Inc. v. Canada*, Interim Award, ¶ 99 (June 26, 2000, NAFTA/UNCITRAL), available at <http://www.naftaclaims.com> [hereinafter *Pope & Talbot*, Interim Award] (likewise rejecting Canada's categorical assertion); see also *Feldman v. Mex.*, Award, ¶ 110 (Dec. 16, 2002, NAFTA/ICSID Add'l Facility), available at <http://www.naftaclaims.com> [hereinafter *Feldman*, Award], (asserting that "[n]o one may seriously question that in some instances government regulatory activity can be a violation" of Chapter 11's provisions on expropriation); Beauvais, *supra* note 2, at 283 (observing that "tribunals uniformly reject an absolute exemption for 'regulatory' or 'police powers' activities from the category of expropriation").

128. See *S.D. Myers*, Partial Award (separate opinion of Bryan Schwartz), *supra* note 60, ¶¶ 12, 86, 203 (acknowledging fears that multilateral investment agreements will impair the capacity of states to "protect citizens or promote social justice," referring to academic observers who fear that Chapter 11 claims challenge "the practical ability of governmental authorities to protect health and the environment," and mentioning fears that governments may "shy away from bold regulatory action in the interests of health, safety, the environment and social justice").

129. *Id.* ¶¶ 261, 263 (finding no "open-ended mandate to second-guess" the controversial policy choices of the NAFTA Parties and recognizing the "high measure of deference that international law generally extends to . . . domestic authorities to regulate matters within their . . . borders"); *Pope & Talbot*, Interim Award, *supra* note 127, ¶ 99 (mentioning the need to exercise "special care" when evaluating challenges to the Partial Award, exercise of "police powers"); see also *Feldman*, Award, *supra* note 127, ¶ 103 (concluding that "governments must be free to act in the broader public interest through protection of the environment . . . and the like").

those rights.¹³⁰ Thus, tribunals seem to appreciate the growing support for ESCRs and have created a mechanism that gives the holders of ESCRs a measure of standing to protect their interests.

Given the increasing support for ESCRs, one may next predict that tribunals will tend to reject claims based on liberty rights (e.g., expropriation, performance requirements, and violations of the minimum standard not involving discrimination) that might set absolute limits on states' efforts to promote ESCRs. Conversely, because they do not threaten to place absolute limits on regulatory action and because they conform to ESCRs' pursuit of equality, one may also predict that tribunals will more frequently sustain complaints founded on allegations of discriminatory treatment (e.g., denials of national treatment). Again, the limited experience to date tends to confirm these theses.

As of this writing, Chapter 11 tribunals have rendered partial or final awards in nine disputes.¹³¹ Although claimants have alleged expropriation in seven of those disputes, six of the seven tribunals

130. See *United Parcel Serv. of Am., Inc. v. Canada*, Decision of Tribunal on Petitions for Intervention and Participation as Amici Curiae, ¶¶ 13, 70, 73 (Oct. 17, 2001, NAFTA/UNCITRAL), available at <http://www.naftaclaims.com> (involving the petition of Canadian postal workers who might be affected by claims challenging the operation of Canada's national mail service, recognizing the "considerable cogency" with which they illustrated "the important public character of the matters in issue . . . and . . . their real interest in these matters," and concluding that Chapter 11 tribunals have the power to accept amicus submissions); *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, ¶¶ 5, 8, 49, 52-53 (Jan. 15, 2001, NAFTA/UNCITRAL), available at <http://www.naftaclaims.com> (involving the petitions of environmental groups, referring to "the immense public importance of the case and the critical impact that the Tribunal's decision will have on environmental and other public welfare law-making in the NAFTA region," recording the contention "that the outcome in this case might affect the willingness of governments . . . to implement measures to protect the environment and human health," recognizing the "public interest in this arbitration . . . as powerfully suggested in the [p]etitions," and expressing an inclination to accept amicus submissions later in the proceedings).

131. See generally *Lowen Group, Inc. v. United States*, Award (June 6, 2003, NAFTA/ICSTID Add'l Facility), available at <http://www.naftaclaims.com> [hereinafter *Lowen*, Award]; *ADF Group, Inc. v. United States*, Award (Jan. 9, 2003, NAFTA/ICSID Add'l Facility), available at <http://www.naftaclaims.com> [hereinafter *ADF*, Award]; *Feldman*, Award, *supra* note 127; *United Parcel Serv. of Am., Inc. v. Canada*, Award on Jurisdiction (Nov. 22, 2002, NAFTA/UNCITRAL), available at <http://www.naftaclaims.com> [hereinafter *UPS*, Award on Jurisdiction]; *Mondev Int'l Ltd. v. United States*, Award (Oct. 11, 2002, NAFTA/ICSID Add'l Facility), available at <http://www.naftaclaims.com> [hereinafter *Mondev*, Award]; *Pope & Talbot, Inc. v. Canada*, Award on the Merits of Phase 2 (Apr. 10, 2001) (NAFTA/UNCITRAL), available at <http://www.naftaclaims.com> [hereinafter *Pope & Talbot*, Award on the Merits of Phase 2]; *S.D. Myers*, Partial Award, *supra* note 60; *Pope & Talbot*, Interim Award, *supra* note 127; *Metalclad Corp. v. Mexico*, Award (Sept. 2, 2000) (NAFTA/ICSID Add'l Facility), available at <http://www.naftaclaims.com> [hereinafter *Metalclad*, Award]; *Azinian v. Mexico*, Award (Nov. 1, 1999) (NAFTA/ICSID Add'l Facility), available at <http://www.naftaclaims.com> [hereinafter *Azinian*, Award].

have rejected those claims either on jurisdictional grounds¹³² or on the merits.¹³³ Likewise, although three claimants accused their host states of imposing unlawful performance requirements, tribunals rejected all of those claims.¹³⁴ In contrast, while six investors have advanced claims based on the denial of national treatment, tribunals rejected those claims on the merits in three cases¹³⁵ and sustained them on the merits in two others.¹³⁶ In the remaining two cases, one tribunal upheld a national treatment claim against a jurisdictional challenge,¹³⁷ and the other tribunal did not.¹³⁸ Thus, consistent with

132. See *Loewen*, Award, *supra* note 131, ¶¶ 141, 230-39; *Mondev*, Award, *supra* note 131, ¶¶ 47-48, 56-62.

133. See *Loewen*, Award, *supra* note 131, ¶¶ 141, 207-17; *Feldman*, Award, *supra* note 127, ¶¶ 111, 152; *S.D. Myers*, Partial Award, *supra* note 60, ¶¶ 279-88; *Pope & Talbot*, Interim Award, *supra* note 127, ¶¶ 96-105; *Azinian*, Award, *supra* note 131, ¶ 100. Several writers have emphasized the fact that Chapter 11 tribunals have denied all but one claim for expropriation. See Beauvais, *supra* note 2, at 285; Been & Beauvais, *supra* note 2, at 59; Soloway & Broadhurst, *supra* note 116, at 395; Lilley, *supra* note 2, at 731; see also Brower, *A Tale of Fear and Equilibrium*, *supra* note 60, at 71 (predicting that “investors will face great difficulty in establishing claims for ‘regulatory takings’ and even greater obstacles to the assertion of expropriation claims directed at the exercise of police powers”).

134. See *ADF Group*, Award, *supra* note 131, ¶¶ 159-74; *S.D. Myers*, Partial Award, *supra* note 60, ¶¶ 277-78; *Pope & Talbot*, Interim Award, *supra* note 127, ¶¶ 75, 80. But see *S.D. Myers*, Partial Award (separate opinion of Bryan Schwartz), *supra* note 60, ¶ 193 (concluding that, by prohibiting the export of PCBs, Canada effectively required remediation to take place in Canada, thereby establishing a required level of “Canadian content”).

135. See *Loewen*, Award, *supra* note 131, ¶¶ 139-40; *ADF Group*, Award, *supra* note 131, ¶¶ 156-58; *Pope & Talbot*, Award on the Merits of Phase 2, *supra* note 131, ¶¶ 88, 93-95, 97, 100-04.

136. See *Feldman*, Award, *supra* note 127, ¶¶ 173-88; *S.D. Myers*, Partial Award, *supra* note 60, ¶¶ 255-56.

137. See *UPS*, Award on Jurisdiction, *supra* note 131, ¶¶ 100-03.

138. See *Mondev*, Award, *supra* note 131, ¶¶ 63-65. Characterization of the success and failure of claims involving the minimum standard of treatment presents a more complex task. In each of the nine claims listed above, investors alleged violations of the minimum standard. Six of the nine tribunals denied the claims either on jurisdictional grounds or on the merits. See *Loewen*, Award, *supra* note 131, ¶¶ 207-17 (merits), 220-39 (jurisdiction); *ADF*, Award, *supra* note 131, ¶¶ 187-92 (merits); *Feldman*, Award, *supra* note 127, ¶ 141 (jurisdiction); *UPS*, Award on Jurisdiction, *supra* note 131, ¶¶ 71-99 (jurisdiction); *Mondev*, Award, *supra* note 131, ¶¶ 128-56 (merits); *Azinian*, Award, *supra* note 131, ¶¶ 92, 97-120 (merits).

Although tribunals found violations not involving discrimination in two of the remaining cases, one involved retaliation by the host state against the investor for commencing the arbitration. *Compare Metalclad*, Award, *supra* note 131, ¶¶ 74-101 (finding that the host state violated the minimum standard because federal officials represented that the investor did not require a local construction permit, the local government required the investor to apply for a construction permit, the local government used arbitrary procedures to consider the application, and the local government denied the application for arbitrary reasons), with *Pope & Talbot*, Award on the Merits of Phase 2, *supra* note 131, ¶¶ 156-81 (finding that the host state

growing support for ESCRs, Chapter 11 tribunals have shown great reluctance to impose absolute limits on state action, but fewer inhibitions in demanding respect for principles of equal treatment.¹³⁹

Given the increasing support for ESCRs, one may finally predict that the NAFTA parties will vigorously seek annulment of awards that disregard their arguments about the public health dimensions of challenged measures. Again, the limited experience to date tends to confirm this thesis. After a tribunal held that restrictions on the operation of a hazardous waste facility constituted a measure “tantamount to expropriation” and a denial of fair and equitable treatment,¹⁴⁰ the Mexican government sought and, in part, obtained a level of judicial review not contemplated by Chapter 11.¹⁴¹ In seeking to justify this controversial step, Mexico’s counsel publicly complained that the award failed to acknowledge several of Mexico’s principal contentions, including its allegation that previous owners had dumped some 20,000 metric tons of untreated hazardous waste at the site, thereby creating a serious possibility of explosion and other health risks.¹⁴² By the same token, Mexico’s counsel suggested that his client would have been much less upset,¹⁴³ and the reviewing court would have been less inclined to disturb the award,¹⁴⁴ if the

violated the minimum standard by conducting a vindictive regulatory audit after initiation of the arbitration proceedings).

In the final case, the tribunal found that the host state’s discriminatory treatment of the investor violated both the obligation of national treatment and the minimum standard of treatment. *See S.D. Myers, Partial Award, supra* note 60, ¶¶ 255-56, 266. It is worth noting that in the two cases involving denials of national treatment, both tribunals have shown an inclination to find violations of the minimum standard of treatment. *See id;* *see also Feldman, Award, supra* note 127, ¶¶ 109 n.9, 141, 188 (finding a denial of national treatment and recognizing that “there may be an argument for a violation of [the minimum standard] under the facts of this case,” but concluding that NAFTA excludes tax measures from the jurisdiction of tribunals over claims involving the minimum standard). This tends to confirm the willingness of tribunals to impose liability in claims involving credible allegations of discrimination.

139. *See Beauvais, supra* note 2, at 285-86 (observing that national treatment claims “by comparison, have had greater overall success” than expropriation claims).

140. *See Metalclad, Award, supra* note 131, ¶¶ 74-101, 104, 109, 111.

141. *See Brower, Empire Strikes Back, supra* note 3, at 51-88 (identifying and criticizing this phenomenon).

142. *See Thomas, supra* note 73, at 436, 439, 440 n.34; *Thomas, supra* note 85, at 5-7.

143. *See Thomas, supra* note 73, at 436.

144. *See Thomas, supra* note 85, at 6 (describing the award’s “extraordinary brevity” as the “central problem that Metalclad faced in defending [it] on judicial review”); *see also* Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?*, 20 J. INT’L ARB. 185, 191 n.43 (2003) (recognizing that “the failure of the *Metalclad* award to emerge unscathed from Judge Tysoe’s court had much to do with the economical presentation of reasons to be found in the award”). Professor Coe represented the investor in *Metalclad*.

tribunal had addressed in detail the public health dimensions of Mexico's submissions.

Thus, for Chapter 11 disputes, one may divide the practical implications of changing attitudes toward CPRs and ESCRs into two categories: those that affect litigation strategy and those that affect decision making strategy. With regard to the former, claimants should recognize that credible allegations of discriminatory treatment enjoy a much higher likelihood of success than claims based on the violation of liberty rights.¹⁴⁵ Likewise, if their claims arguably implicate ESCRs, investors should anticipate that they will draw amicus submissions, which tribunals will probably receive, and which may significantly increase the scope and cost of arbitration.¹⁴⁶ With regard to decision making strategy, Chapter 11 tribunals should address in detail attempts by host states to justify their measures as tools necessary for the promotion of ESCRs. Failure to do so will invite—and may ensure the success of—vigorous petitions for judicial review.¹⁴⁷

B. Implications for the Integration of ESCRs into the Mainstream of International Law

In the abstract, one can hardly doubt the significance of changing attitudes toward CPRs and ESCRs exposed by the application of Chapter 11. Concretely speaking, however, one struggles to describe how this phenomenon will affect the integration of ESCRs into the mainstream of international law. On one hand, one should not overstate the conclusions that may be drawn from limited data. For example, the application of Chapter 11 has shown widespread support for the right to health among the people and government of the United States.¹⁴⁸ It has not, at least as of this writing, revealed the level of support for other rights, such as the rights to work, social security, adequate food and shelter, education, or to take part in cultural life.¹⁴⁹ Likewise, the application of Chapter

145. See *supra* notes 131-39 and accompanying text.

146. See *supra* note 130 and accompanying text.

147. See *supra* notes 140-44 and accompanying text.

148. See *supra* notes 120-26 and accompanying text.

149. One should at least consider the argument that, among ESCRs, the right to health enjoys a uniquely high level of acceptance in the United States. Although international treaties typically characterize the right to health as an ESCR, it is possible that people in the United States embrace this right because, in some respects, it promotes liberty. Although public health measures may restrict liberty for members of the regulated community, the beneficiaries of the measures may see them as a form of liberation from the harmful effects of industry. Cf. Shelton, *supra* note 19, at 112 (explaining that environmental deterioration threatens both ESCRs, such as the rights to health, suitable working conditions, and an adequate standard of living, and CPRs,

11 has shown that the U.S. government supports the right to health when set against the liberty rights of foreign investors.¹⁵⁰ It has not, however, disclosed the extent to which the government will support the right to health when set against the liberty rights of U.S. citizens. Nor can we predict the level of support for U.S. citizens who might assert the right to health (or other ESCRs) against their own government. In short, one could find many reasons to discount the extent to which the application of Chapter 11 has advanced the prospects for integrating ESCRs into the mainstream of international law.

On the other hand, one should not lose sight of the fact that the greatest opponent of ESCRs has essentially asserted the right to health before an international tribunal,¹⁵¹ and that some of its officials recognize the folly of clinging to an eighteenth-century view of individual rights.¹⁵² Also, tribunals have responded to growing support for ESCRs and have granted a measure of standing to the bearers of those rights.¹⁵³ Furthermore, this assertion and recognition of ESCRs in adversarial proceedings at the international level does not represent an isolated phenomenon. To the contrary, the African Commission on Human and People's Rights lately has begun to follow a similar path.¹⁵⁴ Likewise, a distinguished international

such as the rights to life and privacy); Shelton, *supra* note 23, at 942 n.35 (observing that one may characterize environmental harm as an invasion of the rights to privacy, home and family life); *cf. also* RESTATEMENT (SECOND) OF TORTS § 821D cmt. b (1979) [hereinafter RESTATEMENT] (discussing the concept of "private nuisance" and using terms like "freedom from discomfort and annoyance," "freedom from physical interruption with . . . use," and "freedom from detrimental change in the physical condition of . . . land"). On the other hand, the right to health does not seem unique in this regard because all ESCRs theoretically liberate people from private exploitation. See Marks, *supra* note 5, at 438 (explaining that the "social upheavals of the nineteenth century against the exploitation arising from abuses of the rights of the first generation . . . led to the emergence of a . . . second generation of human rights, a generation of economic, social, and cultural rights"); see also L.T. HOBHOUSE, LIBERALISM 78 (1964) (opining that the "function of State coercion is to override individual coercion"); KELLEY, *supra* note 5, at 31 (recognizing the common perception that "the welfare state emerged as a response to the harsher aspects of industrial capitalism").

Alternatively, the long history of causes of action for nuisance may support public acceptance of the idea that people have individual, enforceable rights to health. See RESTATEMENT, *supra*, § 821B(2)(a) & cmt. a (defining "public nuisance" to include "significant interference with the public health" and recognizing that private rights of action have existed since the sixteenth century), § 821D & cmt. a (defining "private nuisance" and observing that the right of action originated in the twelfth century).

150. See *supra* notes 123-24 and accompanying text.

151. See *supra* note 120 and accompanying text.

152. See *supra* notes 120, 124 and accompanying text.

153. See *supra* note 130 and accompanying text.

154. See Shelton, *supra* note 23, at 941-42 (describing the first instance in which a human rights body decided a contentious case "involving violations of nearly all categories of rights," referring to it as a "sweeping decision on the duties of African

arbitrator recently suggested that “the protection of public health or cultural sites . . . might in future achieve preference over *pacta sunt servanda* in the hierarchy of international public policy.”¹⁵⁵ Therefore, he deemed it “essential” for his counterparts to “remain abreast with and [to] respect developments in national and international public policy[,] and to recognize that . . . public policy might include new issues such as environmental policy and human rights norms.”¹⁵⁶ Thus, despite the qualifications and uncertainties already mentioned, one may at least discern a trend sustaining the prediction “that 21st-century jurisprudence will focus increasingly on socio-economic rights.”¹⁵⁷

V. CONCLUSION

Engrossed in sharp debates about NAFTA's investment chapter, observers have missed an important and surprising development: Although the treaty's text reflects the traditional U.S. preference for liberty rights over ESCRs, its application has revealed a competition in which the latter seem to be gaining ground. Recent statements by the media, civil society, academics, and the U.S. government all suggest an astonishingly high level of suspicion concerning the liberty rights created by Chapter 11 and an unexpectedly high level of support for ESCRs.¹⁵⁸ Stated abstractly, this may signal an erosion of the United States' longstanding hostility toward ESCRs. Although one might be tempted to discount the practical implications of this development, the evidence warrants at least three conclusions. First, Chapter 11 tribunals have responded to changing attitudes in constructive ways, for example by providing a measure of standing to the holders of ESCRs and by rendering awards that show greater concern for equality than for liberty.¹⁵⁹ Second, a growing body of practice and opinion suggests that ESCRs can play a more prominent role in the development of international law.¹⁶⁰ Third, and most importantly, if that is to happen, decision makers will require more

states to ensure respect for economic, social, and cultural rights,” and recognizing the “potential . . . impact on human rights law and practice well beyond Africa”).

155. Cremades & Cairns, *supra* note 63, at 206.

156. *Id.* at 208.

157. Sachs, *supra* note 22, at 1387; *see also* ROBERTSON & MERRILLS, *supra* note 12, at 276-77 (identifying “a tendency . . . to pay increasing attention to economic and social rights”).

158. *See supra* notes 120-26 and accompanying text.

159. *See supra* note 130 and accompanying text.

160. *Id.*

than today's "meager" body of relevant scholarship.¹⁶¹ One hopes that others will build on these initial thoughts.

161. See *supra* note 36 and accompanying text.