Traditionally, the protection of foreign investors under international law has been dependent upon the willingness of the investor’s home state to initiate arbitration proceedings against the state in which the investor has been conducting its overseas activities. Over the last forty years, however, a new development, the bilateral investment treaty (BIT), has privatised the international protection of investors. Nearly 2,000 of these BITs have now been concluded. These treaties give investors of one party a direct right of action, through arbitration, against the government of the other country in the event of a violation of various provisions designed to protect investors, which extend beyond the prohibition on expropriation under customary international law. In contrast to the position under customary international law, most BITs will permit the investor to commence proceedings even though it is not in a position to show that it has exhausted local remedies against the respondent State. BITs, typically, will entitle the investor to the benefit of national treatment and most-favoured-nation treatment as well as outlawing performance requirements. They will also give rights to full compensation in the event of an expropriation of any property of the investor. Such provisions are contained in the US Model Bit of 1986, which formed the basis of the North American Free Trade Agreement (NAFTA), which, on 1 January 1995, came into force as between Canada, Mexico and the United States. Until recently, NAFTA was the only major multilateral agreement on investment of...
general application to all investment sectors. Its provisions now form the basis of the 2004 Central American Free Trade Agreement (CAFTA) and the 2004 US–Australia and US–Singapore Free Trade Agreements.

However, in contrast to the willingness of states to expose themselves to investor-state provisions under BITS, there has been slow progress towards the incorporation of such norms into multilateral agreements on investment. In 1998 the Organization for Economic Cooperation and Development (OECD) took NAFTA as the basis for its draft Multilateral Agreement on Investment (MAI). Unwisely, it omitted any environmental exceptions from its initial draft. The resulting anxieties on the part of environmental bodies over whether its investor protection provisions would stifle measures that sought to protect the environment contributed significantly to the cessation of negotiations on MAI in December 1998. The provision that, perhaps, caused most controversy was article 2.1 of Chapter IV of MAI. This was based on article 1110 of NAFTA, which not only entitles such investors to compensation in the event of their investment being nationalised or expropriated but also extends this protection to measures ‘tantamount to nationalisation or expropriation’.

The fact that the United States was one of the three NAFTA parties led to fears that article 1110 would be interpreted in the light of US domestic law on expropriation. US jurisprudence, unlike that of Mexico and Canada, recognises that regulations that restrict the economic use of property may, in certain circumstances, qualify as compensable ‘ takings’. US takings law derives from the fifth amendment to the Constitution. This provides ‘nor shall private property be taken for public use, without just compensation’ and is made applicable to the States by the fourteenth amendment. There are two categories of takings that may attract compensation. The first is physical taking of property for which the owner must be compensated. In Pennsylvania Coal Co v Mahon in 1922, the Supreme Court held that this rule would also apply to a regulation whose effect was to strip land of any economic use. A second category deals with regulations that adversely impact on the economic use of property but fall short of stripping it of all economic use, so-called partial takings. The Supreme Court has avoided setting hard and fast rules for determining when compensation will be awarded in such circumstances. In Penn Central Transport Co v New York City, it stated that the issue would have to be determined on a case-by-case basis, balancing of factors such as the severity of the regulation’s impact on the property owner, the legitimate expectations of the property owner over land use, the nature of the regulation itself. There has been concern that the peculiarly US jurisprudence on partial takings will infect the construction of article 1110. NAFTA also raises the prospect of environmental regulations in a developed country giving rise to an award of damages under investor-state proceedings.

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4 In contrast, the Energy Charter Treaty of 1994, to which the United States is not a party, deals only with rights of investors in a designated economic sector.
5 It provisions are also likely to form the basis of the Free Trade Area of the Americas which is currently being negotiated.
6 260 US 393 (1922). The case involved the denial of permission to mine coal to protect buildings from subsidence.
7 438 US 104 (1978). A denial of permission to build a fifty-five-storey block on top of Grand Central Station, which had been designated as a landmark under New York State’s Landmarks Preservation Act 1965, was held not to amount to a compensable partial taking.
Since then, there have been moves to include provisions on investment within the framework of World Trade Organization (WTO) agreements. It is likely that such moves will continue, notwithstanding the fact that at Cancun in 2003 the European Union (EU) was forced to drop the Singapore agenda containing a watered-down set of investment proposals, in the face of opposition from developing countries. This article analyses the extent to which there are legitimate concerns that importing expropriation provisions based on article 1110 of NAFTA will have an adverse impact on the ability of states to legislate for the protection of the environment. In doing so, I shall compare the substantive norms on expropriation under (a) customary international law, (b) article 1 of the First Protocol of the European Convention on Human Rights and (c) Chapter Eleven of NAFTA.

1. What Constitutes Expropriation?

1.1 Customary International Law

Until the early 1970s, the major problems arising under customary international law were concerned with the measure of compensation due in the event of nationalisation of property. Since then, outright nationalisations have become much rarer. Instead, the question has arisen whether the effect of regulations on an investment could constitute an expropriation. In the absence of authority from the International Court of Justice (ICJ) on this issue, reference must instead be made to decisions of Tribunals that have made awards under BITs that purport to apply customary international law on expropriation. In particular, some useful guidance on what state conduct short of nationalisation can amount to expropriation can be derived from the awards of the Iran–US claims tribunals.

The awards show that expropriation includes indirect or ‘creeping’ expropriation that strips the investor’s property of value without any formal transfer of title to the state or to a third party. For example, in Tippetts, the Iran–US Claims Tribunal held that the expropriation occurred when the Iranian government appointed a new manager of the partnership the claimant had established with an Iranian engineering firm prior to the Iranian revolution. The Tribunal reasoned as follows:

A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected. While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been

8 Annex 10-B of CAFTA defines customary international law as that which results from a general and consistent practice of States that they follow from a sense of legal obligation.

9 George H Aldritch, ‘What Constitutes a Compensable Taking of Property? The Decisions of the Iran–United States Claims Tribunal’ 88 Am J. Int’l L. 585 (1994). Caution should, however, be exercised in dealing with these awards given the rather wider remit of the Tribunals to deal with other measures affecting property rights. Aldritch, who was one of the arbitrators on the Claims Tribunal, expresses the view that some of the decisions made a finding on this basis so as to avoid the application of the full compensation standard that would be applicable to all takings of property rights under the 1955 Treaty of Amity between the United States and Iran.

10 Many of the awards involved nominally temporary appointments of supervisors and managers for companies by the government of Iran. However, by late 1983, when the first claims came to be heard, it had become clear that such interference had become permanent.
taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.\footnote{11}

This passage, which has been much quoted in subsequent literature on creeping expropriation, suggests that the principal factual enquiry required of a Tribunal is one that assesses the extent to which a government measure has led to permanent impairment of rights of ownership over particular property. The role of governmental intent in this analysis, though, is not altogether ruled out. It is merely ‘less important’ than the focus on the effect of the measure. But does governmental intent have any role to play in a determination of whether or not there has been an expropriation? A negative answer was given by the tribunal in Phillips, where it stated not only that it ‘need not determine the intent of the Government of Iran’ but also that ‘a government’s liability to compensate for expropriation of alien property does not depend on proof that the expropriation was intentional’.\footnote{12} In contrast, the Tribunal in Sea-Lands referred to the need to establish ‘deliberate governmental interference’ with the conduct of Sea-Lands’ operations.\footnote{13}

The role of intent needs to be analysed in two distinct contexts. First, there is the causative issue that involves a determination of what link needs to be established between government action and the destruction of an alien’s fundamental rights in a piece of property. At the very least, the adverse effects sustained by an investment must follow from the acts of governments or agencies whose actions can be attributed to the government. Losses sustained as a result of a failure to act on the part of government bodies should therefore not be capable of giving rise to a claim for expropriation. This was the case in Sea-Lands, where the Tribunal found that the government of Iran was not obliged to pay compensation in respect of losses sustained consequent upon the deterioration in the situation at the port of Bandar Abbas, consequent upon inactivity on its part. A similar finding was later made in Olguin v Paraguay, where the Tribunal found that the failure on the part of Paraguayan authorities to monitor activities of financial institutions, one of which, La Mercantil, had collapsed owing substantial sums to a Peruvian investor, Mr Olguin, did not constitute an expropriation. The Tribunal observed that:

For an expropriation to occur, there must be actions that can be considered reasonably appropriate for producing the effect of depriving the affected party of the property it owns, in such a way that whoever performs those actions will acquire, directly or indirectly, control, or at least [sic] the fruits of the expropriated property. Expropriation therefore requires a


\footnote{12} Phillips Petroleum Co. Iran v Islamic Republic of Iran, 21 Iran–U.S. Cl. Trib. Rep. 79 at 115.

\footnote{13} Sea-Land Svs., Inc v Iran, 6 Iran–U.S. Cl. Trib. Rep. 149 (1984) at 166. Cf, however, the decision of African Commission on Human Rights in Decision regarding Communication 155/96 (Social and Economic Rights Action Centre/Centre for Economic and Social Rights v Nigeria) case number ACHPR/COMM/A044/1, 27 May 2002, to the effect that the government had been in breach of various articles of the 1981 African Charter on Human and Peoples Rights by reason of its failure properly to regulate the activities of foreign oil companies involved in the exploitation of oil in Ogoniland in the 1990s.
teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place.\footnote{ICSID Case No. Arb/98/5 26 July 2001, para 84.}

This formulation, though, goes beyond merely ruling that omissions cannot find an expropriation claim in extending such a rule to government actions. The concept of a teleologically driven action is essentially a means of distinguishing those who are directly affected by a measure from those who are merely indirectly affected thereby. The question it requires a Tribunal to ask the question: ‘At whom was this government action directed?’ Thus, if a government expropriates X and that has the indirect effect of putting one of X’s suppliers out of business, an expropriation claims would be generated only as regards the losses sustained by X, but not the supplier.\footnote{This position approximates to that pertaining under Chapter 11 of NAFTA as a result of the interpretation given by the Tribunal in Methanex v USA, award on jurisdiction, 28 August 2002, to the phrase in article 1101 ‘a measure relating to an investor’.}

The reference to a transfer of benefit to the government in question is more problematic. If the benefit of X’s property has been transferred, that will clearly show that the measure was directed at X. However, the measure may still be shown to have been directed at X without any transfer of benefit. The Tribunal in Tippetts explicitly rejected an argument that a transfer of benefit is a requirement for a finding of expropriation and, for this reason, preferred the term deprivation to taking. The point, though, still remains unsettled, as is illustrated by the diverging awards dealing with alleged expropriation of a foreign investment in a Czech television station as a result of the actions and omissions of the Czech Media Council.\footnote{In Lauder v Czech Republic, Uncitral Arbitration, Final Award 3 September 2001, the Tribunal held that there had been no expropriation as the loss had arisen out of a breach of contract between two private parties and that there had been no transfer of benefit from the investor to the state. In contrast, the same facts were analysed as giving rise to an expropriation in CME v Czech Republic, Uncitral Arbitration, Partial Award 13 September 2001.}

The second context in which intent needs to be considered is in determining whether a state is relieved of its obligation to compensate for an expropriation if the measure in question was motivated by concerns of public welfare. Brownlie notes that:

Jurists supporting the compensation rule recognise the existence of exceptions, the most widely accepted of which are as follows: ... as a legitimate exercise of police power, including measures of defence against internal threats; ... loss caused indirectly by health and planning legislation and the concomitant restrictions on the use of property.\footnote{Brownlie, Principles of Public International Law (Oxford University Press, 6th ed., 2003), fn 11, at 511–512.}

The latter exception is probably not a true exception, given that most restrictions on the use of property are unlikely to have economic consequences that are sufficiently severe as to constitute an expropriation in the first place. The former exception, however, is more problematic. Under customary international law, the police powers exception\footnote{The term appears to bear a wider meaning under US takings law. In Hawaii Housing Authority v Midkiff 467 U.S. 229, 240 (1984), the Supreme Court held that ‘[t]he public use requirement [of the Takings Clause] is... coterminous with the scope of a sovereign’s police powers’. However, under the fifth amendment, a taking remains compensable notwithstanding that it has been made for the public use.} has a very limited ambit. The exception would cover forfeiture for crime, bona fide general taxation or measures necessary for the maintenance of public order, provided the state action in question is not discriminatory and is not designed...
to cause the alien to abandon the property to the State or to sell it at a distress price. The limited nature of this latter category is illustrated by *Tecnicas Medioambientales Tecmed SA v United Mexican States* (*Tecmed*). The Tribunal awarded compensation under a BIT between Mexico and Spain, in respect of a refusal by a Mexican state agency, Instituto Nacional de Ecología (INE), to renew a license to operate the Las Viboras landfill site. Having once been used for landfill, the site had no alternative economic use. INE’s decision was made in response to considerable local opposition based on the proximity of the site to the town of Hermosillo. However, for the police powers exception to come into play, the local opposition would have had to be so pronounced as to result in a state of emergency, which, on the facts, was not the case.

Expropriations outside the scope of a state’s police powers will entail an obligation to compensate, notwithstanding the public interest considerations behind the state’s action or the fact that such action is lawful. In *Cia del Desarrollo de Santa Elena SA v Republic of Costa Rica*, US interests acquired a beach property in 1970 with a view to developing tourism. By a decree of 5 May 1978, Costa Rica took the property for inclusion as part of a national park. The award dealt primarily with the quantum of compensation to be awarded in respect of the expropriation, but the Tribunal also stated that the purpose of protection of the environment that motivated the taking did not absolve Costa Rica from its obligation to compensate as follows, with the issue whether the purpose behind the measure absolved Costa Rica of its obligation to compensate:

[T]he purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.

The Tribunal then went on to state that:

Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental

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19 *Too v Greater Modesto Insurance Associates*, 23 Iran–U.S. Cl. Trib. Rep. 378 (1989) at 387–388, in which the seizure by the US Internal Revenue Service of a liquor licence owned by an Iranian national in California to satisfy over $70,000 of overdue taxes was held to fall within the scope of the state’s police powers.

20 Article V referred to ‘nationalisation, expropriation or measures of similar effect’.

21 After the site’s location had been approved, new regulations were introduced that would have prevented the siting of a waste disposal sites so close to a town the size of Hermosillo. Under Mexican law, INE could not take such factors into account but could consider only the manner in which the site had been operated.

22 The Tribunal stated that the situation in Hermosillo was not comparable to that pertaining in *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* 1989 I.C.J. 15 (July 20 1989), which arose out of a temporary requisition in 1968, by the Mayor of Palermo, of a factory which was being shut down by the US company which owned it. Due to the high level of unemployment in Sicily at the time, the facts potentially fell within the police powers exception. However, the ICJ never ruled on this point and instead rejected the claim on the ground that the requisition had not impeded the orderly disposal of the investor’s assets.

23 *FR Germany v Poland* 1926 P.C.I.J. (ser A) no. 7 (May 25) (Chorzow Factory) makes it clear that even a lawful expropriation entails an obligation to compensate, although a higher quantum of compensation may be awarded where the expropriation is unlawful.

24 ICSID Case No. ARB/96/1, award 17 February 2000.

25 Para 71. See, too, *Phelps Dodge Corp v Islamic Republic of Iran*, 10 Iran–U.S. Cl. Trib. Rep. 121 (1986) at 130 where the Tribunal held that the financial, economic and social motivations behind a law, pursuant to which a transfer of management had been effected, did not relieve the government of Iran of its obligation to compensate in respect of the expropriation.
purposes, whether domestic or international, the state’s obligation to pay compensation remains.26

A slightly different approach was taken in *Tecmed*; the Tribunal stated that the concept of proportionality adopted in the jurisprudence of the European Court of Human Rights (ECHR) in relation to claims under article 1 of the First Protocol of the European Convention on Human Rights could play a useful role in determining whether there had been a compensable expropriation. An agency of the Mexican government, INE, refused to renew a licence to operate a landfill site by taking into account local opposition based on the site’s proximity to the town of Hermosillo. However, under Mexican law, INE were only entitled to make their decision by reference to the manner of the site’s operation. Although there had been some breaches of the terms of the license, these were not substantial and were easily remedied, and accordingly, the refusal to renew the license here was a disproportionate response. However, under the ECHR jurisprudence discussed below, a deprivation of possessions, which equates to an expropriation under customary international law, will rarely, if at all, be proportional in the absence of compensation. In contrast, a measure that affects a control of use will often be proportional in the absence of compensation, but such claims would not constitute expropriations under customary international law, because of the absence of the requisite severity of impact on the investment. It must therefore be doubted whether the concept has any role to play in developing the jurisprudence of customary international law as to what State conduct constitutes and expropriation.

1.2 The European Convention on Human Rights. Article 1 of the First Protocol

Article 1 of the First Protocol provides that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.27

The general principles to be applied in determining whether or not there has been a violation of article 1 were set out in *James v United Kingdom*.28 First, the deprivation must

26 Para 72. For criticisms of the decision, see Sornarajah, *The International Law of Foreign Investment* (Cambridge University Press, 2nd ed., 2004) at 385–386. A similar finding was made in *SPP (Middle East) v Arab Republic of Egypt* 32 ILM (1992) 937. In awarding damages, the Tribunal rejected the discounted-cash-flow approach as too speculative. It also observed, at paras 190–191, that, in any event, damages awarded under this method could not take account of profits that would have been made after 1979, after which further development of the site would have become illegal under the UNESCO Convention.

27 The European Convention on Human Rights was signed in Rome on 4 November 1950. Initially, the Convention contained no provisions on the right to property, but in 1952 the First Protocol was added. The Convention was ratified by the United Kingdom in 1953. Since 1966, individual UK citizens have been allowed to petition the Court in Strasbourg directly. The Human Rights Act 1998 now implements the Convention directly into the law of the United Kingdom, allowing violations of the Convention to be challenged before the courts of the United Kingdom.

be in the ‘public interest’. In deciding this issue, national authorities enjoy a margin of appreciation because their direct knowledge of their society and its needs make them better placed in principle to assess this than the international judge. This judgement will be respected unless it be ‘manifestly without reasonable foundation’. Not surprisingly, it has proved very difficult to mount a successful challenge to a measure on this ground. Second, there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. A ‘fair’ balance must be struck between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights. The balance would not be fair if the applicant had to bear ‘an individual and excessive burden’. Taking of property without payment reasonably related to its value would normally constitute a disproportionate interference.

Different principles apply when the claim is one for ‘control of use’. In contrast, where the claim falls under the head of control of use, rather than deprivation of possessions, public interest considerations will frequently determine that the measure was ‘proportionate’, notwithstanding the absence of any compensation. The measure in question will still have to be lawful and in the public interest and will satisfy these criteria, provided it has been made lawfully and is for a valid social or economic purpose. In deciding this, account must be taken of the wide ‘margin of appreciation’ that is ceded to local regulatory and legislative bodies. The fact that the aim of the measure could have been achieved in a less severe manner does not, of itself, render the measure disproportionate. Nor will the severity with which the measure affects an individual necessarily indicate that an absence of compensation is disproportionate. Thus, in *Pinnacle v United Kingdom*, the fact that the measure was based on the most urgent and compelling need to protect public health was fatal to the applicant’s control-of-use claim.

The provisions of the ECHR also cover a failure of a government to regulate the actions of non-state actors. In *Hatton v UK [2003] ECHR 338*, the ECHR held that, potentially, there could have been a violation of the right to private and family life under article 8, where the applicants’ right to sleep had been disrupted by night flights by private airlines, given that the regulatory framework had been set by the government. On the facts, however, no such breach was established.

In *James*, this was not the case with Parliament’s belief as to the social injustice to be remedied by the 1967 Act. Such claims are somewhat akin to partial takings cases arising under the fifth amendment of the US constitution. However, the decisions of the Supreme Court in *Nollan v California Coastal Commission 483 US 825* 107 S.Ct 3141 (1987) and *Dolan v City of Tigard 114* S.Ct 2309 (1994) show that the margin appreciation ceded to the state may be narrower in such cases.


See also *Hatton v United Kingdom* where the ECHR, overruling the Chamber Decision, held that the adverse effect on the applicants’ sleep of a decision to increase the volume of night flights into Heathrow did not amount to a violation of article 8. The government was entitled to give greater weight to the economic interests of the country than to the interests of the small number of individuals living underneath the flight path whose sleep would be disrupted thereby.

A similar finding was made in *Adams v Scottish Ministers [2003] SC 171*, Ct of Session (Outer House) in connection with Scottish legislation based on the general interest in the prevention of cruelty to animals. Although Mr Adam’s economic interest in acting as a self-employed manager of foxhounds was held to amount to a possession, there was no deprivation because it was not certain that, after the legislation came into force, he would cease to be able to make a living from it. His claim, therefore, fell to be considered as one for control of use.
It follows, therefore, that where the applicant has received no compensation, a breach of article 1 will generally be established only if it can bring its claim within the heading of ‘deprivation of possessions’. However, the threshold for this heading is a high one. The measure in question must completely denude the possession of any economic value. A mere reduction in value will not suffice, as is shown by a series of decisions by the European Court of Human Rights. In *Pinnacle v United Kingdom*, regulations introduced to deal with the bovine spongiform encephalopathy (BSE) crisis meant that the applicants would no longer be able to use their specialised deboning equipment for its intended purpose of deboning cattle heads. However, there was no deprivation of possessions because the equipment was found to retain some residual value, albeit a much reduced one. A similar result was reached in *Fredin v Sweden*, which involved conservation legislation pursuant to which the applicants’ permit to extract gravel from their land had been withdrawn. The applicants’ deprivation claim failed because the parcel of land from which gravel was extracted had been separated from the applicants’ other adjoining properties for the sole purpose of serving the gravel business. The effects of the revocation, therefore, had to be assessed in the light of how the applicants’ properties as a whole were affected. As these were not affected by the measure, there was no deprivation.

In *Pine Valley v Ireland*, reference was also made to the fact that a failure to obtain planning permission was one of the usual commercial risks that a property developer had to accept. Although these comments were made in the context of a control-of-use claim, it is possible that the concept of reasonable investment expectations could also have a role to play in deprivation claims. The findings in both *Pinnacle* and *Fredin* that there was no deprivation of possessions initially appear harsh, given that even a nominal residue of value would appear to rule out a claim on this basis. However, the decisions appear justifiable when one takes into account the expectations of the applicants. In *Pinnacle*, the decision to invest in specialised equipment was made against a background of increasing regulation of the meat processing industry since the BSE crisis began in 1989. In *Fredin*, the landowner had ten years’ notice of the fact that it would ultimately lose its right to extract gravel. When it was granted permission to build a pier for its business, the relevant authorities stressed that this did not amount to any waiver of the ten-year rule. Against the investment background in each case, it is difficult to argue that the measures in question came as an unfair surprise to either applicant.

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37 See also *Tre Traktorer v Sweden* (1991) 13 EHHR 309 at para 53, where the withdrawal of a restaurant’s licence to serve alcohol did not amount to a deprivation because the company that owned the restaurant retained some economic interests represented by its ability to lease or sell the premises.
39 In addition, the applicants still retained ownership of the land that was affected as well as of its gravel resources. It must, however, be doubtful whether either of these assets retained any real value once the applicants were no longer allowed to extract gravel.
41 Indeed, it is conceivable that the same facts, had they come before a Tribunal applying customary international law on expropriation, might have given rise to a prima facie case of expropriation, although an analysis of the investor’s reasonable expectations might still have precluded an award of compensation.
42 The phrase was used by Dr Schwarz in *SDMI v Canada* in discussing the relevance of reasonable investment expectations to the question of whether there had been a measure tantamount to an expropriation.
There will also be occasions when there is neither a deprivation nor a control of use of property but there is, nonetheless, an interference with property. In such circumstances, a claim may be brought by reference to the opening words of article 1, which protect the peaceful enjoyment of possessions. This occurred in *Sporrong and Lonnroth v Sweden*\(^3\) where the applicants had suffered loss as a result of planning blight. The local authorities in Stockholm had issued expropriation notices in respect of two plots of their land with a view to redevelopment. These were a preliminary to expropriation but did not effect an immediate deprivation of the land. Nor did the notices interfere with the use of the land, although the landowners were forbidden to erect new structures on their land. They did, however, substantially depress the value of the land throughout the period for which the notices were valid. The notices ‘blighted’ the land and made it difficult, but not impossible, to sell, lease or mortgage the land.\(^4\) The period of the notice was subsequently extended to twenty-three years in respect of one of the pieces of land and eight years in respect of the other, although ultimately no expropriation of either parcel took place. The applicants had suffered a disproportionate burden and were entitled to compensation because the period of the expropriation notices was extended without giving the applicants any chance to object or without giving them any right of compensation. This implies that compensation would not necessarily have been available had the applicants been given a chance to object to the extension of the expropriation notices. This demonstrates that such claims are treated as akin to those for control of use as opposed to deprivation of possessions.\(^5\)

1.3 NAFTA: Article 1110

In many respects NAFTA is one of the most environmentally sensitive trade and investment agreement. The preamble commits the Parties to attain the trade goals of the agreement ‘in a manner consistent with environmental protection and conservation’ while also including in NAFTA’s goals that of promoting sustainable development and strengthening development and enforcement of laws and regulations. In addition NAFTA contains a side agreement, the NAAEC, which is directed towards fostering environmental cooperation amongst the parties. One of the principal aims of the NAAEC is the promotion of effective enforcement by the Parties of their domestic environmental legislation, through the Committee on Environmental Cooperation (the ‘CEC’). Accordingly, the NAAEC provides, under Articles 14 and 15, a means by which anyone living in any of the three NAFTA Parties may complain about a failure of enforcement of the environmental legislation in force in any those countries. The process involves the submission of a claim to the CEC. After reviewing the submission, the CEC may investigate the matter and publish a factual record of its findings, subject to approval by the CEC Council.\(^6\)

\(^3\) (1983) 5 EHRR 35.

\(^4\) The notices also discouraged the landowners from effecting repairs on their premises.

\(^5\) However, given the length of time in which the expropriation notices blighted the applicants’ property, it is arguable that the claim should have been regarded as one for deprivation.

Chapter Eleven grants the following substantive protections to investors of another party. Foreign investors are entitled to the benefit of ‘national treatment’ under article 1102 and to the application of most-favoured-nation principles under article 1103. Article 1105 entitles foreign investors to the minimum treatment to which they are entitled under international law, ‘including fair and equitable treatment and full protection and security’. Performance requirements, as regards both foreign and domestic investors, are outlawed under article 1106, subject to some limited exceptions.

Successful claims by investors have tended to involve breaches of articles 1102 and 1105. Notwithstanding this, the major focus of concern by environmental groups has been on the potential of article 1110 to inhibit environmental regulation, the so-called ‘regulatory chill’. Article 1110 provides that:

No Party shall directly or indirectly nationalise or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalisation or expropriation of such an investment except:

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

This provision must be read in the light of article 1101, which defines the scope of Chapter Eleven, as follows:

1. This Chapter applies to measures\(^{47}\) adopted or maintained by a Party relating to:

(a) investors of another Party;
(b) investments of investors of another Party in the territory of the Party existing at the date of entry into force of this Agreement as well as to investments made or acquired thereafter by such investors; . . .

The words ‘relating to’ have been held, in a preliminary hearing on jurisdiction in *Methanex v USA\(^{48}\)*, to signify something more than the mere effect of a measure on an investor or investment and required a legally significant connection between them.\(^{49}\) This meant that Methanex, a Canadian enterprise that produced, transported and marketed methanol, a component of methyl tertiary-butyl ether (MTBE), could not claim in respect of measures taken by the Californian legislature to phase out the presence of MTBE in gasoline.\(^{50}\) Methanol is one of the components needed to

\(^{47}\) Defined by article 201, so as to include any law, regulation, procedure, requirement or practice. This has been held to cover measures of state and local governments (*Metalclad v Mexico*, final award 2 September 2000); maladministration by civil servants (*Pope & Talbot v Canada*, final award 10 April 2001); and judicial proceedings, as regards both procedure (*Loewen v USA*, Arb (AF)/98/3, final award 26 June 2003) and matters of substantive law (*Mondev v USA*, final award 11 October 2002).

\(^{48}\) Award on jurisdiction, 28 August 2002. On 9 August 2005, the Tribunal released its Final Award, dismissing Methanex’s claims and ordering the company to pay legal fees and arbitral expenses in the amount of approximately $4 million.

\(^{49}\) Para 147.

\(^{50}\) Concerns had arisen about leakage of MTBE from gasoline storage facilities into the water supply.
make MTBE and was therefore indirectly affected by the measure.\textsuperscript{51} The measure would, however, relate to methanol were there evidence that it had been introduced with a view to benefitting the US ethanol industry at the expense of foreign producers of methanol.\textsuperscript{52}

Provided the measure has directly impacted on the investor or investment, one must next consider what type of governmental conduct can amount to expropriation.\textsuperscript{53} The interim merits award in \textit{Pope & Talbot v Canada}\textsuperscript{54} gives some useful pointers as to what will and will not amount to expropriation for the purposes of Chapter Eleven. The investor based its claim on losses it had suffered by reason of restrictions on lumber exports to the United States by its wholly owned Canadian company, pursuant to the operation of the Softwood Lumber Agreement between the United States and Canada. The investor argued for a wide reading of article 1110, alleging that there would be expropriation whenever a governmental act was used to deny \textit{some} benefit to property. The phrase ‘tantamount to expropriation’ should be construed to cover a measure beyond the sort of outright taking or creeping expropriation that was recognised under customary international law. So long as a measure, even if it were non-discriminatory, substantially interfered with the investment of a foreign investor, there would be a violation of article 1110. Canada, on the other hand, had argued that non-discriminatory regulation falling within the exercise of a state’s police powers\textsuperscript{55} fell outside the scope of article 1110.

The Tribunal rejected both positions. It ruled that the phrase ‘measure tantamount to nationalisation or expropriation’ in article 1110 did not broaden the ordinary concept of expropriation under international law. Tantamount meant ‘equivalent to’ and covered ‘creeping expropriation’, for which compensation was payable under international law. Pope and Talbot would, therefore, need to show that the interference alleged was ‘sufficiently restrictive to support a conclusion that the property has been “taken” from the owner’.\textsuperscript{56} The Tribunal, however, observed that:

\textsuperscript{51} Cf \textit{Ethyl Corporation v Canada}, the first investor-state suit to be brought under Chapter Eleven, and which was subsequently settled. Ethyl Corporation, as the sole manufacturer of the gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT), claimed in respect of a Canadian ban on the import and transport of MMT within Canada, which effectively prevented Ethyl from using it as a gasoline additive in Canada. Unlike Methanex, Ethyl was directly affected by the measure.

\textsuperscript{52} As was the case in \textit{SDMI v Canada}, where the Tribunal held that the measure was one relating to the investment, Myers (Canada), in that the whole point of the ban was to protect Canadian polychlorinated biphenyl (PCB) remediators from US competitors such as the claimant.


\textsuperscript{54} 26 June 2000.

\textsuperscript{55} Para 96. Canada here seems to have been referring to a state’s right to regulate in the public interest rather than to the more limited exception of police powers that has been recognised under customary international law. Given this context, the Tribunal should not be taken to have found that the police powers exception under customary international law does not apply to claims under article 1110, particularly as article 1131 specifically mandates tribunals to decide in accordance with [NAFTA] and applicable international law.

\textsuperscript{56} Para 102.
The sole ‘taking’ that the Investor has identified is interference with the Investment’s ability to carry on its business of exporting softwood lumber to the US. While this interference has, according to the Investor, resulted in reduced profits for the Investment, it continues to export substantial quantities of softwood lumber to the US and to earn substantial profits on those sales.57

In *S.D.Myers v Canada*, the claim under article 1110 was also unsuccessful. In the early 1990s, S.D.Myers Incorporated (SDMI), a company based in Talmadge, Ohio, sought to import polychlorinated biphenyls (PCBs) from Canada to the United States for processing in its Ohio facility. Its shareholders set up a Canadian company, Myers (Canada), to assist in the obtaining and processing of orders for this work. Canadian law then favoured the domestic treatment and disposal of PCBs but did permit exports to the United States, subject to the prior approval of the US Environmental Protection Agency (EPA). The US 1976 Toxic Substance Control Act prohibited imports of PCBs, with very narrow exceptions. In October 1995, the EPA exercised its enforcement discretion to allow SDMI and nine other companies to import PCBs for processing and disposal in the United States, with the policy being formalised in a regulation in early 1996.

In November 1995, Canada issued an interim order banning exports of PCBs, stating that it needed to review both the contradictory legal situation in the United States and its obligations under the Basel Convention 1989 concerning PCB trade.58 Notwithstanding this, there were compelling environmental reasons against the measure, not least the fact that SDMI’s Ohio site was closer to the Canadian PCB waste locations by the Great Lakes than its main Canadian competitor. An adverse side effect of the measure was the likelihood that some Canadian PCB owners, denied access to the cheaper US option, would not have used the Canadian facilities but would just have hung on to the waste. Indeed, the Tribunal found that the measure had been motivated not by environmental concerns but rather by a desire to protect Canadian remediators of PCBs from the competition posed by SDMI.

After making its assessment, Canada introduced new regulations on 4 February 1997, and Myers imported seven shipments of Canadian PCB waste into the United States. On 20 July 1997, a US federal court found that the EPA’s new Import Disposal Rule violated the Toxic Substance Control Act and the US border was thereafter permanently closed to further PCB trade. On October 30 1998, Myers claimed $20 million from Canada to cover lost profits during the sixteen-month period during which the EPA’s tolerance of imports of PCBs had coincided with Canada’s embargo on their export. SDMI’s claim alleged violations of articles 1102, 1105, 1106 and 1110.

The Tribunal observed that ‘regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out that possibility’.59 It then continued:

Expropriations tend to involve the deprivation of ownership rights: regulations a lesser interference. The distinction between expropriation and regulation screens out most potential

57 Para 101.
58 The Tribunal, however, found that, on the facts, exports to a non-party, the United States, would not have violated the Convention.
59 Para 281.
cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.\textsuperscript{60}

The closure of the border here had been temporary, whereas an expropriation usually

\[\text{Amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if were partial or temporary.}\textsuperscript{61}

The Tribunal construed the word ‘tantamount’ as ‘equivalent’ and agreed with the finding in \textit{Pope \& Talbot} that it cannot logically mean more than ‘expropriation’. The word was inserted to cover ‘creeping expropriation’ rather than to expand the accepted international definition of ‘expropriation’. On the facts there was no expropriation, as all that happened was than an opportunity was delayed; Canada realised no benefit from the measure, and there was no transfer of property or benefit directly to others.\textsuperscript{62}

A more expansive interpretation of ‘tantamount to expropriation’ was to be provided by the Tribunal in \textit{Metalclad v United Mexican States},\textsuperscript{63} the only case to date in which a claim under article 1110 has succeeded. In 1993, Metalclad’s second-tier Mexican subsidiary, Econsa, bought another Mexican company, Coterin, with a view to acquiring, developing and operating its hazardous waste transfer station and landfill in Guadalcazar, for which it owned permits and licenses. The regulatory background at the time of the purchase was Coterin had a federal permit to operate the site, and Metalclad had received assurances that obtaining a municipal permit would be a mere formality.\textsuperscript{64} The State Government had also granted Coterin a state land-use permit to construct the landfill, subject to the condition that the project conform to various specifications and technical requirements.\textsuperscript{65}

Against this background, Metalclad began constructing the landfill site in May 1994. The landfill site was never, however, able to commence business. Local opposition resulted in the Municipality denying a construction permit at the end of 1995 and obtaining an injunction in the Mexican courts to prevent operation of the site.\textsuperscript{66} On 2 January 1997, Metalclad initiated Chapter Eleven proceedings under article 1117, on behalf of Coterin, as the enterprise. On 23 September 1997, the State Governor, on his final day in office, issued an Ecological Decree declaring a Natural

\begin{itemize}
\item Para 282.
\item Para 283. The position is similar to that under US takings law. See \textit{Tahoe-Sierra Preservation Council Inc v Tahoe Regional Planning Agency}, 535 US 302 (2002) 122 S.Ct 1465, where a thirty-two-month moratorium on development of all land around Lake Tahoe was held not to give rise to a total takings claim.
\item Cf \textit{Tippets}, where the Tribunal held that this factor was not relevant to the issue of expropriation.
\item ICSID Case No. Arb (AF) 97/1, Award 30 August 2000.
\item Additionally, the State Governor had given Metalclad the impression that he would support the project if studies confirmed the site as suitable or feasible and if the environmental impact was consistent with Mexican standards.
\item The permit stated that the licence did not prejudge the rights or ownership of the applicant, nor did it authorise works, construction or the functioning of business or activities.
\item The Tribunal was to hold that the Municipality had exceeded its authority in denying the permit on grounds of the wider environmental impact of the site. Under Mexican law, it was only authorised to take into account considerations relating to the actual operation of the site itself.
\end{itemize}
Area for the protection of rare cactus over land which comprised the area of the landfill. In May 1999, the injunction was lifted.

The Tribunal found that there had been a breach of both article 1105 and article 1110 because of Mexico’s breach of the transparency obligations imported into Chapter Eleven from article 102(1) and Chapter 18 of NAFTA. The denial of a municipal permit to Coterin had effectively and unlawfully prevented it from operating the landfill site, thus constituting a measure ‘tantamount to expropriation’.67 The Tribunal observed that:

Expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host state, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.68

This formulation is in terms wider than that used in SDMI v Canada and Pope & Talbot v Canada, in that it appears to recognise that partial takings can constitute expropriation. The phrase ‘significant part’ would allow for a finding of expropriation even if the measure merely reduced the profitability of the enterprise.69 If so, this goes beyond the position under customary international law70 and appears to set out a lex specialis under NAFTA on expropriation, contrary to what was said by the Tribunal in Pope & Talbot v Canada. However, the formulation is not essential to the decision. The Tribunal could simply have justified its decisions by reference to the effect of the denial of the municipal permit, which, on the facts, was surely sufficiently severe as to have amounted to an expropriation under customary international law.

The Tribunal also expressed the view, obiter, that the effect of the Ecological Decree, which had the effect of barring forever the operation of the landfill, could also constitute an act ‘tantamount to expropriation’, irrespective of its motivation or intent.71 When the award came up for review in British Columbia, Judge Tysoe relied on this obiter dicta in upholding the award, notwithstanding his finding that the Tribunal’s finding of a breach of article 1110 had been infected by its error of importing transparency obligations into its analysis of article 1105. Although the Tribunal’s definition of expropriation was ‘sufficiently broad to include a legitimate rezoning of property by municipality or other zoning authority’,72 this amounted to a question of law which the court overturn only if was patently unreasonable, which was not the case.

67 Metalclad was awarded the costs of its investment, reduced to take account of the remediation costs of the landfill site. The Tribunal, however, rejected Metalclad’s claim for future profits because the landfill had never been operative. This method of assessment could be adopted only once an investment had been operated for a sufficiently long time to establish a performance record.
68 Para 104.
69 A regulation could also constitute an expropriation, notwithstanding that it effected no transfer of benefit to the state.
70 The Metalclad formulation was, however, referred to with approval by the Tribunal in CME v Czech Republic, Uncitral Arbitration, Partial Award 13 September 2001.
71 Para 109.
72 Para 99.
The wording of article 1110 clearly mandates the payment of compensation for an expropriation, notwithstanding that the measure in question is directed at the protection of the environment. There are, however, two provisions in Chapter Eleven itself, and two elsewhere in NAFTA, that might qualify this position. The first of these is article 1114, which provides as follows:

(1) Nothing in this Chapter shall be construed to prevent a party from adopting, maintaining, or enforcing any measure, otherwise consistent with this Chapter, that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. (emphasis added)

The highlighted words illustrate the potentially limited effect of this exception. First, there is the weakness of the wording 'sensitive to environmental concerns'. Second, the phrase 'otherwise consistent with this Chapter' subordinates the exception to the general principles of investor protection to be found in Chapter Eleven.\(^73\) As the wording of article 1110 specifies that expropriations can be justified only if they are both for a public purpose and accompanied by suitable compensation, it is likely that article 1114(1) will not derogate from this.\(^74\) Article 1110(1) does not prevent a Party from introducing an expropriatory measure ‘to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns’. The reference to ‘public purpose’ clearly allows this, provided that compensation is paid to the investor.\(^75\)

The same reasoning would also apply when considering article 1112, which provides that ‘[i]n the event of any inconsistency between a provision of this Chapter and a provision of another Chapter, the provision of the other Chapter shall prevail to the extent of the inconsistency’. This might suggest that Chapter Eleven is subject to the sanitary and phytosanitary (SPS) provisions to be found in Chapter Seven and to the technical barriers to trade (TBT) provisions to be found in Chapter Nine, both of which are very similar to those found in the equivalent WTO agreements.\(^76\) It is likely, however, that there would be no inconsistency between a measure complying with Chapters Seven and Nine and an obligation to compensate under article 1110, given the reference in the latter to a ‘public purpose’.\(^77\)

\(^73\) The wording here is similar to that in the chapeau of article XX of General Agreement on Tariffs and Trade (GATT).

\(^74\) An interpretation tacitly borne out by the fact that in, Metalclad, the only award in which article 1114(1) has been considered, the Tribunal considered the provision solely in the context of the claim under article 1105 but made no reference to its potential application to the claim under article 1110.

\(^75\) However, given that article 1131 specifically mandates tribunals to decide in accordance with [NAFTA] and applicable international law, it must be the case that compensation would not be payable under article 1110, where a measure falls within the scope of a state’s police powers, in the very limited sense in which that term is used in customary international law.

\(^76\) Article 2101, ‘General Exceptions’ also specifically incorporates GATT article XX and its interpretative notes into NAFTA for the purposes of Part Two (Trade in Goods), ‘except to the extent that a provision of that Part applies to services or investment’, and Part Three (Technical Barriers to Trade), ‘except to the extent that a provision of that Part applies to services’. On general principles of construction, therefore, the exceptions contained in article XX of GATT would not appear to apply to claims brought under Chapter Eleven.

\(^77\) Similar reasoning would apply as regards article 104, which provides for the primacy of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) treaty, the 1987 Montreal Convention, as well as the 1989 Basel Convention upon its entry into force for Canada, Mexico and the United States in the event of any inconsistency between the specific trade obligations set out therein and the provisions of NAFTA. Article 104 is subject to the proviso that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the means that is least inconsistent with the other provisions of this Agreement.
Notwithstanding the above, the intention behind the measure may still be of relevance in determining whether there was an expropriation in the first place. First, evidence of discriminatory intent may enable investors who are indirectly affected by a measure to bring proceedings under Chapter Eleven, despite the definition of ‘relating to’ adopted by the Tribunal in *Methanex v USA*. Second, one element in all the definitions of ‘expropriation’ adopted by the Tribunals in the three article 110 cases is the protection of the ‘reasonable expectations’ of an investor. This will require an analysis at the regulations already in place at the time the investor made its investment. An investor will not be able to claim that an expropriation has been effected by reason of regulations already in existence at such time. In *GAMI v Mexico*, the Tribunal held, in the context of a claim under article 1105, that an investor must accept the regulatory background in force when the investment is made. The question that needs to be addressed is whether subsequent changes to this background can trigger the operation of article 1110. Is the investor entitled to assume that regulatory regime in force at the time the investment is made will remain unaltered throughout the lifetime of the investment? The answer to this question may well require an analysis of the motivation behind a particular regulation. In particular, an investor could reasonably assume that it will not be affected by regulations motivated by a discriminatory or protectionist intent. This issue is likely to prove critical in the recent suit against the United States commenced by the Canadian mining company, Glamis Gold.

2. What Constitutes Property?

2.1. Customary International Law

For there to be a recovery for expropriation, there must be a taking of property. Significantly, in the *Oscar Chinn* case, market access was held not to amount to

78 In its final award, 9 August 2005, the Tribunal, considering the phrase ‘tantamount to expropriation’, stated, at Chapter IV D para 7, that ‘... as a matter of international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, inter alia, a foreign investor is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation’. This suggests that there could be circumstances in which a regulation whose effect was insufficiently severe to be ordinarily regarded as expropriatory could, in fact, be regarded as such. It would be preferable, though, to deal with a regulation involving a breach of a stabilisation clause under the norms of customary international law regarding the treatment of aliens—a claim under article 1105 rather than article 1110.

79 Final Award 15 November 2004.

80 See also *Feldman v Mexico*, Case No. ARB (AF) 99/1, award 16 December 2002, where it was held that the investor could have no reasonable expectations as to the continuance of an informal waiver of regulations relating to exports of cigarettes from Mexico.

81 Thus, in *Metalclad*, the fact that the Municipality exceeded its powers in denying the permit could be seen as an example of a measure which interfered with the investor’s reasonable expectations.

82 Claim filed 9 December 2003. Following the California Desert Protection Act 1994, Glamis Gold committed $13 million for developing its mining project on federal lands in the California desert which fell well outside the closest of the wilderness areas created by the Act. However, it has been unable to develop the project due to (a) its inability to obtain the necessary approval for gold mining from the Department of the Interior, under both the Clinton and the Bush administrations and (b) a recent Californian law imposing on all new and pending mining claims reclamation requirements that would be unfeasible, both economically and technically. The claim raises important issues on whether Glamis Gold could reasonably expect no further restrictions on mining operations in the California desert to be introduced in the foreseeable future.

83 *(UK v Belgium)* 1934 PCIJ (ser A/B) no. 63 (December 12).
property. The Belgium Government, with a view to maintaining viable shipping on the river Congo, gave a subsidy to UNATRA and directed it to charge nominal freight rates. The effect was to close down the business of Mr Chinn, who was UNATRA’s sole competitor. The United Kingdom argued that this amounted to a breach of the general principles of international law, in particular of respect for vested rights. The Court, however, rejected this position, reasoning thus, ‘[t]he Court . . . is unable to see in his original position—which was characterised by the possession of customers and the possibility of making a profit—anything in the nature of a genuine vested right’. A similar position was adopted in Sea-Land Sev., Inc v Iran, in relation to a claim that there had been an expropriation by virtue of Sea-Lands’ loss of its acquired right to use and benefit from port facilities in Bandar Abbas due to the inactivity of the Iranian government after the 1980 revolution which had led to disruption in the functioning of the port. In contrast, vested contractual rights have been regarded as property which is capable of being expropriation.

2.2. Article 1 of the First Protocol

Regulation of economic activity will usually involve a ‘control of use’ on property for which there is no automatic right to compensation. However, if the ability to use property in a particular way can, in itself, be regarded as a distinct category of possession, it may be possible to reclassify the claim as one for ‘deprivation of possessions’, in which case the absence of compensation will generally indicate an absence of proportionality. The more property is segmented in this fashion, the easier it becomes to establish a ‘deprivation’ of the segmented property.

The importance of this threshold issue was clearly demonstrated in Pinnacle Meat Processors Co v United Kingdom, where a stream of anticipated future income was held not to constitute a ‘possession’. The applicant’s business was deboning cattle heads and selling the extract to manufacturers of processed meat. From 1989 onwards, their business had become increasingly regulated due to concern about BSE. Against this background, they had invested heavily in specialised plant and equipment for this business. In 1996 the applicants were effected by legislation which prevented the sale of, inter alia, material extracted from cattle heads for animal or human consumption. At a stroke, the applicants’ business was effectively wiped out. They received compensation of 65% of the value of their unsold stock but received nothing for the loss of goodwill or for their specialised equipment. As regards the goodwill, or ‘the present value of the future income stream which the company can be expected to derive’, although this might be an element in valuing a professional practice, future income per se would constitute a ‘possession’ only once it had been earned or an enforceable claim to it had come into existence.

84 p 88.
86 In SPP (Middle East) v Arab Republic of Egypt ICSID Award 20 May 1992, 32 ILM 933 (1993), where a claim for expropriation succeeded in respect of losses sustained by the claimant under a contract to develop a site near the Pyramids for tourism when the Egyptian government introduced legislation precluding further development on the site. See also CME v Czech Republic Uncitral Arbitration, Partial Award 13 September 2001.
89 Cf Adams v Scottish Ministers [2003] SC 171, Ct of Session (Outer House) where the applicant’s economic interest in acting as a self-employed manager of foxhounds was held to amount to a possession.
This finding meant that there could be no ‘deprivation’ claim in respect of the applicants’ expectations of making future income from deboning cattle heads. Although this expectation was totally wiped out, it did not constitute a ‘possession’.90

2.3. Article 1110 of NAFTA

An investor may claim in respect of its own losses under article 1116 or under article 1117 in respect of losses sustained by an enterprise that is owned or controlled directly by the investor. The key concept of investment is defined in article 1139, as including ‘(a) an enterprise’. Also included are an equity security,91 and a debt security of an enterprise,92 a loan to an enterprise93 as well as an interest in an enterprise that entitles the owner to share in income or profits of the enterprise,94 or to share in the assets of that enterprise on dissolution.95 Heading (g) takes in ‘real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes’, while heading (h) includes ‘interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory’.96 The wordings of these final headings are particularly open-ended and apt to encompass expectations of future trading profits in another NAFTA party.

‘Investment of an investor of a Party’ is defined as ‘an investment owned or controlled directly or indirectly by an investor of such Party’. The wording here is again very wide and designed to avoid the rule of customary international law set out in the Barcelona Traction case, whereby a claim can only be brought on behalf of the company rather than on behalf of the individual shareholders.97 Even indirect control of an investment will suffice to give locus standi to bring proceedings under article 1116 in respect of their own losses.98

These threshold issues were to play a significant part in the award in S.D.Myers v Canada.99 The measure in question was a temporary ban on PCB exports from Canada to the US—Sea-Land Sev., Inc v Iran deboning—which adversely affected the investor’s PCB remediation business. The claim was brought under article 1116 by SDMI in respect of losses it had sustained as an investor in Myers (Canada). This was undoubtedly an ‘enterprise’, but Canada argued that SDMI could not be an investor in an enterprise in which it had no shareholding; instead, the shares were all owned by four

90 In contrast, the applicant’s specialised deboning equipment was a possession, but because it retained some residual value the claim was one for ‘control of use’. This failed as the compelling health problems to which the measure was addressed meant that it was proportionate even in the absence of compensation.

91 (b).
92 (c).
93 (d).
94 (e).
95 (f).
96 Two examples of such interest are given: (i) contracts involving the presence of an investor’s property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.
97 ICJ Reports (1970) 3, 9 ILM (1970) 227. Where a corporation’s property is expropriated, the state with which that corporation has a close permanent connection will have title to bring proceedings. The place of incorporation will be a strong indicator of this necessary connection. However, shareholders do not generally have any separate right of protection, apart from that afforded to the company.
98 Alternatively, a claim may be brought under article 1117 in respect of the loss suffered by the investment itself. In many cases, the investor will be able to bring its claim under either heading.
99 13 November 2000, 40 ILM 1408.
members of the Myers family. The Tribunal reviewed the evidence of Dana Myers as to the corporate structure adopted by the Myers family in respect of its businesses and concluded that it did ‘not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs.’ The Tribunal’s view was reinforced by the use of the word ‘indirectly’ in the following definition set out in article 1139: ‘an investment owned or controlled directly or indirectly by an investor of such Party’.100

After the first partial award, the Tribunal returned to this issue when it came to consider the question of damages for breach of articles 1102 and 1105. The Tribunal concluded that Myers (Canada) was an integral part of SDMI’s business plan. Although Myers (Canada) did not destroy PCBs, which was done by SDMI over the border, the tribunal noted that assistance with pre-shipment activities could be a substantial part of the overall operation for a Canadian PCB owner. Furthermore, SDMI planned that to expand the future role played by Myers (Canada) in its business of PCB remediation.101 What needed to be assessed was the overall damage to the economic success of the investor arising from the measure. Chapter Eleven required the loss to be linked causally to the interference with an investment located in a host state. It did not impose any additional requirement that all of the investor’s losses must be felt in the host state to be recoverable.

This ‘overall economic success’ analysis effectively used Myers (Canada) as a hook on which to hang the losses sustained by SDMI, the investor, and losses sustained by Myers (Canada), the investment. The aggregation of the two entities made it logical to compare the activities of the single economic entity with those of other Canadian processors of PCB waste and to allow recovery for loss of profits on potential processing contracts during the period of the export ban. A focus on the losses sustained by Myers (Canada) would have resulted in a very much reduced quantum of damages for breach of the ‘national treatment’ provisions of article 1102 as the relevant point of comparison would have been with other domestic broking concerns in the PCB business. Indeed, it is likely that the claim could still have succeeded had it been pleaded without reference to Myers (Canada) at all. In the initial hearing, the Tribunal also identified, without ruling on the point, various other grounds on which SDMI could have contended that it had an investment in Canada, namely that it and Myers (Canada) were in a joint venture, Myers (Canada) was a branch of SDMI, it had lent money to Myers (Canada) and its market share in Canada was an investment.102 In the partial award on damages, the Tribunal also noted that SDMI might well have been able to base its claim on the effect of the measure on its ‘goodwill’ in Canada which would have been recognised as an intangible property right under Canadian law.103 The Tribunal also applied the

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100 Para 229.
101 The tribunal noted that article 1102 covered not just the current operation of an entity but also extended to its expansion.
102 A similar approach to this threshold question was adopted by the Tribunal in the interim merits award in Pope & Talbot v USA, where it held that the investor’s access to the Canadian market constituted ‘an investment’ under articles 1110 and 1139. At para 98, the Tribunal observed that the true interests at stake were the Investment’s asset base, the value of which was largely dependent on its export business.
103 In subsequent proceedings for judicial review, Judge Kelen, in January 2004, upheld the award. The Tribunal’s approach to these issues had been fully justified by the wording of article 1139, in particular its reference to indirect control.
cumulative principle\textsuperscript{104} in finding that such an overlap between different chapters of NAFTA did not have the effect of adding to or subtracting from an investor’s rights to proceed under Chapter Eleven, provided there was no conflict between the provisions. It should, however, be noted that, in its final award, the Tribunal in Methanex v USA expressed the view that market access and goodwill, in themselves, would not constitute an investment but could be taken into account when valuing an investment.\textsuperscript{105}

3. Conclusion

In considering the scope of article 1110, NAFTA Tribunals have taken into account three factors. The first, and most important, is the economic impact of the government action. The fact that a measure has an adverse effect on the economic value of an investment will be insufficient to show that there has been an indirect expropriation. The second is the extent to which the government action interferes with distinct, reasonable, investment-backed expectations. Third is the character of the government action. These factors are specifically referred to in the ‘shared understanding’ to the expropriation chapter of the new US Model Bit.\textsuperscript{106} As these are the same factors that Tribunals under BITs have used to define expropriations under customary international law, fears that a multilateral investment agreement based on NAFTA would lead to a ‘regulatory chill’ would appear to be without foundation. The ‘shared understanding’ goes on to provide that:

Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.

This follows from the fact that regulations generally will not have sufficiently serious and adverse impact on an investment as to amount to an indirect or ‘creeping’ expropriation. If there remains uncertainty in the NAFTA jurisprudence as to the ‘rare circumstances’ in which such a non-discriminatory regulation might amount to an indirect expropriation, that is an uncertainty that is mirrored in customary international law. Indeed, article 1110 appears to be more restrictive than article 1 of the First Protocol of the ECHR, in that in the terminology of the ECHR, it covers only deprivation claims and not those arising out of control of use or interference with peaceful enjoyment.

However, there is genuine problem of definition with Chapter Eleven. The recognition of ‘market access’ as a form of property makes it possible to advance claims of the sort which were denied in the Oscar Chin case. In SDMI v Canada, the effect of the regulation was to impose a restriction on a specific use of real or personal property but did not involve any taking as such. The investor was unable to use its remediation facilities to process Canadian PCB waste. A conventional property analysis, of

\textsuperscript{104} Set out in keto—Definitive Safeguard Measure on Import of Certain Dairy Products Wt/396/R, at para 738: ‘. . . the WTO Agreement is a “single Undertaking” and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously unless there is a “formal conflict” between them’.

\textsuperscript{105} August 9, 2005 Chapter IV Part D para 17.

\textsuperscript{106} This forms the basis of the free trade agreements concluded by the United States in 2004 with Australia, Chile, Central America (CAFTA), Morocco and Singapore.
the type applied in *Chinn*, would view those facilities as the property, rather than a specific way of employing them.

Once market access is treated a distinct category of property, though, it becomes far easier to categorise regulatory interference as amounting to an expropriation.\textsuperscript{107} Take, for example, the facts of *Pinnacle v United Kingdom* which was dealt with as a control-of-use case rather than one involving a deprivation. However, if NAFTA’s definition of investment were to be applied to property, the claim would have shifted from the control-of-use category to that of deprivation of possessions, thereby entitling the claimant to compensation.\textsuperscript{108} Had a similar measure in, say Canada, affected a Mexican meat processor there, it is likely that a tribunal hearing a Chapter Eleven claim would find, in the light of *SDMI v Canada*, that the right to make a living by deboning cattle heads constituted an ‘investment’. Unlike the embargo in *SMDI v Canada*, the measure in *Pinnacle* was both severe and permanent in its effects on the investment. Under article 1110 the measure would, therefore, amount to an indirect expropriation and compensation would then have been mandated, no matter that the measure was non-discriminatory and motivated by the most urgent considerations of public health protection.\textsuperscript{109}

These considerations mean that environmentalists are right to be wary of those seeking to use NAFTA as the basis of any WTO investment agreement. With market access treated as an investment it becomes increasingly likely that trade restrictions will generate investor-state suits under Chapter Eleven. Trade disputes will, therefore, no longer remain under the control of the NAFTA State Parties. After the decision in *SDMI v Canada* it is clear that the availability of State-to-State arbitration under Chapter Twenty, does not preclude the same facts from generating parallel proceedings under Chapter Eleven. This may well lead to different results arising in parallel arbitrations under Chapter Eleven and Chapter Twenty, or under the WTO dispute settlement procedure. Take for instance a drastic trade restriction based on compelling public health grounds. The State imposing the measure would be able to rely on Chapter Seven, which deals with SPS measures, in any State-to-State proceedings. However, a parallel suit under article 1110 might well succeed, due to the severity of the impact of the measure on an affected exporter’s market access, coupled with the lack of any equivalent exception based on public welfare considerations.\textsuperscript{110}

\textsuperscript{107} The shared understanding attempts to deal with this issue by remitting the definition of property to national law, although it does not specify whether this is the national law of the investor or of the respondent.

\textsuperscript{108} As the claimant was not an alien, it might have been proportionate under the ECHR, as was the case in *James*, for the Government to have offered a lower amount of compensation than that to which an alien would have been entitled under customary international law.

\textsuperscript{109} The position would be the same under customary international law if property were to be expansively redefined in line with the interpretation of investment adopted in *SDMI v Canada*. Once there has been a taking of property of an alien an obligation to compensate arises.

\textsuperscript{110} Factors similar to those which determine the application of the exceptions to be found in article XX of GATT were taken into account in *SDMI v Canada* in assessing whether the temporary embargo on PCB exports to the United States would entail a violation of articles 1102 and 1105. However, it is doubtful whether such an analysis could be brought to bear on a claim under article 1110 given that an expropriation can be lawful only if it both in the public interest and subject to full compensation.