

***Lingle* and *Kelo*: The Accidental Tourist in Canada and NAFTA-Land**

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INTRODUCTION

At the end of its 2004 term the United States Supreme Court decided two important cases on governmental “takings” of private property. This essay offers some preliminary thoughts on the relationship of those decisions to the varying approaches to public acquisition of private property in the United States and Canada and under the international regime of the North American Free Trade Agreement (NAFTA).

I. *LINGLE*, *KELO* AND THE FIFTH AMENDMENT

*No person shall... be deprived of... property, without due process of law; nor shall private property be taken for public use, without just compensation.*¹

The Takings Clause of the Fifth Amendment, set forth above, expressly confers a right to “just compensation” if two other questions are appropriately answered: (1) When is property “taken” so as to invoke the right to that compensation? (2) What uses are sufficiently “public” to permit a government to take private property? An extensive jurisprudence has developed around these questions. In *Lingle v. Chevron U.S.A. Inc.*² and *Kelo v. City of New London*,³ the Supreme Court dealt with the questions in ways that brought fresh, if not universally applauded, clarity to the inconsistent and incomplete judicial interpretations with which they had become encrusted.

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¹ U.S. CONST. amend. 5 (the “Takings Clause”).

² 125 S. Ct. 2074 (2005).

³ 125 S. Ct. 2655 (2005).

A. Lingle

Lingle was a challenge by Chevron, Hawaii's largest gasoline refiner and marketer, to a legislative act capping the rent that oil companies could charge retail dealers who leased company-owned service stations. The cap provision was part of a larger scheme to address retail gasoline-market concentration by protecting independent dealers through restrictions on oil-company ownership and leasing of service stations. Chevron sought both a declaratory judgment that the cap violated the Takings Clause and an injunction against application of the cap to Chevron's stations. The district court and court of appeals, relying on the standard announced by the Supreme Court in *Agins v. City of Tiburon*,⁴ held that the cap violated the Takings Clause because it did not "substantially advance" Hawaii's interest in preventing market concentration. The Supreme Court reversed.⁵

A unanimous Court, in an opinion by Justice O'Connor, held that the *Agins* "substantially advance" test is not the appropriate standard for determining whether a regulatory measure effects an uncompensated taking that violates the Fifth Amendment. Recognizing that "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property,"⁶ Justice O'Connor laid out three categories of "regulatory takings" that decisions of the Court have recognized since the concept was first articulated in the 1922 decision of *Pennsylvania Coal Co. v. Mahon*.⁷ The first two categories were characterized as "*per se* takings": (1) Where the regulation imposes permanent physical invasion, "however minor" (a "*Loretto*" taking);⁸ (2) Where the regulation "completely deprive[s] an owner of 'all economically beneficial us[e]'" (a "*Lucas*" taking).⁹ The third category, "*Penn Central*" takings, embraced those where the regulation has sufficient impact in some other way—(a) some economic impact, particularly interference with "investment-backed expectations"; or (b) an effect on individual property interests rather than an adjustment of "the benefits and burdens of economic life to promote the common good."¹⁰ These

⁴ 447 U.S. 255 (1980).

⁵ 125 S. Ct. at 2077-80, 2085.

⁶ *Id.* at 2081, citing *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (seizure and operation of coal mine to prevent strike), and *United States v. Gen Motors Corp.*, 323 U.S. 373 (1945) (occupation of private warehouse).

⁷ 260 U.S. 393 (1922) (Holmes, J.).

⁸ 125 S. Ct. at 2081, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (requiring that landlords permit cable companies to install facilities in apartment buildings).

⁹ *Id.*, quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in the original) (addressing coastal zone regulations prohibiting any development of property adopted after owner purchased lots).

¹⁰ *Id.* at 2082, quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (holding that denial of permit to build on top of designated historic landmark, where transfer of development rights would have been permitted if sought, was not a taking). The Court cited *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-618 (2001) (finding that rejection of petition to fill salt marsh was not a taking where property retained substantial development value), *id.*, at 632-634 (O'Connor, J., concurring), as an example of the *Penn Central* factors in action. 125 S. Ct. at 2082.

three categories “aim[s] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses upon the severity of the burden that government imposes upon private property rights.”¹¹

By contrast, said the Court, though the *Agins* “substantially advances” test has been treated as an additional test for identifying a compensable regulatory taking, the test, when properly analyzed in context, sets forth a due process standard. It was derived from the earliest zoning cases, which were challenges to the exercise of the police power decided on substantive due process grounds. The test thus goes to the reasonableness of the governmental action as a means of achieving a legitimate governmental purpose. Unlike the *Loretto/Lucas/Penn Central* regulatory takings tests, the *Agins* test, by not focusing on the magnitude of the impact or its allocation among property interests, does not serve the purpose of the Takings Clause as applied to regulatory actions.¹² In sum, a regulation that would survive a due process/police power inquiry must still be determined to be a taking under the functionally oriented *Loretto/Lucas/Penn Central* tests. The Takings Clause is about compensation, not about the validity of governmental action. The Clause “presupposes that the government has acted in pursuit of a valid public purpose.”¹³ Conversely, if the governmental action does not meet the due process test, or is not a “public use” within the meaning of the Takings Clause, “that is the end of the inquiry. No amount of compensation can authorize such action.”¹⁴ Whatever its merits might have been as a due process challenge, *Chevron’s* claim on the facts did not establish a compensable taking.¹⁵

¹¹ 125 S. Ct. at 2082.

¹² *Id.* at 2082-84.

¹³ *Id.* at 2084.

¹⁴ *Id.* Justice O’Connor made clear that prior cases using the “substantially advances” test were not overruled and, indeed, could be rationalized because “in no case have we found a compensable taking based on such an inquiry.” *Id.* at 2086. She distinguished *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), both previously classified as *Loretto* physical invasion cases, *supra*, text at note 8, as “land-use exaction” cases, conditioning grant of a development permit on dedication of a public easement. *Id.* The “substantially advances” test was used in those cases to decide “whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether” in order to determine whether insistence on the dedication was an unconstitutional condition because grant of the permit was insufficiently related to the property taken. *Id.* at 2087.

¹⁵ *Id.* at 2085. *Chevron* had not argued a due process violation; in any event, the Court noted that the district court had employed a heightened scrutiny that had long been rejected in economic regulation cases. *Id.* Justice Kennedy, in a brief concurrence, *id.* at 2087, noted that the decision “does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process,” citing *E. Enter v. Apfel*, 524 U.S. 498, 539, 550 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (noting “the rare instances in which such a permissive standard has been violated”).

B. Kelo

In *Kelo*, the City of New London, Connecticut, and appropriate state agencies, spurred by the intentions of Pfizer, Inc., to build a \$300 million pharmaceutical research facility in the city, had approved an “integrated development plan” for a ninety-acre shoreline area adjacent to the Pfizer site.¹⁶ The area consisted of 115 private parcels and a thirty-two-acre parcel formerly occupied by a United States naval facility and now partly occupied by a state park. The plan provided for mixed uses, including eighty new residences; a new U.S. Coast Guard museum; a public walkway linking the state park and other uses; an “urban village” containing a hotel, restaurants, and shops; a 90,000 square-foot research and development office facility adjacent to the Pfizer site; recreational marinas and other water-dependent commercial uses; and parking and other retail and office uses. Certain parcels were to be leased to a private developer for subsequent leasing to as-yet-unknown tenants. The purpose of the plan was to take advantage of Pfizer’s arrival by creating jobs, increasing tax revenue, stimulating downtown revitalization, making the city more attractive, and creating leisure and recreational opportunities in a city that had been designated by the state as economically distressed. The city was able to negotiate for the purchase of most of the properties in the area but had to initiate condemnation proceedings against nine individuals owning fifteen properties.¹⁷ The owners sought injunctive relief against the condemnation, claiming that it would violate the public use provision of the Takings Clause.¹⁸ Ultimately, the Connecticut Supreme Court held that all of the takings were for a public use under Connecticut’s municipal development statute and Constitution, as well as the Fifth Amendment, and that the takings were “reasonably necessary” to achieve the public use and served “reasonably foreseeable needs.”¹⁹

The United States Supreme Court in a five-to-four decision, with Justice Stevens writing for the majority, affirmed the decision below. Citing *Berman v. Parker*,²⁰ *Hawaii Housing Authority v. Midkiff*,²¹ and earlier decisions, Justice Stevens noted that the meaning of “public use” in the Fifth Amendment had evolved from the idea of a use open to the general public to a notion of “public purpose.”²² That term had been defined broadly to reflect significant deference to the legislature in many situations where the goals of a taking included economic development and the ultimate beneficiaries included private parties.²³ Applying this approach, Stevens found that, in light of the comprehensive nature

¹⁶ *Kelo v. City of New London*, 125 S. Ct. 2655, 2659 (2005). For a description of the redevelopment plan, see *id.* at 2659-60.

¹⁷ *Id.* at 2660.

¹⁸ *Id.*

¹⁹ *Id.* at 2660-61. The Connecticut decision is *Kelo v. City of New London*, 843 A.2d 500 (2004).

²⁰ 348 U.S. 26 (1954) (condemnation of blighted residential area for both public and private redevelopment).

²¹ 467 U.S. 229 (1984) (transfer of title from lessors to lessees to reduce concentration of land ownership).

²² 125 S. Ct. at 2662-63.

²³ *Id.* at 2661-65.

of the plan, its range of purposes, the extensive deliberative process used in its development, and the deferential nature of the scope of review, the New London plan served a public purpose and the takings satisfied the public use requirement.²⁴ In so deciding, he rejected arguments for adoption of a rule that economic development could not constitute a “public use” for Fifth Amendment purposes or, alternatively, that in the case of a taking for economic development there must be a heightened standard of review, “a reasonable certainty” that the public benefits sought would occur.²⁵ Both of his positions reflected the established principle of deference to legislative judgment. In particular, he found that the “reasonable certainty” test would have involved inappropriate scrutiny of the legislative judgment, like the “substantially advances” test rejected in *Lingle v. Chevron U.S.A. Inc.*, as a substantive due process notion.²⁶

In a vigorous dissent, Justice O’Connor, distinguishing the authorities relied upon by the majority, focused on the economic development aspects of New London’s plan, the portions of it that would benefit private interests, and its impact on individual property owners. She rejected arguments that a lesser standard of review would impose sufficient limits on private benefit and that the comprehensiveness of the plan and its process sustained its character as serving a public purpose.²⁷ Dissenting separately, Justice Thomas urged a reconsideration of *Berman* and *Midkiff* and a return to a narrower original understanding of the meaning of “public use.”²⁸

C. The Fifth Amendment

Lingle and *Kelo* read together remove a creeping anomaly from the jurisprudence of the Takings Clause. Both decisions deal with the often cloudy relationship of that provision to due process limitations on the police power. While the federal government may legislate only pursuant to the specific powers conferred by Article I, Section 8, of the Constitution, as amplified by the Necessary and Proper Clause, the police power is a broad residual power of state governments to act for the public health, safety, and general welfare, subject to the minimal due process limitation that such actions must be rationally related to those legitimate governmental interests.²⁹ *Lingle* reasserted the

²⁴ *Id.* at 2665.

²⁵ *Id.* at 2667.

²⁶ *Id.* at 2667-68; *see text, supra* at notes 2-15 (discussing *Lingle*), Justice Kennedy, in concurrence, emphasized the relationship of the majority’s deferential test to the due-process/equal protection rational basis test commonly applied to economic regulation. *Id.* at 2669-70 (Kennedy, J., concurring). He noted, however, that a higher standard of review might be appropriate if factual circumstances, not present here, suggested a pre-textual public benefit that might mask an intention solely to benefit private parties. *Id.* at 2670.

²⁷ *Id.* at 2671-77 (O’Connor, J., dissenting).

²⁸ *Id.* at 2677-87 (Thomas, J., dissenting).

²⁹ *See, generally*, JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 11.10, 11.13 (7th ed. 2004). The federal government has a “police power” for regulation on federal property, including the District of Columbia. *Id.* § 11.10, n. 2.

fundamental purpose of the Takings Clause, holding that even in the context of regulatory takings the focus should be on the impact on the owner, not on the appropriateness of the government's action. A police power/due process type of inquiry about the relationship of governmental action to governmental purpose was proper in determining whether there was a "public use" or purpose, not in determining whether there had been a taking. The Court thus removed a "police power-plus" factor from the takings equation, which under the *Agins* "substantially advances" test had required the Court to consider the purpose question twice—in both the "public use" and takings determinations. *Kelo* reaffirmed earlier decisions holding that takings satisfied the public use requirement if they were legitimate exercises of the police power.³⁰ In so holding, the majority of the Court rejected another "police power-plus" test that would have subjected the states' actions to a more rigorous level of scrutiny where economic development was the purpose. For all practical purposes, under *Kelo* it is now clear that governmental action that may be a taking requiring compensation is legitimate if it satisfies the standard for a valid exercise of the police power.³¹

In sum, *Lingle* and *Kelo* mean that, if governmental action is not warranted by the police power because it does not satisfy the due process rational relationship test, it is not a public use and the government cannot undertake the action even if it compensates the affected property owner. The owner's remedy in such a case may be an action for violation of the Due Process Clause under Section 1983 of the Civil Rights Act.³² If the action satisfies the police power standard, then it is a public use to which a court must apply Takings Clause principles to determine whether the action is a taking and thus compensable.

II. O CANADA

"[T]he prohibition 'Thou shalt not steal' has no legal force upon the sovereign body."³³

In Canada, governmental takings of private property are considered under the more elegant rubric "expropriation." The above and oft-quoted words of Mr. Justice Riddell, in a decision

³⁰ See *Berman v. Parker*, 348 U.S. 26, 31, 35 (1954) *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241-42 (1984), discussed *supra*, text and notes 20-21. Though not noted by the majority, both decisions equated the public use requirement with the police power (applicable to the federal government in *Berman* because the taking was for redevelopment in the District of Columbia; see *supra* note 29).

³¹ Justice Kennedy would apply a higher standard of review to a pretextual public benefit whether or not the governmental action was a taking. *Kelo v. City of New London*, 125 S. Ct. 2655, 2669 (Kennedy, J., concurring).

³² 42 U.S.C. § 1983. See, e.g., *Woodwind Estate, Ltd. v. Gretkowski*, 205 F.3d 118 (3d Cir. 2000) (allowing due process claim under 42 U.S. § 1983 against town for improper motive or bad faith in denial of subdivision plan); see, generally, JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS §§ 18.01-18.03 (Supp. 2005).

³³ *Florence Mining Co. v. Cobalt Lake Mining Co.*, [1909] 18 O.L.R. 275, 279 (Riddell, J.), *aff'd*, [1910] 43 O.L.R. 474 (Ontario P.C.).

holding that no compensation was owed for an expropriation in which a statute denied it, overstate, but describe, the Canadian bottom line.³⁴ Under principles of parliamentary sovereignty derived from the unwritten British Constitution, Canada's federal Parliament and provincial legislatures may infringe individual rights that are not protected by the 1982 Canadian Charter of Rights.³⁵

The starting point for analysis is the Constitution Act of 1867, the constitutional framework of Canadian federalism, which distributes governmental powers between the federal and provincial governments.³⁶ The general plan of the 1867 Act is that the powers of both levels of government are limited to those expressly granted in sections 91 and 92 of the Act. Section 91 enumerates specific federal powers and contains a residual power "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters" that are not exclusively of provincial jurisdiction (the "POGG" Power).³⁷ The specific provincial powers enumerated in section 92 include, in section 92(13), exclusive power to "make Laws in relation to . . . Property and Civil Rights in the Province."³⁸ Though the "Fathers of Confederation" intended to establish a strong national government, nearly a century of interpretation of the 1867 Act by the British Privy Council left many of the federal powers (including the POGG Power) narrowly confined and gave broad scope to the provincial Property and Civil Rights Power.³⁹ If there is no Charter of Rights protection of particular individual interests, the only limits on the exercise of those powers are found in the interplay of federal and provincial powers, legislative wisdom and prudence, and judicially enforceable principles of the common law and statutory interpretation.

The Charter of Rights contains no express or implied "due process" protection of property or other economic rights and no provision that, like the Takings Clause, would impose a requirement of "public use" or compensation for a governmental appropriation of private property.⁴⁰

³⁴ *Id. See, e.g.*, 1 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 28-12, n.58 (4th edn. 1997, supp. 2004); *Authorson v. Canada (A.G.)*, [2003] S.C.R. 40; John A. H. Clay, *Expropriation: A Federal Tool*, CAN. ADMIN. L. & PRAC. 1, 5 (2001-2002); ERIC C.E. TODD, THE LAW OF EXPROPRIATION AND COMPENSATION IN CANADA 34 (2d ed. 1992).

³⁵ Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I (Can.), enacted as Schedule B, Canada Act 1982, ch. 11 (U.K.); *see, generally* HOGG, *supra* note 34 12.1, 12.2. Indeed, in a survival of principles of parliamentary sovereignty, many of the Charter protections may be overridden by an express legislative declaration. Canadian Charter of Rights, § 33; HOGG, *supra* note 34 12.2(b).

³⁶ Originally enacted as the British North America Act, 1867, 30 & 31 Vic., c. 3 (U.K.), renamed the Constitution Act, 1867, in the Constitution Act, 1982, § 53(2), Part VII (Can.), enacted as Schedule B, Canada Act 1982, ch. 11 (U.K.). *See generally* HOGG, *supra* note 34, §§ 1.2, 5.3.

³⁷ Constitution Act, 1867, § 91.

³⁸ *Id.*, § 92(13).

³⁹ The appellate jurisdiction of the Privy Council ("the 'wicked stepfathers of confederation' ") ended in 1949, but the spirit of its decisions persists. HOGG, *supra* note 34, § 5.3(c).

⁴⁰ *See* 1 P. *id.* at 28-11 to- 28-13; TODD, *supra* note 34, at 31-38. The statutory Canadian Bill of Rights, R.S.C. 1985, App. III, contains a due process clause that has been held to protect only procedural rights and, in any event,

Thus, the scope and purposes of expropriation must be divined from the interlocking provisions of the 1867 Act. Expropriation must be for a purpose within one of the powers allocated to the respective levels of government in sections 91 and 92. The federal power to expropriate has been closely confined to the heads of section 91, with only a slight leeway under the POGG Power.⁴¹ The provincial expropriation power, based not only on specific section 92 powers but on the Property and Civil Rights Power under section 92(13), has a broader and less defined reach.⁴² Within this framework, an expropriation may only be challenged as *ultra vires*, that is, beyond the constitutional or statutory power of the expropriating government or agency. Though there is no due process limit on governmental action, the courts have been careful to distinguish expropriation from the tort of abuse of public office, for which damages may be awarded if, for example, an effort to take land or diminish its value is undertaken in bad faith.⁴³

Mr. Justice Riddell evidently sought to soothe any pain engendered by his comment in *Florence Mining Co.*⁴⁴ a few years later, when he assured the Iowa Bar Association that “In Canada, nobody at all is afraid that his property will be taken from him; it never is, in the ordinary case.”⁴⁵ This comment describes a Canadian sense of security that has a non-constitutional source: Despite the breadth of legislative power, as a matter of sound policy and judicial interpretation, rather than constitutional right, payment of compensation for expropriation of property is the rule. Authorization to expropriate for particular purposes is conveyed in specific federal and provincial legislation and, by delegation, in municipal bylaws. General federal and provincial expropriation laws provide a process and standards for the determination and award of compensation when the government expropriates property in accordance with the applicable act and for payment of

applies only to the federal government and lacks entrenched constitutional status. It has been expressly held not to import the Takings Clause. HOGG, *supra* note 34, at 28-12; *infra*, text at notes 50-51. There is, in fact a “takings clause” in Article 952 of the revised Quebec Civil Code, S.Q. 1991, c. 64, § 952, which provides: “No owner may be compelled to transfer his ownership except by expropriation according to law for public utility and in consideration of a just and prior indemnity.” In *Société Asbestos v. Société nationale de l’amiante* (1981), 128 D.L.R. (3d) 405 (Que. C.A.), the court noted that the predecessor of this article, Article 407 of the Quebec Civil Code of 1866, lacked the constitutional status of the provision of the French Code Napoleon (1803) from which it was taken and that, as permitted by Article 1589 of the 1866 Code, a subsequent specific legislative provision for the timing of payment superseded the requirement of Article 407 that the indemnity be “previously paid.”

⁴¹ See HOGG, *supra* note 34, at § 28.5(a).

⁴² See *id.* at § 28.5(b) TODD, *supra* note 34, at 31-32.

⁴³ See, e.g., *Alberta (Minister of Public Works, Supply, & Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474 (Alta. C.A.) (holding that Crown officers’ intentional imposition of development freeze for *ultra vires* purpose was abuse of public office). See generally, Raymond E. Young, *Canadian Law of Constructive Expropriation*, 68 SASK. L. REV. 345 (2005).

⁴⁴ *Florence Mining Co. v. Cobalt Lake Mining Co.*, [1909] 18 O.L.R. 275, 279, text, *supra*, at notes 33, 34.

⁴⁵ William Renwick Riddell, *The Constitutions of the United States and Canada*, 32 CAN. LAW TIMES 849, 871 (1912), quoted in David. Schneiderman, *NAFTA’s Takings Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499, 523 at n.137 (1996).

consequential damages for injury to land occasioned by public action other than a taking (“injurious affection”).⁴⁶

When governmental action not covered by such a statute is judicially determined to be an expropriation, the courts follow a principle of statutory construction adopted from the British common law that the right to compensation will be presumed unless the statute expressly indicates that no compensation is to be paid.⁴⁷ Nevertheless, it still remains true, as suggested by Mr. Justice Riddell in *Florence Mining Co.*,⁴⁸ that compensation may be denied if the expropriating government so ordains. For example, in *Authorson v. Canada*, the Supreme Court of Canada upheld federal legislation expressly barring the payment of interest accrued on disabled veterans’ pensions prior to January 1, 1990, as an expropriation not barred by the statutory Canadian Bill of Rights.⁴⁹ The Court declined to read the American doctrine of substantive due process into the Bill of Rights.⁵⁰ In *R. v. Appleby*, the New Brunswick Court of Appeal upheld federal legislation requiring the publisher of a book in Canada “at his own expense” to send two copies of the book to the National Librarian as an expropriation within the power of Parliament. Defendant had argued that the Takings Clause of the Fifth Amendment should be read into the Canadian Bill of Rights.⁵¹ Thus, Canadian expropriation law in appropriate circumstances permits what would be an anomaly, if not an oxymoron, under U.S. law: An uncompensated taking.

A. Constructive or De Facto Expropriation

The presumption of compensation is of most significance in cases of constructive or *de facto* expropriation, which by definition arise outside the statutory expropriation framework.

⁴⁶ See TODD, *supra* note 34, at 7-14, 26-29. As to “injurious affection” (“not an emotion but an effect,” quoting *Edwards v. Minister of Transp.*, [1964] 2 Q.B. 134, 144 (Harlan, L.J.)), see *id.* at 328-93 (explaining that even if an owner’s land has not been expropriated, the owner may claim compensation in certain situations, for “injurious affection” caused to the land from the government’s lawful activities on neighboring land).

⁴⁷ *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101, citing *A.G. v. De Keyser’s Royal Hotel*, [1920] A.C. 508, 542 (H.L.); *R. British Columbia v. Tener*, [1985] S.C.R. 533; see also *Rock Res., Inc. v. British Columbia*, [2003] 229 D.L.R. (4th) 115 (B.C.C.A.); *Steer Holdings Ltd. v. Manitoba* (1992), 99 D.L.R. (4th) 611 (Man. C.A.). See generally 357-63 (2005); 1 P. HOGG, *supra* note 34, at 28-9 to 28-11; TODD, *supra* note 34, at 35-38.

⁴⁸ *Florence Mining Co. v. Cobalt Lake Mining Co.*, [1909] 18 O.L.R. 275, 279, discussed *supra*, text at notes 32, 34.

⁴⁹ *Authorson v. Canada (A.G.)* (2003), 227 D.L.R. (4th) 385.

⁵⁰ See text, *supra* at notes 12-15, 29-31 for discussion of the American doctrine of substantive due process. As to the Canadian Bill of Rights, see *supra* note 35.

⁵¹ *R. v. Appleby* (1976), 76 D.L.R. (3^d) 110 (N.B. A.D.). For cases finding the presumption rebutted in provincial legislation, see, e.g., *Canadian Pac. Ry. v. City of Vancouver* (2004), 237 D.L.R. (4th) 40 (B.C.C.A.); *B.C. Med. Serv. Ass’n v. R.* (1984), 15 D.L.R. (4th) 568 (B.C.C.A.).

Canadian law in this area is founded on two leading decisions by the Supreme Court of Canada.⁵² In *Manitoba Fisheries Ltd. v. R.*,⁵³ the federal government had given a monopoly of freshwater fishing to a Crown corporation (an entity created by and acting as agent of the Crown). The new entity did not acquire plaintiff's physical assets but absorbed all of its suppliers and customers. The Supreme Court held that plaintiff should receive compensation for the loss of business and good will, which had been acquired by the Crown. Citing *Manitoba Fisheries*, the Court held in *British Columbia v. Tener*⁵⁴ that a series of provincial acts that deprived plaintiffs of the right to access mineral deposits that they owned in a provincial park under a previous Crown grant required compensation, even though plaintiffs remained in possession of the mineral deposits. The Crown had reacquired a portion of its earlier grant, enhancing the value of the park. In both cases, since there was no formal statutory expropriation provision, the right to compensation was based on the presumption of compensation.

In subsequent cases, the courts have read these decisions to require not only a deprivation of beneficial use but an acquisition of an interest by the Crown as a condition for compensation. For example, in *Mariner Real Estate Ltd. v. Nova Scotia*,⁵⁵ the Nova Scotia Court of Appeal held that a designation of plaintiffs' property as "beach" under the provincial Beaches Act and a refusal of building permits for houses with concrete foundations did not deprive them of all reasonable use and did not amount to an acquisition of the land by the Crown entitling them to compensation under the provincial Expropriation Act. Declining to follow regulatory takings decisions of the U.S. Supreme Court because of their Constitutional basis, the court described its function as merely interpreter of the Expropriation Act, which it said, following *Manitoba Fisheries* and *Tener*, required deprivation of "all reasonable private use," not merely the loss of the economic value of the land. Moreover, the acquisition must be of an actual property interest, not merely an enhancement of value of the Crown's property. The court distinguished in this regard *Lucas v. South Carolina*⁵⁶ on the grounds that the U.S. Supreme Court had recognized regulatory takings under the Fifth Amendment for deprivation of economic value without the taking of a property interest. While other cases have softened the principle at the edges, no decision has abandoned the two prongs of virtually complete

⁵² See generally, Young, *supra* note 43, at 357-63; Clay, *supra* note 34, at 12-13; TODD, *supra* note 34, at 24-25, 165-68; HOGG, *supra* note 34, at 28-11.

⁵³ [1979] S.C.R. 101.

⁵⁴ [1985] S.C.R. 533; see also *Rock Res., Inc., v. British Columbia* (2003), 229 D.L.R. (4th) 115 (following *Tener* as to personal property); *Casamiro Res. Corp. v. British Columbia (A.G.)* (1991), (A.G.), 80 D.L.R. (4th) 1 (B.C.C.A.).

⁵⁵ 177 D.L.R. (4th) 696.

⁵⁶ 505 U.S. 1003 (1992) The court also noted the statement in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) that the purpose of the Takings Clause was to prevent individuals from bearing burdens that in fairness should be borne by the public, but stated that the task of Canadian courts was the narrower one of determining whether an expropriation was justified by statute. The court did, however, look with favor on the requirement of ripeness asserted in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997).

deprivation and acquisition.⁵⁷ As a result of this approach, land use and planning decisions generally are viewed as “regulatory” and do not result in compensation even when the burden on the owner is significant.⁵⁸

B. Public Use or Purpose

In effect, the limited federal POGG Power because of its residual nature, and the provincial Property and Civil Rights Power because of its great breadth, serve the police power function of the Fifth Amendment’s public use requirement. Most cases in which expropriation is challenged do not address the issue of public purpose. They involve purposes that are clearly within the powers of the expropriating authority, and the issue is whether the government action is an expropriation.⁵⁹ As noted above, the limit on expropriation powers is not found in due process or Taking Clause protection but in the ability to challenge an expropriation as *ultra vires* the expropriating government or agency. Provincial or federal expropriations are subject to this challenge if they are in conflict with the powers of the other level of government. Thus, direct challenges to expropriation legislation often raise issues of federalism.

For example, in *Reference Re Upper Churchill Water Rights Reversion Act 1980*,⁶⁰ the Supreme Court of Canada held *ultra vires* a Newfoundland act that provided for reversion to the province of all rights in a 1961 lease of hydro-electric resources to the Churchill Falls Corporation, repeal of the lease act, and expropriation of all of the corporation’s power-generation facilities. Compensation was to

⁵⁷ See, e.g., *A & L Investments Ltd. v. Ontario* (1997), 152 D.L.R. (4th) 692 (holding that legislation voiding rent increases was not an expropriation because government obtained no property); see generally, Young, *supra* note 43, at 353-57.

⁵⁸ See, e.g., *Alberta (Minister of Public Works, Supply, and Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474 (Alta. C.A.) (holding that development freeze in greenbelt area for later use as transportation corridor was not expropriation); *Manitoba Ltd. v. Manitoba* (2002), 214 D.L.R. (4th) 37 (Man. C.A.) (holding that denial of permit as inconsistent with park management plan was not expropriation); *Re Brighton (Municipality of) Official Plan Amendment No. 20, 46 O.M.B.R. 78* (Ont. Mun. Bd. 2003) (finding that a plan amendment resulting in designation of land as environmental protection is not expropriation and citing and distinguishing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), as to quantum of diminution required); *Harvard Inv. Ltd. v. Winnipeg* (1995), 129 D.L.R. (4th) 557 (Man. C.A.) (determining that historic property designation was not an expropriation), (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)); *Steer Holdings Ltd. v. Manitoba* (1992), 99 D.L.R. (4th) 61 (Man. C.A.) (holding that legislation general in nature but specifically designed to stop plaintiff’s development was a “taking away” but not an expropriation because there was no acquisition by province).

⁵⁹ See, e.g., *British Columbia v. Tener*, [1985] S.C.R. 533 (provincial park); *Steer Holdings Ltd. v. Manitoba* (1992), 99 D.L.R. (4th) 61 (Man. C.A.) (planning and zoning); *B.C. Med. Servs. Ass’n v. R.* (1984), 15 D.L.R. (4th) 568 (B.C.C.A.) (regulation of medical profession); *Roberts v. Newfoundland & Labrador* (2005), 255 D.L.R. (4th) 673 (N.L.C.A.) (public hospital); *Alberta (Minister of Public Works, Supply, & Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474 (Alta. C.A.) (development freeze).

⁶⁰ [1984] 1 S.C.R. 297.

be paid only to secured creditors and to shareholders for diminution in the value of their shares. The Newfoundland act did not provide compensation for the corporation's facilities. Thus, the act could not be sustained under section 92(13) of the 1867 Constitution Act, because, by rendering the corporation unable to fulfill its contractual commitments to supply power to Hydro-Quebec, a Quebec entity, it affected property and civil rights outside the province.⁶¹ The Quebec Court of Appeals, in *Société Asbestos v. Société nationale de l'amiante*, held that Quebec legislation providing for the expropriation of the property of the Asbestos Corporation was *intra vires*, that is, a valid exercise of the provincial power under section 92(13). The legislation did not affect the structure and other potential activities of the federally incorporated Société Asbestos and primarily affected facilities and resources within the province, with only an incidental effect on inter-provincial trade and commerce, over which there was federal power under section 91(2) of the Constitution Act.⁶² In addition to challenges based on federal-provincial distribution of powers, governmental actions may also be challenged as *ultra vires* because they are beyond the powers delegated by the federal or provincial government to a municipality or other entity.⁶³ With the focus thus on distribution or delegation of power, expropriation for the benefit of private interests has not been an issue where governmental action is *intra vires*.⁶⁴

⁶¹ See also *Munro v. National Capital Comm'n.*, [1966] S.C.R. 663 (holding that POGG power sustained expropriation to create a green belt, because act was not "in relation to provincial property and civil rights"); *R. v. Appleby* (1976), 76 D.L.R. (3d) 110 (N.B.A.D.) (upholding expropriation as within POGG Power), discussed *supra*, text at note 51.

⁶² *Société Asbestos v. Société nationale de l'amiante* (1981), 128 D.L.R. (3d) 405 (Que. C.A.) The court interpreted the Quebec legislation to apply only to property and resources within the province, thus avoiding the issue that led to the conclusion that the legislation in *Upper Churchill Water Rights*, [1984] 1 S.C.R. 297, text *supra* at notes 60-61, was *ultra vires*.

⁶³ See, e.g., *Canadian Pac. Ry. v. City of Vancouver* (2004), 237 D.L.R. 40 (B.C.C.A.) (determining that designation of former rail corridor as public thoroughfare was not *ultra vires* provincial Planning Act); *McAfee v. Irving Ref. Ltd.* (1970), 17 D.L.R. (3d) 729 (N.B. A.D.) (finding expropriation for pipeline right of way within province permissible under § 92(13) of Constitution Act, 1867); *But see Steer Holding Ltd. v. Manitoba* (1992), 99 D.L.R. (4th) 61 (Man. C.A.) (explaining that if zoning bylaw is disguised confiscation, owner should seek declaration that it is *ultra vires*); *Columbia Estate Co. Ltd. v. Burnaby* (1974), 49 D.L.R. (3d) 123 (B.C. Supr. Ct.) (reserving private land for later parking use through a zoning bylaw was *ultra vires*); *Tegon Devs. Ltd. v. Edmonton* (1977), 81 D.L.R. (3d) 543 (Alta. Supr. Ct. A.D.), *aff'd sub nom*, *Edmonton v. Tegon Devs. Ltd.*, [1979] 1 S.C.R. 98 (1978) (holding that development freeze pending historic designation was *ultra vires* the provincial Planning Act).

⁶⁴ See, e.g., *Newman v. Toronto (City of)* (1998), 1998 CarswellOnt. 6347 (Ont. Joint Board) (considering property expropriated under urban redevelopment plan to be resold or leased to private interests); *Magee v. Calgary* (1979), 103 D.L.R. (3d) 686 (Alta. Q.B.) (upholding expropriation of private land for lease to private developer where private use was sufficiently subordinate to public use); *Mangin v. Windsor* (1978), 1978 Carswell Ont. 506 (Ont. S.C.D.C.) (upholding expropriation from one developer to allow second developer to construct housing project); *McAfee v. Irving Ref. Ltd.* (1970), 17 D.L.R. (3d) 729 (N.B. A.D.) (analyzing expropriation of private land for refining company's pipeline right of way). *Cf. Florence Mining Co. v. Cobalt Lake Mining Co.*, [1909] 18 O.L.R. 275.

C. *Lingle* and *Kelo* in Canada?

In sum, though there is no Takings Clause to limit expropriation in Canada, there are other significant limits on the practice. Expropriation may be undertaken by express statutory action or may be constructive, but only if property is rendered useless to the owner and the government acquires some interest in it. If an action is deemed to be expropriation, then compensation is either provided expressly by the expropriating statute or the right will be presumed in the absence of an express statutory denial of compensation. If an action does not meet the definition of statutory or constructive expropriation, then there is no right to compensation unless expressly provided by statute. However, the common-law torts of injurious affection and abuse of office provide remedies if governmental action causes actual damage to property or is confiscatory or undertaken in bad faith.

Despite academic concerns that NAFTA would import American takings jurisprudence wholesale into Canadian expropriation law,⁶⁵ Canadian courts have continued to show a marked disinclination to follow U.S. Takings Clause decisions. The *Lingle* categorization of regulatory takings may nevertheless offer guidance for decisions on constructive expropriation. Cases in which the Canadian courts have found constructive expropriation would fit into the first two *Lingle* categories: permanent physical invasion and deprivation of all economically beneficial use. The utility of the third category, where the impact of the regulation on individual property interests outweighs its contribution to the common good, is problematic in view of the strong Canadian tradition of upholding regulatory actions, particularly the regulation of land use, though it may provide a rationale for addressing expropriation issues in other areas. As to *Kelo*, despite the different Constitutional framework from which it arises, its underlying rationale is consistent with the Canadian approach. While expropriation in Canada must find its ultimate basis in an express power of the federal or a provincial government, those powers, like the police power scope given to public use in *Kelo*, are broadly stated and define the whole realm of proper public purposes. Deference is given to legislative determinations that governmental action is within those powers.⁶⁶

An important common feature of *Lingle* and *Kelo* may be more instructive. The two cases together clearly assign the due process inquiry to the determination of public use and posit a police

⁶⁵ Schneiderman, *supra* note 45, discussed further, *infra*, text at note 86.

⁶⁶ One recent Canadian comment expressed concern that *Kelo* would be understood as sanctioning use of expropriation to aid land-assembly schemes for private development. The effect would be to allow developers to avoid paying "last man standing premiums" to holdouts, because the usual compensation rules preclude consideration of increases in value caused by the impact of the land assembly process. Jeffrey W. Lem, Annotation on *Roberts v. Newfoundland & Labrador (Minister of Transportation & Works)* (2005) 255 D.L.R. (4th) 673 (N.L.C.A.). As to the usual rule, see, e.g., *Re Weidman and Minister of Pub. Works* (1979), 99 D.L.R. (3d) 472 (B.C.C.A.); TODD, *supra* note 34, at 158-62. However, avoidance of the premium would seem to be an appropriate exercise of governmental powers when an ultimate public benefit comparable to that found in *Kelo* is the purpose of the expropriation.

power reasonable-relation standard for that determination. The effect is to place new emphasis on the purpose of the Takings Clause to redress harm to the owner without regard to the extent of the governmental benefit achieved.⁶⁷ This focus may suggest a basis for Canadian courts to move away from the present requirement in constructive expropriation decisions that the government have acquired the interest that the property owner has lost. The *Lingle/Kelo* shift of the focus from the governmental benefit to the owner's loss makes clear the distinction between an action that is invalid because it exceeds governmental power and one that is compensable because it injures a property interest. While the Canadian decisions do not recognize any substantive due process protection of property rights that is relevant to expropriation, it is also fundamental that governmental action that is *ultra vires* is invalid. Indeed, a deliberate *ultra vires* action may give rise to damages in tort. With these protections of the property owner in place, the Canadian courts could well follow the spirit of *Lingle* and *Kelo* and begin to treat the "constructive" nature of the expropriation as rendering the requirement of acquisition constructive as well. The emphasis would be on the degree of impairment of the property owner's interest. If it is significant and the government has acted *intra vires*, the government has by definition acquired a benefit because its proper purpose has been served. The taking is then compensable unless compensation is expressly denied in the regulatory scheme.

III. MEANWHILE, IN NAFTA-LAND

*No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.*⁶⁸

A. Article 1110

Article 1110 of the North American Free Trade Agreement, set forth above, was adopted effective in 1994 by Canada, Mexico, and the United States, as part of Chapter 11, which implements

⁶⁷ See text, *supra* at notes 29-32; see, e.g., *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2082 (2005) (goal is "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests [defining regulatory takings] focuses upon the severity of the burden that government imposes upon private property rights").

⁶⁸ North American Free Trade Agreement art. 1110(1), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

the NAFTA objective of substantially increasing “investment opportunities in the territories of the Parties.”⁶⁹ Section A of Chapter 11 provides a variety of specific protections that a Party must provide for investors of another Party, including the requirements of Articles 1102-1104 that investors be accorded the better of the treatment accorded a Party’s own nationals or foreign nationals.⁷⁰ Article 1105(1) provides that treatment of investments must be “in accordance with international law, including fair and equitable treatment and full protection and security.”⁷¹ Article 1110(1), set forth above, prohibits expropriation of an investment except as provided therein. Paragraphs (2)-(6) of Article 1110 include requirements that compensation be at fair market value at the time of expropriation and that it “be paid without delay and be fully realizable.”⁷² “Investment” is defined as including a corporate or other enterprise; equity, debt, and other interests in an enterprise; real estate or other tangible or intangible property acquired or used for economic benefit; and certain contract interests arising from the commitment of resources to economic activity.⁷³ Section B of Chapter 11 provides a procedure under which an individual investor may submit to binding arbitration a claim that a Party has breached a protection provided by Section A.⁷⁴ Arbitration tribunals consisting of three arbitrators are to decide such claims “in accordance with this Agreement [NAFTA] and applicable rules of international law.”⁷⁵ Awards are to “have no binding force except between the disputing parties and in respect of the particular case.”⁷⁶ Limited judicial review of an award is available in the domestic courts of the state where the Tribunal has sat.⁷⁷

Article 1110(1) resembles the Takings Clause of the Fifth Amendment in structure, and with good reason. It is drawn in large measure from the language of a series of Bi-national Investment Treaties (BITs) that the United States developed and entered into beginning in 1982. The intention was to provide American investors in what were by and large undeveloped nations with significant protection against expropriation. The BIT terms in large part reflected the triumph of the distinctively American view of governmental appropriation of private property embodied

⁶⁹ NAFTA, *supra* note 68, art. 102(1)(c).

⁷⁰ *Id.*, arts. 1102-1104.

⁷¹ *Id.*, art. 1105(1).

⁷² *Id.*, arts. 1110(2), (3).

⁷³ *Id.*, art. 1139. “Enterprise” is defined in *id.*, Art. 201, to mean for-profit or nonprofit entities, privately or governmentally owned, “including any corporation, trust, partnership, sole proprietorship, joint venture, or other association.”

⁷⁴ *Id.*, arts. 1115-1138.

⁷⁵ *Id.*, art. 1131(1).

⁷⁶ *Id.*, art. 1136(1).

⁷⁷ Chapter 11 is silent on the question of judicial review of an award, but judicial review is available under two of the three arbitration regimes that Article 1120 makes available. *Id.* arts. 1122, 1136(3), (7). *See generally*, Cheri D. Eklund, *A Primer on the Arbitration of NAFTA Chapter 11 Investor-State Disputes*, 11 J. INT’L ARBITRATION., Dec. 1994, at 135.

in the jurisprudence of the Takings Clause.⁷⁸ So dominant did that view seem as a principle of international law that the American Law Institute substantially adopted it in the *Restatement of the Foreign Relations Law of the United States* in 1965.⁷⁹ A provision virtually identical to Article 1110(1) appeared in the Canada-United States Free Trade Agreement, NAFTA's immediate predecessor.⁸⁰ Comparable provisions are found in recent international agreements, and in pending drafts of others.⁸¹

The provisions of Chapter 11 allowing an individual investor to initiate arbitration directly with a Party state, also derived from the BITs, are contrary to the more usual practice under international agreements, in which only the Party states may proceed on behalf of their citizens for whatever remedies may be provided.⁸² In ways evidently not anticipated by the drafters, this grant of individual standing has raised significant concerns that investor interests will make use of the arbitration procedure to override, and ultimately discourage, police power regulation, particularly at the sub-national level, that has a significant impact on investment. Though the domestic expropriation or takings law of Canada, Mexico, and the United States varies considerably, these concerns would ultimately have an impact on each of them.

B. The Parties and NAFTA Jurisprudence

In Canada, as Part II of this paper notes, the law of expropriation, lacking a constitutional basis, is considerably less friendly to property owners than is takings law in the United States.⁸³ Mexican expropriation law, under the influence of NAFTA and a new national focus on globalization, is in a state of transition toward a more investor-friendly posture. It is founded on Article 27 of the

⁷⁸ As to the development of the BIT program and the expropriation provisions, see Kenneth J. Vandavelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L LAW 621, 642-58 (1993); Kenneth J. Vandavelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 231-36 (1988).

⁷⁹ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 185-92 (1965), revised, with addition of requirement that taking not be discriminatory, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1) (1987). Neither ALI provision includes the requirement of Article 1110(1) that the taking be "in accordance with due process of law," but see generally RESTATEMENT (THIRD), § 711.

⁸⁰ Canada-United States Free Trade Agreement art. 1605, Jan. 2, 1988, 27 I.L.M. 281 (1988).

⁸¹ See Matthew C., Porterfield, *International Expropriation Rules and Federalism*, 23 STANF. ENVTL. L.J. 3, 41-68 (2004); Free Trade Area of the Americas Ch. XVII, art. 13, , 3d draft, Nov. 21, 2003, available at http://www.ftaa-alca.org/FTAADraft03/ChapterXVII_e.asp (last visited Dec. 11, 2005); Dominican Republic-Central America-United States Free Trade Agreement chapter 10, art. 10.7 (2005) available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file328_4718.pdf.

⁸² See Vandavelde articles cited, *supra* note 78. The Canada-United States Free Trade Agreement, *supra* note 80, provides only for dispute settlement between the Party states. See *id.*, arts. 1608, 1806, 1807.

⁸³ See generally *supra* notes 59-67 and accompanying text.

Constitution of 1917, which permits expropriation only for a public use and with compensation fixed at the property's current tax valuation through an expedited judicial proceeding. Article 27 also expressly permits limitations on private property when necessary in the public interest, as well as more specific regulation of the use of natural resources to assure equitable distribution of public wealth, well-balanced development, and improvement of living conditions. Such limitations, which have included environmental and other land use restrictions, do not require compensation if they are of general applicability and do not transfer ownership.⁸⁴ The history of Article 27 and its application suggest that it was a significant factor in discouraging foreign investment in Mexico. Indeed, a principal goal of NAFTA was reduction of the threat of expropriation as a barrier to investment in that country.⁸⁵

The initial Canadian fear that NAFTA would lead to the importation of American takings standards and concepts into Canadian domestic law has not been realized.⁸⁶ Instead, the reasoning in the relatively small number of final decisions by NAFTA tribunals in claims based on Article 1110 has given rise in both Canada and the United States to a more serious and focused concern. Commentators fear that the provision of Article 1110(1) providing compensation for "a measure tantamount to ... expropriation," together with other provisions of Chapter 11, the establishment of international law as the rule of decision, and the lack of precedential value for tribunal decisions, mean that investors will raise, and tribunals will recognize, claims of constructive expropriation that go beyond even the open-ended American law of regulatory takings. The result would be discrimination in favor of foreign investors and against domestic interests. The further concern is that to avoid this effect, if state or provincial and local land use and other regulations are found to be expropriations in sufficient number and at sufficient cost, the respective national governments may seek to limit the scope of sub-national regulation or impose requirements of compensation on it. The effect would be to chill police power regulation that, as a matter of domestic policy, may have significant benefits in areas such as health and safety and environmental protection.⁸⁷

⁸⁴ MEX. CONST. art. 27 & art. 27(VI), translated in GIBBERT H. FLANZ & PATRICIE H. WARD, 12 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (2004); See J. Martin Wagner, *International Investment, Expropriation, and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465, 516 (1999); Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 U.C.L.A. L. REV. 35, 49-51, 54-57 (2003). Article 27 is supplemented by the 1936 Law of Expropriation, D.O., Nov. 25, 1936, available at <http://www.cddhcu.gob.mx/leyinfo/pdf/35.pdf>, which sets forth a broad definition of public use to include such purposes as takings to avoid exploitation of natural resources or accumulations of monopolized wealth. *Id.*

⁸⁵ *Id.* at 49-93.

⁸⁶ See Schneiderman, *supra* note 4500. See generally *supra* note 65 and accompanying text.

⁸⁷ See, e.g., Naveen Gurudev, Comment: *An Evaluation of Current Legitimacy-Based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process*, 6 SAN DIEGO INT'L L.J. 399, 403-27 (2005); Porterfield, *supra* note 81, at 43-68; Vicki Been and 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, 40-86 (2003); Howard Epstein, *NAFTA, Other International Agreements and Local Government Jurisdiction—Comments on United Mexican States v. Metalclad Corp.*, 34 MUN. PLANNING L. REP. (3d) 44 (2003).

The jury, so to speak, is still out on the question whether NAFTA tribunal decisions to date do in fact indicate a threat to domestic law and policy that warrants change. Since 1997, notice of arbitration has been filed in at least twenty-nine claims involving Article 1110. Final decisions have been made in ten of these claims, one was settled during the arbitration process, eight are pending before tribunals, in eight no tribunal has been established, and in two the notice has been withdrawn.⁸⁸ Concern has focused on *Metalclad Corp. v. Mexico*, ironically a case that demonstrates the effectiveness of Chapter 11 from the viewpoint of a foreign investor in Mexico.⁸⁹ A hazardous waste landfill had been constructed in Mexico by a U.S. company under Mexican federal and state permits but a municipal permit was denied without notice and the governor of the state created an “ecological zone” in the area, thus rendering the landfill useless. The NAFTA tribunal found both actions “tantamount to” an expropriation under Article 1110, reading that language broadly to include any interference with use that had a significant impact.⁹⁰ The tribunal had sat in Canada. On appeal by Mexico, the British Columbia Supreme Court (a trial court) found that the first action involved a violation of Article 1105 that was beyond the tribunal’s jurisdiction, but held that it could not review the tribunal’s legal conclusion as to the scope of “tantamount” and so upheld the second finding.⁹¹ The other nine final decisions have all denied the expropriation claim, giving “tantamount to expropriation” a narrower reading than the *Metalclad* tribunal had proposed. Several found a violation of other provisions of Chapter 11. Despite the formal lack of precedential value for Chapter 11 decisions, the tribunals have begun to cite and analyze prior tribunal decisions⁹²

A recent Canadian decision at the trial court level rejected arguments that the provisions of Chapter 11 violate various constitutional guarantees, including those of equality. The court accepted

⁸⁸ There is no official publication or compilation of tribunal decisions. Documents, including tribunal awards, may be accessed on a number of web sites. See, e.g., <http://www.state.gov/s/l/c3439.htm>; <http://www.dfait-maec.gc.ca/tna-nac/NAFTA-e.asp>; <http://www.naftaclaims.com> (all last visited on Dec. 2, 2005).

⁸⁹ See Del Duca, *supra* note 84, at 85-93.

⁹⁰ *Metalclad, Inc. v. Mexico* (2000), available at www.state.gov/s/l/c3439.htm.

⁹¹ *United Mexican States v. Metalclad Corp.* (2001), 89 B.C.L.R. (3d) 359, (B.C.S.C.).

⁹² See *Azinian v. Mexico* (1999), available at <http://www.state.gov/s/l/c3750.htm> (cancellation of concession contract was not expropriation); *Pope and & Talbot, Inc. v. Canada* (2002), available at <http://www.state.gov/s/l/c3747.htm> (Art. 1105 violated; interference not substantial enough to be expropriation); *S.D. Myers v. Canada* (2002), available at <http://www.state.gov/s/l/c3746.htm> (violations of Arts. 1102, 1105; temporary interference is not expropriation); Federal Court of Canada dismissed AG’s appeal, 1/13/04; *Mondev Int’l Ltd. v. United States* (2002), available at <http://www.state.gov/s/l/c3758.htm> (claim under Art. 1110 time-barred); *Methanex Corp. v. United States* (2005), available at <http://www.state.gov/s/l/c5818.htm> (state ban of MBTE additive was regulation, not expropriation); *Loewen Group v. United States*, (2003), available at <http://www.state.gov/s/l/c3755.htm> (judicial actions were not expropriation); *Feldman v. Mexico* (2002), <http://www.state.gov/s/l/c3751.htm> (tax on exports was not expropriation); *GAMI Invs., Inc. v. Mexico* (2004), available at <http://www.state.gov/s/l/c7119.htm> (investor’s loss from expropriation of corporate assets was not expropriation); *Waste Mgmt., Inc. v. Mexico* (2004), available at <http://www.state.gov/s/l/c3753.htm> (breach of contract did not violate Art. 1105 and was not expropriation).

the government's position that many of the challenges were at best premature.⁹³ The commentators, both Canadian and American, however, have seen in the language and approach of the NAFTA tribunal decisions ground for their concerns. The tribunals have not only defined "investment" broadly (as NAFTA requires) but have ignored limiting features of U.S. takings jurisprudence, such as the rejection of constructive severance, the reasonableness of the claimant's expectation or reliance, and procedural requirements of exhaustion and ripeness. Tribunals have also not followed the Canadian requirements that expropriation involve a transfer of interest to the expropriating governments and that compensation is only payable by express statutory provision or as a result of the common-law presumption.⁹⁴

These concerns have given rise to a variety of proposed cures. Proposals range from NAFTA amendments that would clarify or eliminate the provision of compensation for measures "tantamount to expropriation" to the adoption of a system of precedent and, perhaps, of internal review that would allow the development of standards through a "common-law" process. Such a system might shore up the breadth of NAFTA's express provisions with concepts derived from the American regulatory taking cases.⁹⁵ All such proposals would force the governments of the Parties to tread a delicate line between sustaining the protections for their own investors abroad that Chapter 11 was meant to assure and heeding the complaints of domestic interests that traditional regulatory authority is seriously impaired when those protections are invoked by foreign investors at home. Ironically, this problem has arisen for the United States only with the advent of NAFTA because the nations upon which the United States imposed similar BIT provisions lacked the economic capacity to be a source of significant investment in the United States.

C. Lingle, Kelo, and NAFTA

Given NAFTA's direction that claims under it are to be decided "in accordance with this Agreement and applicable rules of international law,"⁹⁶ tribunals in Article 1110 proceedings have made little direct reference to U.S. Takings Clause decisions. In this situation, it would

⁹³ Council of Canadians v. Canada (A.G.), 2005 Carswell Ont. 2973 (Ont. S.C.J.), available at 2005 W.L. 1594597.

⁹⁴ See Gurudevan, *supra* note 87, at 411-19; Edward J. Sullivan & Kelly D. Connor, *Making the Continent Safe for Investors: NAFTA and the Takings Clause of the Fifth Amendment of the American Constitution*, 36 URB. LAW 99, 119-128 (2004); Porterfield, *supra* note 81, at 43-68; Been & Beauvais, *supra* note 87 at 59-86; Epstein, *supra* note 87, text accompanying notes 10-53; Ethan Shenkman, *Could Principles of Fifth Amendment Takings Jurisprudence Be Helpful in Analyzing Regulatory Expropriation Claims Under International Law?*, 11 N.Y.U. ENVTL. L. J. 174, 182-97 (2002).

⁹⁵ See Gurudevan, *supra* note 87, at 427-33; Porterfield, *supra* note 81, at 86-89; Been & Beauvais, *supra* note 87, at 128-43; Epstein, *supra* note 87, text accompanying notes 127-31; Shenkman, *supra* note 94, at 182-97.

⁹⁶ NAFTA, *supra* note 68, art. 1131(1).

seem that *Lingle* and *Kelo* would not have significant impact on tribunal decisions. The fact that there is no formal system of precedent between tribunal decisions further limits the possibility. Nevertheless, the similarity of the substantive framework of NAFTA and the Fifth and Fourteenth Amendments, together with the basic instinct to decide like cases alike, may mean that, as the NAFTA jurisprudence develops, U.S. concepts will find their way into the mix as an articulation of the principles of “this Agreement and applicable rules of international law.” As previously noted, Article 1110 closely parallels the Takings Clause. Certainly those tribunal decisions that have read the phrase “tantamount to . . . expropriation” as not extending the concept of expropriation beyond regulation that significantly diminishes an investor’s interest are consistent with U.S. regulatory takings jurisprudence.

Commentators have pointed out that other provisions of Chapter 11 have their parallels in the Bill of Rights as well. Thus, Articles 1102-1104 require that a Party accord the investors of another Party the more favorable of the treatment that it accords its nationals and the most favorable treatment that it accords the nationals of any other state. These provisions have the effect of the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment. Article 1105 is a kind of Due Process Clause, requiring a Party to accord “fair and equitable treatment and full protection and security” to investments of another Party’s investors, regardless of how domestic investors are treated.⁹⁷ In addition, Articles 1101(4) and 1114 recognize a Party’s right to take domestic measures for certain police power purposes, expressly including environmental measures, though these measures must be consistent with Chapter 11.⁹⁸

It is in the context of this group of Chapter 11 provisions that *Lingle* and *Kelo* could have an effect—assuming that NAFTA tribunals will look to the Takings Clause framework by analogy. In Part I of this paper, I have suggested that the significance of those two cases for U.S. Takings Clause law is that they have clarified the relationship between the Takings Clause and other provisions of the Fifth and Fourteenth Amendments by in effect creating a two-tiered decision-making process.⁹⁹ Governmental action taken to serve the public health, safety, or general welfare pursuant to the police power must first be tested by the standards of due process or equal protection: Does the action, or a discrimination pursuant to it, bear a rational relation to the police power purpose? An action must pass that test before the question whether it is in fact a taking will be determined. Similarly, in a NAFTA Chapter 11 proceeding, though Articles 1102-1105 are expressly incorporated as standards defining a permitted, compensable, expropriation in Article 1110(1)(b) and (c), *Lingle* and *Kelo* counsel that these standards can effectively and properly be abstracted from the

⁹⁷ *Id.* arts. 1102-1105; see Been & Beauvais, *supra* note 87, at 40-41.

⁹⁸ NAFTA, *supra* note 68, arts. 1101(4), 1114.

⁹⁹ See *supra* Part I.

expropriation decision. If the challenged governmental action fails the tests of Articles 1102-1105, then any proposed or consummated expropriation is void. The appropriate remedy under Article 1135(1) is monetary damages for any incidental harm from the proposal to expropriate, or restitution of property, or money damages in lieu of restitution, if the property has in fact been expropriated. If the governmental action satisfies Articles 1102-1105, then, following *Kelo*, it is “for a public purpose.” Only then do the questions arise whether the action is in fact an expropriation, and, if it is, what is the appropriate measure of compensation.

Concededly, this use of *Lingle* and *Kelo* would not directly address concerns that Article 1110 threatens the domestic police power regimes of the Parties. That concern can only be met by the kinds of revisions of the agreement itself that commentators have suggested. To the extent that such revisions require the insulation of police power regulation from the reach of Chapter 11, they invoke the tension between legitimate domestic regulation and inappropriate trade barriers that is inherent in all international trade agreements.¹⁰⁰ Application of *Lingle* and *Kelo* might lower the tension, however, by more clearly separating the trade barrier issues from the expropriation issues. If the focus in Article 1110 proceedings is on the impact of governmental action that is otherwise proper under Chapter 11, tribunals will be in a better position to determine whether regulation other than an actual taking of possession or ownership has sufficient impact on the investor to be an action “tantamount to . . . expropriation.”

IV. CONCLUSION

Lingle and *Kelo* show U.S. takings law in the course of a continuous process of refinement and clarification, reaffirming the police power basis of the public use requirement and the need to define a taking of property in terms of its impact on the owner. A direct comparison of this distinctively American jurisprudence with Canada and NAFTA is rendered difficult, and suggestions that it might influence those treaties are rendered problematic by profound differences among the legal frameworks and the legal cultures involved. In contrast to the United States, Canada's constitution retains a limited form of parliamentary sovereignty in a tightly interlocked distribution of power between the national and provincial governments. Property rights are protected neither by a generic Due Process Clause nor a specific Takings Clause. NAFTA at first blush seems to establish an expropriation regime comparable to the U.S. law of takings. NAFTA, however, is a quasi-constitutional instrument, and Chapter 11 is intended to protect foreign investors as part of a more

¹⁰⁰ See, e.g., “The Tuna/Dolphin Case,” General Agreement on Tariffs and Trade Dispute Settlement Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991) (holding that U.S. could not ban imports of tuna caught by methods that violated U.S. Marine Mammal Protection Act); see, generally, JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 414-48 (2000); BRIAN McDONALD, *THE WORLD TRADING SYSTEM: THE URUGUAY ROUND AND BEYOND* 257-68 (1998).

general regime of international trade protections. Its framework provides no real balance between property protection and the traditional police power regimes of domestic law and no mechanism for striking such a balance. Nevertheless, this essay presumes to suggest that, without direct reference to *Lingle* and *Kelo*, Canadian courts and NAFTA tribunals can observe and follow their direction: Excess of governmental power in a purported expropriation should be restrained through substantive protections akin to the Due Process Clause. Decisions to allow compensation for expropriation should focus on the impact of governmental action on the owner's rights.