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NAFTA Chapter 11 and the Environment: An Assessment after Fifteen Years

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Books and numerous articles have been written about the interplay between NAFTA Chapter 11 and environmental protection.[1] In this relatively short contribution I will limit myself

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[1] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 612 (1993) [hereinafter NAFTA]. A partial listing of relevant writings includes: GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION (D.L. Markell & J.H. Knox eds., 2003); GREENING THE AMERICAS: NAFTA'S LESSONS FOR HEMISPHERIC TRADE (C.L. Deere & D. Esty eds., 2002); HOWARD MANN & KONRAD VON MOLTKE, NAFTA'S CHAPTER 11 AND THE ENVIRONMENT: ADDRESSING THE IMPACTS OF THE INVESTOR-STATE PROCESS ON THE ENVIRONMENT (1999); PIERRE M. JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW (1996); NAFTA & THE ENVIRONMENT: SUBSTANCE & PROCESS (D.B. Magraw ed., 1995); Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine*, 78 N.Y.U. L. REV. 30 (2003); Lucien J. Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of* Metalclad Corporation v. United Mexican States, 10 MINN. J. GLOBAL TRADE 209 (2001); Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 AM. BUS. L.J. 475 (2001); David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Protection under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651 (2001); Howard Mann, *NAFTA and the Environment: Lessons for the Future*, 13 TUL. ENVTL. L.J. 387 (2000); Justin R. Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law*, 16 J. TRANSNAT'L L. & POL'Y 275 (2007); Marc R. Poirier, *The NAFTA Chapter 11 Expropriation*

to discussing three areas in which NAFTA Chapter 11 and its interaction with environmental issues have affected the subsequent development of investment laws and policies.

The first two areas will come as no surprise to followers of NAFTA Chapter 11 and its progeny—the investment agreements (and the trade agreements with investment chapters lodged within them) concluded primarily by the United States and Canada and affected in significant ways by the experiences of those two governments with NAFTA Chapter 11. One is the evolution of the definition of regulatory expropriation in the U.S. Model Bilateral Investment Treaty of 2004[2] and the Canadian Model Foreign Investment Promotion and Protection Agreement of 2003,[3] as well as in those States' post-NAFTA investment agreements and free trade agreements; the second is the strengthening of the environmental safeguards included in those agreements.

The third area is the development of transparency norms in investment arbitration. By transparency norms I mean both the participation of *amici curiae* in investment arbitration and the publication of awards, and even of party pleadings and memorials. These two norms are linked, and while they may seem only tangentially related to the environment, the impetus for greater transparency in investor-State arbitration can be traced to the acts of NGOs—and particularly environmental NGOs—seeking

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Debate Through the Eyes of a Property Theorist, 33 ENVTL. LAW. 851 (2003); Stephen J. Byrnes, *Balancing Investor Rights and Environmental Protection in Investor-State Dispute Settlement under CAFTA: Lessons from the NAFTA Legitimacy Crisis*, 8 U.C. DAVIS BUS. L.J. 103 (2007); Thomas Wälde & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 INT'L & COMP. L.Q. 811 (2001).

[2] Available at http://www.state.gov, the website of the U.S. Department of State [hereinafter U.S. Model BIT].

[3] Available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website [hereinafter Canadian Model FIPA].

information about and access to cases in which environmental regulations affecting the public interest were at issue.[4]

I. REGULATORY EXPROPRIATION

Regulatory expropriation, a type of indirect taking, is an ever-controversial topic. Article 1110 is the provision in Chapter 11 that protects foreign investors from uncompensated expropriations. In the early years of Chapter 11—the first seven or eight of this now venerable institution—a few tribunals suggested a broad interpretation of that language. In *Metalclad*, for example, the tribunal suggested that "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" constituted an expropriation.[5] The *Pope & Talbot* tribunal suggested, albeit in *obiter dicta*, that restriction of market access could be an expropriation.[6] The then-pending *Methanex* dispute, which involved a challenge to California's ban on the gasoline additive methyl tertiary-butyl ether, was a case in which the idea that removal of a market constituted an expropriation could have been a significant weapon in the claimant's arsenal.[7] Concerned about what they reviewed as potentially expansive liability for regulations taken to protect public health and the safety and the

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[4] *See* Donald McRae, *Trade and the Environment: The Issue of Transparency*, *in* Markell & Knox, *supra* note 1, at 237.

[5] Metalclad Corp. v. United Mexican States, Award, Aug. 30, 2000, 16 ICSID REV. 168, ¶ 103 (2001), available at http://www.ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration.

[6] Pope & Talbot, Inc. v. Canada, Interim Award, June 26, 2000, 40 I.L.M. 258, ¶¶ 96–98 (2001), available at http://www.ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration.

[7] Methanex Corp. v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, Aug. 9, 2005, 44 I.L.M. 1345, Part IV, Chapter D, 1–3 (2005), available at http://www.naftaclaims.com.

environment, the United States and Canada amended their Model BIT and Model FIPA, respectively, to address the relationship between police powers regulation and the expropriation provision in investment treaties.

The U.S. Model BIT of 2004 did not eliminate altogether the possibility that regulation could effect an indirect expropriation, but it added limiting language (and this language is also included in annexes to U.S. free trade agreements).[8] It set forth a number of factors for a tribunal to consider, including (1) the economic impact of the government action, although it emphasized that an adverse economic effect alone is insufficient to establish that taking has occurred; (2) the extent to which the government action interfered with legitimate investment-backed expectations; and (3) the character of the government action.[9] These criteria mirror those set out by the U.S. Supreme Court in the *Penn Central* case for considering the effect of regulation in domestic takings law.[10]

The second limiting provision specifies 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.[11]

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[8] *See, e.g.*, the U.S. Model BIT, Annex B; the United States-Singapore Free Trade Agreement, Art. 15.6 & Letter Exchange on Expropriation, available at http://www.ustr.gov, the website of the Office of the United States Representative; and United States-Chile Free Trade Agreement, Art. 10.9 & Annex 10-D, available at http://www.sice.oas.org, the website of the Organization of American States dedicated to Foreign Trade Information.

[9] U.S. Model BIT, Annex B.

[10] Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) [hereinafter *Penn Central*].

[11] *Id.*

The Canadian Model FIPA contains language virtually identical to that in the U.S. Model BIT, including the three criteria derived from the U.S. Supreme Court in *Penn Central*:

> The Parties confirm their shared understanding that:
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> a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
>
> b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
>
> ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and
>
> iii) the character of the measure or series of measures;
>
> c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.[12]

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[12] Canadian Model FIPA, Annex B.13(1).

Mexico, on the other hand, has not included limiting language about police powers in its investment agreements.[13]

The language in Annex B of the US Model BIT and in Annex B.13 (1) of the Canadian Model FIPA was designed to clarify the scope of the expropriation obligation, an initiative one would ordinarily applaud. It may have failed to achieve that objective for at least four reasons.

First, the criteria for assessing the existence of an indirect expropriation are imported from U.S. takings jurisprudence, notably from the *Penn Central* case. That case established that the primary factors a court should consider when evaluation a regulatory takings claim were "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations" as well as the "character of the governmental action."[14] U.S. takings jurisprudence is an area of the law not known for its coherence or predictability; the Supreme Court itself has written a disarmingly frank assessment:

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[13] The United Nations Conference on Trade and Development (UNCTAD) has the text of twenty of Mexico's investment agreements; *see* http://www.unctadxi.org.

[14] *Penn Central*, *supra* note 10, at 124. The *Penn Central* rule applies when a State's interference has resulted in taking less than the entire (or nearly entire) economic value of a parcel. If the interference is total, there will usually be a duty to compensate, unless the proscribed use interests were not part of the owner's property title to begin. In other words, if a projected use falls within the domain of common-law nuisance, the owner cannot complain of a taking, because he never had the right to commit a nuisance by purchasing the property, and even prior to the exercise of government regulation deeming the proposed use a nuisance. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992). This rule presupposes a "reasonable" restriction. An unreasonable restriction on property may be compensable even if the regulation prohibiting the use was in place at the time the investor purchased the property. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 626–30 (2001).

> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries . . . share a common touchstone. Each aims 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.[15]

Indeed, many academics have built their careers on analyzing the U.S. Supreme Court's ever-evolving approach to the application of those criteria.[16] This is at least good news for investment scholars. It does not, however, augur well for clarity or predictability for either States or investors in the course of investment arbitration.

Second, the three-factor provision is lifted directly from U.S. jurisprudence, yet the introductory language to the new expropriation provision states that it is consistent with customary international law.[17] I am not opposed to filling lacunae in

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[15] Lingle v. Chevron, 544 U.S. 528, 539 (2005). *Lingle* elaborated on the common inquiry as assessing the severity of the burden that the government imposes on private property rights to decide whether it gives rise to compensation. Some cases are easier than others and easily meet the standard for requiring compensation, including: (1) those that result in a permanent physical invasion, albeit with minimum environmental impact; (2) those that involve the complete diminution of a property's value. More difficult are those placed in the third category, which involve weighing the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests. *Id.* at 539–40.

[16] The articles published on U.S. takings law are far too numerous to list here. Notable examples are Richard Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STANFORD L. REV. 1369 (1993); Richard Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1; Carol Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1; Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000); Frank I. Michelman, *Takings*, 88 COLUM. L. REV. 1600 (1988).

[17] U.S. Model BIT, Annex B ("1. Article 6 [Expropriation and Compensation] (1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.").

customary international law or to developing it by looking at the principles developed by municipal legal systems or specialized international legal regimes on congruent matters to learn from their expertise when doing so is appropriate.[18] Nonetheless it is confusing—not to say inaccurate—to conflate U.S. Fifth Amendment takings jurisprudence and customary international law.[19] My point is not so much that U.S. jurisprudence is significantly different from customary international law, but that it is potentially an overstatement to say they are the same.[20] Borrowing from another system should also be undertaken carefully, and only after assuring oneself that sufficient parallels warrant it. The tribunal in *Glamis*, for example, looked to U.S.

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[18] *See, e.g.*, Andrea K. Bjorklund & Sophie Nappert, *Beyond Fragmentation*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW – IN MEMORIAM THOMAS WÄLDE 439 (T. Weiler & F. Baetens eds., Brill Publishing, forthcoming 2011).

[19] For an earlier warning of this danger, *see* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 22 (6th ed. 2003) ("[I]n some cases, for example the law relating to expropriation of private rights, reference to domestic law might give uncertain results and the choice of models might reveal ideological predilections.").

[20] *Compare* Céline Lévesque, *Influences on the Canadian FIPA Model and the US Model BIT: NAFTA Chapter 11 and Beyond*, [2006] CANADIAN Y.B. INT'L L. 249, 284–90 (tracing language in the Canadian Model FIPA to U.S. takings jurisprudence and suggesting that U.S. influence on international law will be increased), *and* Andrew P. Newcombe, *The Boundaries of Regulatory Expropriation*, 20 ICSID REV. 1, 28 (2005) (suggesting that international law looks to domestic law to discover the scope of acquired rights). *See also* Wälde & Kolo, *supra* note 1, at 822 (describing the United States as the "natural laboratory" for testing new legal doctrines dealing with the tension between environmental regulation and property rights); Poirier, *supra* note 1, at 898; 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 (2002); Jon A. Stanley, Comment, *Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence*, 15 EMORY INT'L L. REV. 349 (2001).

takings law to determine whether and when agency action was sufficiently "ripe" to be deemed an expropriation: the tribunal explained that there was a "congruence" between international arbitral awards and U.S. takings law, perhaps because of common underlying logic, that warranted looking to domestic decisions.[21] Moreover, to lift from one State's domestic jurisprudence the approach towards regulatory takings risks marginalizing the approach taken by other States. Canada, for example, has a significantly different approach to regulatory takings—one more deferential to the Government—than does the United States.[22] Were a CAFTA-type expropriation annex to be included in a NAFTA Free Trade Commission interpretation under Chapter 11, Canada might welcome it because of the apparently broad nature of the exception. Yet the actual interpretation of the *Penn Central* factors by U.S. courts has been highly fact-specific and might not extend the kind of blanket protection some States with less well entrenched property protection desired, or thought they were getting.

Third, the police powers doctrine as articulated in the U.S. treaties arguably reflects a departure from customary international law.[23] Customary international law has not been altogether uniform

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[21] Glamis Gold, Ltd. v. United States of America, Award, June 8, 2009, ¶ 332, available at http://www.naftaclaims.com.

[22] Yves Fortier & Stephen Drymer, *Caveat Investor! Investor Protection Under Investment Treaties*, John E.C. Brierley Memorial Lecture, McGill University, 21–22 (Mar. 20, 2003). *See also* Shenkman, *supra* note 20, at 196–97 (questioning whether the U.S. Supreme Court's approach reflects a "uniquely American philosophy about the power and limits of the 'Regulatory State'").

[23] Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 J. WORLD INV. & TRADE 717, 724–29 (2007); Céline Lévesque, *Distinguishing Expropriation and Regulation Under NAFTA Chapter 11: Making Explicit the Link to Property*, *in* THE FIRST DECADE OF NAFTA: THE FUTURE OF FREE TRADE IN NORTH AMERICA 293, 305-07 (K.C. Kennedy ed., 2004); Been & Beauvais, *supra* note 1, at 51, 58.

in its approach to regulatory expropriation.[24] But the dominant approach has been to recognize that, while the mere fact that a State's exercise of police powers has an adverse economic impact on an investment will not in and of itself signify that an expropriating measure has been taken, the usual criterion for distinguishing compensable from non-compensable acts has been the degree to which the investment has been affected—a complete or substantial taking of the property will give rise to a duty to compensate.[25] The degree of compensation required might vary depending on the lawfulness of the act. Thus, an expropriation that is lawful, non-discriminatory and done for a public purpose must still be accompanied by compensation, although perhaps not damages. It is as yet early to tell what effect this limiting language will have on future decisions.

Fourth, U.S. law actually reflects the same tension that one finds in customary international law as to whether regulation to protect human health, the environment, and the like is *per se* excluded from being considered a taking, or whether the character of the government activity is merely one factor to be considered in determining whether a taking did or did not occur.[26] Suggesting

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[24] Kriebaum, *supra* note 23, at 724–29 (describing three approaches to regulatory expropriation: the "sole-effects" doctrine; the radical police powers doctrine; and the moderate police powers doctrine); August Reinisch, *Expropriation, in* OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 407, 432–38 (P. Muchlinski, F. Ortino & C. Schreuer eds., 2008); Anne K. Hoffman, *Indirect Expropriation, in* STANDARDS OF INVESTMENT PROTECTION 151, 152–55 (A. Reinisch ed., 2008); Fortier & Drymer, *supra* note 22, at 10–11; Rudolf Dolzer, *Indirect Expropriation of Alien Property,* 1 ICSID REV. 41, 59 (1986).

[25] Kriebaum, *supra* note 23, at 720–22. This, incidentally, is not dissimilar to *Penn Central.* *But see* Newcombe, *supra* note 20, at 30–36 (suggesting that the police powers exception is well established in customary international law).

[26] *See, e.g.*, Rose Acre Farms v. United States, 559 F.3d 1260, 1276–79 (2009); Shenkman, *supra* note 20, at 187–88 (noting the general view that the

that the two provisions in the U.S. Model BIT and the Canadian Model FIPA are easily read to be consistent with one another overstates the extent to which that question has been answered under either municipal or international law.

II. ENVIRONMENTAL STANDARDS IN INVESTMENT AGREEMENTS

The second area I want to focus on is the effect that including an environmental side agreement in NAFTA has had on subsequent trade agreements. There the practice of the NAFTA parties has diverged.

Mexico has consistently opposed linking environmental issues with trade and investment.[27] Some commentators have suggested that Mexico felt manipulated and left without any option by the last-minute insertion of the environmental side agreement into the NAFTA. That, in addition to a long-standing resistance to linking trade and environmental issues and a policy focus on the eradication of poverty, has meant that Mexico's trade agreements have had only aspirational environmental provisions.[28] Canada, on

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"public use" requirement in the Fifth Amendment is synonymous with "police powers" and that the government must provide compensation for a "public use").

[27] Gustavo Alanis-Ortega & Ana Karina González-Lutzenkirchen, *No Room for the Environment: The NAFTA Negotiations and the Mexican Perspective on Trade and the Environment*, *in* Deere & Esty, *supra* note 1, 41, at 41, 54–55 (discussing "scars" left in Mexico by its having been forced to accept the NAAEC and the consequent hardening of the Government to including environmental issues in investment agreements); Mónica Araya, *Mexico's NAFTA Trauma: Myth and Reality*, *in* Deere & Esty, *supra* note 1, 61, at 62–63; 65–67 (discussing reasons for Mexico's hostility to a trade and environment policy agenda).

[28] M. Angeles Villareal, *Mexico's Free Trade Agreements*, Congressional Research Service 7-5700 (Aug. 27, 2009) at 1, 7, 9, 17 (describing Mexican free

the other hand, has included a GATT Article XX-like provision in its Model FIPA.[29] The NAFTA parties had briefly contemplated including such a provision in NAFTA, but the proposal did not make its way into the final version of the Agreement.[30] Most of the fourteen U.S. free trade agreements and BITs entered into subsequent to NAFTA evince significant changes and advances in their approach to encouraging State parties actively to engage in environmental protections.[31]

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trade agreements in which the parties agree to increase cooperation in environmental matters).

[29] Canadian Model FIPA, Art. 10.1:

> Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health; (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or (c) for the conservation of living or non-living exhaustible natural resources.

[30] MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA'S CHAPTER 11, at 1108.9-1108.10 (2009 update).

[31] For a comparative description of the approaches to labor and environmental issues in the Dominican Republic-Central American Free Trade Agreement (available at http://www.ustr.gov, the website of the Office of the United States Representative) [hereinafter DR-CAFTA] and the United States-Peru Trade Promotion Agreement (available at http://www.ustr.gov, the website of the Office of the United States Representative) [hereinafter U.S.-Peru FTA], *see* Huma Muhaddisoglu & Mark Kantor, *Background on US and EU Approaches to Labor and Environment Chapters in Free Trade Agreements*, available on the OECD's website. A 2009 Governmental Accountability Office (GAO) Report covers the Chile-United States, Jordan-United States, Morocco-United States, and Singapore-United States agreements (all of which are available at available at http://www.ustr.gov, the website of the Office of the United States Representative): U.S. GOVERNMENTAL ACCOUNTABILITY OFFICE,

NAFTA is, of course, broader than Chapter 11, but does not have environmental provisions that apply to investment.[32] The most direct reference in Chapter XI itself[33] to environmental issues is Article 1114, which states in less-than-strong language that

> [n]othing 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.

The provision further states that it is inappropriate to encourage investment by relaxing domestic health, safety, or

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INTERNATIONAL TRADE: FOUR FREE TRADE AGREEMENTS GAO REVIEWED HAVE RESULTED IN COMMERCIAL BENEFITS, BUT CHALLENGES ON LABOR AND ENVIRONMENT REMAIN (July 2009) [hereinafter GAO REPORT].

[32] NAFTA Article 2101 is a general exceptions provision extremely similar to GATT Article XX. It does not, however, apply to Chapter XI, but applies only to trade in goods. KINNEAR, BJORKLUND & HANNAFORD, *supra* note 30, at 1108.19.

[33] Article 1101(4) states that:

> [n]othing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.

Article 1106 eliminates most performance requirements, but paragraph (6) preserves the parties' ability to require measures "necessary to protect human, animal, or plant life or health" or "necessary for the conservation of living or non-living exhaustible natural resources." These are far from compelling environmental protection mandates.

environmental measures.[34] Environmentalists have criticized this provision for its lack of force.[35]

An environmental side agreement, the North American Agreement on Environmental Cooperation (NAAEC) was added to NAFTA at the last minute in order for it to achieve passage in the U.S. Congress.[36] While the side agreement contains citizen-standing provisions that permit individuals, NGOs, and other affected entities to complain about member States' failure to enforce their environmental laws, these procedures have not been viewed as altogether effective.[37] Yet the NAAEC has also been lauded as an innovative way to include environmental issues in the

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[34] Similar language is found outside Chapter XI. NAFTA Article 714 says that the parties agree not to reduce protection of human, animal, or plant life or health, and will pursue equivalence with respect to sanitary and phytosanitary measures.

[35] KINNEAR, BJORKLUND & HANNAFORD, *supra* note 30, at 1114.4–1114.6, 1114.9–1114.13.

[36] John H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation*, *in* Markell & Knox, *supra* note 1, 1 at 4, 7–8.

[37] *Id.* at 10 (describing groups who depicted the NAAEC as "greenwash" and remained steadfast in their opposition to NAFTA); John H. Knox, *The CEC and Transboundary Pollution*, *in* Markell & Knox, *supra* note 1, 80 at 88 (noting disappointing implementation of the Commission for Environmental Cooperation's (CEC) directive to help establish the standing of NAFTA citizens to complain of transboundary pollution in municipal courts); Mary E. Kelly & Cyrus Reed, *The CEC's Trade and Environment Program: Cutting-Edge Analysis but Untapped Potential*, *in* Markell & Knox, *supra* note 1, at 101 (discussing lack of cooperation between the CEC and the Free Trade Commission in preventing Chapter 11 disputes); Carolyn L. Deere & Daniel C. Esty, *Trade the Environment in the Americas: Overview of Key Issues*, *in* Deere & Esty, *supra* note 1, 1 at 2, 14–15.

international trade and investment arena.[38] In addition, it served as a baseline from which stronger protections could be built.[39]

When NAFTA was concluded, the public demand that environmental and labor protections be included in the agreement seemed surprising. Yet now it is taken for granted that trade negotiators must consider those issues in their negotiations, even if certain stakeholders still do not view the protections included as stringent enough.[40] The environmental protections in U.S. free trade agreements have continued to be strengthened.[41] Recent U.S. agreements have a chapter on the environmental obligations of the State parties.[42] Environmental obligations have thus been elevated from sub-ordinate to co-equal status. In contrast to the precatory language in Article 1114, DR-CAFTA provides "A party shall not fail to effectively enforce its environmental laws . . . ."[43] The U.S.-Peru FTA goes even further, and required the State parties to abide

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[38] Magraw, *supra* note 1, at 15–20.

[39] Poirier, *supra* note 1, at 870–71 (describing NAFTA as the baseline against which the environmental protections in other agreements have been measured). *But see* John Knox, *Neglected Lessons of the NAFTA Environmental Regime*, 45 WAKE FOREST L. REV. 391 (2010) (suggesting the NAFTA regime has been a disappointment and that unsuccessful NAFTA initiatives have been fruitlessly re-created in other agreements).

[40] *See, e.g.*, Mann, *supra* note 1, at 393; Knox, *supra* note 39.

[41] GAO REPORT, *supra* note 31, at 1. The GAO Report numbers the agreements at fourteen; it disaggregates DR-CAFTA into individual agreements between the United States and the other State parties. The Agreements are: Australia-United States; Bahrain-United States; Chile-United States; Costa Rica-United States; Dominican Republic-United States; El Salvador-United States; Guatemala-United States; Honduras-United States; Jordan-United States; Morocco-United States; Nicaragua-United States; Oman-United States; Peru-United States; Singapore-United States. *See* http://www.ustr.gov, the website of the Office of the United States Representative.

[42] *See, e.g.*, DR-CAFTA, Ch. XVII; U.S.-Peru FTA, Ch. XVIII.

[43] *See, e.g.*, DR-CAFTA, Art. 17.2(1)(a).

by seven multilateral environmental protection treaties.[44] The agreement also requires the establishment of an Environmental Affairs Council to oversee implementation of the environmental chapters.[45] There are other innovations as well, including the establishment of programs to assist in the implementation and enforcement of environmental laws.[46]

The effectiveness of these changes in U.S. free trade agreements has yet to be determined. A July 2009 GAO report suggests that the environmental initiatives of the Jordan, Chile, Singapore, and Morocco free trade agreements have not been fully implemented and are hindered by lack of funding and lack of commitment of resources by the U.S. and agencies charged with monitoring and enforcing the initiatives therein.[47] Yet some implementation seems to have occurred. According to the report, Jordan has four hundred environmental enforcement officers.[48]

No investor-State tribunal has yet issued a decision in a case brought under one of those trade agreements which it was obliged to weigh the obligations of environmental protection against those contained in the investment chapter.

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[44] U.S.-Peru FTA, Annex 18(2). The covered agreements are: the Convention on International Trade in Endangered Species of Wild Fauna and Flora; the Montreal Protocol on Substances that Deplete the Ozone Layer; the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973; the Convention on Wetlands of International Importance Especially as Waterfowl Habitat; the Convention on the Conservation of Antarctic Marine Living Resources; the International Convention for the Regulation of Whaling; and the Convention for the Establishment of an Inter-American Tropical Tuna Commission.

[45] U.S.-Peru FTA, Art. 18.6.

[46] U.S.-Peru FTA, Art. 18.4.

[47] GAO REPORT, *supra* note 31, at 5–6.

[48] *Id.* at 66.

III. TRANSPARENCY AND THE ENVIRONMENT

Finally, the third item I want to address—and the one apparently the most attenuated from the environment—is the issue of transparency. Cases involving challenges to environmental regulations were driving forces in the campaigns by pioneering NGOs to participate in Chapter 11 cases as *amici curiae* and in gaining access not only to awards but also to memorials and pleadings. The importance of this issue goes beyond NAFTA to all of investor-State arbitration.

NAFTA tribunals and the NAFTA parties led the way in permitting *amici* to participate in investor-State cases. The first case in which the issue arose was, of course, *Methanex v. United States*, an UNCITRAL case involving a challenge to California's proposed ban on the gasoline oxygenate methyl tertiary-butyl ether.[49] In rapid succession other tribunals, some convened under NAFTA Chapter 11 and some convened under other investment agreements, followed suit. Many of those cases involved measures affecting the environment.

Methanex was an UNCITRAL case, and the tribunal concluded that the rules conferred authority on the tribunal to determine whether or not *amici* could participate.[50] Tribunals

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[49] Methanex Corp. v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene As "*Amici Curiae*", Jan. 15, 2001, available at http://ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration.

[50] *Id.* ¶¶ 47–53. The tribunal in *UPS* came to a similar conclusion and also grounded its decision in Article 15(1) of the UNCITRAL Arbitration Rules. United Parcel Service of America v. Government of Canada, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, Oct. 17, 2001, available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website.

administering ICSID Convention[51] cases (prior to the 2006 changes in the Rules) were faced with the same decision and generally came to the same conclusion, save for one tribunal which queried whether the existing rules gave it adequate authority to grant *amicus curiae* status.[52]

The NAFTA parties, working through the Free Trade Commission (a committee comprising the trade ministers of the three States party to NAFTA) established procedures governing the participation of *amici curiae*.[53] Criteria for a tribunal to consider include whether

> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

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[51] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 8, 1965, 17 U.S.T. 1270, 1298–99, 1357–64 (1965), 575 U.N.T.S. 160 (1966), 229–35.

[52] Aguas Argentinas, S.A. v. The Argentine Republic, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, May 19, 2005, available at http://ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration; Aguas Privinciales de Santa Fe S.A. v. The Argentine Republic, Order in Response to a Petition for Participation as *Amicus Curiae*, Mar. 17, 2006, available at http://ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration. Compare Aguas del Tunari S.A. v. Republic of Bolivia, Letter from the President of the Tribunal to Earthjustice, Jan. 29, 2003. *See generally* Andrea K. Bjorklund, *The Participation of Amici Curiae in NAFTA Chapter Eleven Cases* (Mar. 22, 2002), available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website.

[53] Statement of the NAFTA Free Trade Commission on Non-Disputing Party Participation (Oct. 7, 2003), available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website, and reproduced as Annex 3 to the present volume.

> (b) the non-disputing party submission would address matters within the scope of the dispute;
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> (c) the non-disputing party has a significant interest in the arbitration; and
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> (d) there is a public interest in the subject-matter of the arbitration.[54]

The ICSID Convention Rules, as well as the ICSID Additional Facility Rules, have been changed to give tribunals the authority to permit *amicus* participation providing certain conditions are met.[55]

The right of *amicus* participation is not unqualified, which is as it should be, but the authority of tribunals to permit participation is uncontrovertibly there.

Related to *amicus* participation is procedural transparency —*i.e.*, notice of the existence of proceedings and access to public

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[54] *Id.* The tribunal is also to ensure that the non-disputing party submission does not disrupt the proceedings and that neither disputing party is unfairly burdened or unfairly prejudiced by the submissions.

[55] Rules of Procedure for Arbitration Proceedings, [hereinafter ICSID Convention Rules], R. 37(2); Arbitration (Additional Facility) Rules, [hereinafter Additional Facility Rules], Art. 41(3). Those rules contain provisions very similar to those found in the NAFTA Free Trade Commission's statement. Tribunals are to consider whether:

> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding.

The tribunal should also be sure to avoid permitting the non-disputing parties to disrupt the proceeding or to unfairly burden or prejudice any of the participants.

versions of awards and, in some cases, pleadings and memorials. Why are these issues linked? To have meaningful *amicus* participation an aspiring participant needs to know about a case—that is self evident—and also needs to know how the case is being argued by the parties in order to tailor its arguments effectively.[56] Here again the NAFTA parties are out ahead. In 2003 the United States and Canada issued a joint statement on open hearings, which Mexico later joined.[57] Earlier the Free Trade Commission has issued a statement that nothing in Chapter 11 imposed a general duty of confidentiality on the disputing parties, and all three NAFTA parties have made pleadings, memorials, and awards available on their respective websites.[58] Subsequent U.S. and Canadian investment agreements, including those found within free trade agreements, have transparency measures built in. This norm of disclosure has progressed in only limited form to non-NAFTA (and non-United States and Canada) investor-State arbitration, but there is some evidence of greater openness more generally. The ICSID Rules now require that summaries of the legal reasoning in awards be made available[59] and, indeed, it seems that most awards in investor-State cases are now made public.[60]

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[56] In the *Foresti* arbitration against South Africa, the Tribunal ordered that non-disputing parties be allowed access "to those papers submitted to the Tribunal by the Parties that are necessary to enable [non-disputing parties] to focus their submission upon the issues arising in the case and to see what positions the Parties have taken on those issues" (Foresti v. Republic of South Africa, Letter Regarding Non-Disputing Parties, Oct. 5, 2009, available at http://www.ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration).

[57] KINNEAR, BJORKLUND & HANNAFORD, *supra* note 30, Appendix 11.

[58] Notes of Interpretation of Certain Chapter Eleven Provisions (Free Trade Commission, July 31, 2001), available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website, and reproduced as Annex 2 to the present volume.

[59] ICSID Convention Rules, R. 48(5); Additional Facility Rules, Art. 53(3). Other institutions have steadfastly maintained rules in which the default

The transparency norm has not just permitted civil society, and the broader general public, to be more aware of the issues arising in investment cases. The establishment of a transparency norm has also contributed to the development of a body of investment law, and NAFTA has had a significant effect on the development of the jurisprudence. As Meg Kinnear explains above in this volume, NAFTA's contribution is based *inter alia* on the critical mass of NAFTA awards and the transparency norm that makes available the awards and the pleadings and memorials in most NAFTA cases.[61] The availability of decisions in other cases is essential to developing an eventual *jurisprudence constante*.[62]

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assumption is confidentiality: Joachim Delaney & Daniel B. Magraw, *Procedural Transparency*, *in* Muchlinski, Ortino & Schreuer, *supra* note 24, at 721, 739–41.

[60] Though we cannot be sure how many awards are not published, the existence of a dispute is almost always known, and the pressure to publish awards is increasing. It is at least fair to say there is an emerging trend towards transparency in proceedings, and that the trend encompasses the eventual publication of the award. *See* Andrea K. Bjorklund, *The Promise and Peril of Arbitral Precedent: The Case of* Amici Curiae, *in* PROTECTION OF FOREIGN INVESTMENTS THROUGH MODERN TREATY ARBITRATION – DIVERSITY AND HARMONISATION, ASA SPECIAL SERIES NO. 34, at 165, 178–79 (A.K. Hoffmann ed., 2010).

[61] *See supra* at 21, 28 *et seq.* *See also* Sergio Puig & Meg Kinnear, *NAFTA Chapter Eleven at Fifteen—Contributions to a Systemic Approach in Investment Arbitration*, 25 ICSID REV. 225, 226–27, 259–61 (2010).

[62] *See, e.g.*, Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as* Jurisprudence Constante, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (C. Picker, I. Bunn & D. Arner eds., 2008); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357 (2007); Jan Paulsson, *Awards—and Awards*, *in* INVESTMENT TREATY LAW: CURRENT ISSUES III 97 (A.K. Bjorklund, I. Laird & S. Ripinsky eds., 2009); Christoph Schreuer, *Diversity and Harmonisation of Treaty Interpretation in Investment Arbitration*, 3 T.D.M. (Apr. 2006); Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, *in* Muchlinski, Ortino & Schreuer, *supra* note 24, at 1207.

Transparency is generally a positive development, but it is not an unrelieved good.[63] Some proceedings might be better arbitrated by a tribunal rather than by the press in the court of public opinion. Public scrutiny can affect the proceedings and the arguments of the parties in ways that do not necessarily work towards achieving justice. Often analogies are made to court proceedings, in which all pleadings and arguments are theoretically available. Yet until very recently, "public" in that context has meant that the information is available to someone willing to go physically to the courthouse to request the docket and read or photocopy the files. This is a far cry from ensuring that everything is available on the internet. Concerns about such politicization or polemicization of disputes might lead to suggestions that transparency obligations be limited to the fact of a case's existence and publication of an award after the dispute has been concluded. Yet principles of open government make it difficult not to make at least the government's arguments available in any given case. Indeed, the obligations found in the Freedom of Information Act[64] in the United States and the Access to Information Act[65] in Canada led those two parties to pioneer transparency under NAFTA Chapter 11.[66]

IV. CONCLUSION

These changes in the last fifteen years do not mean the picture is altogether rosy for environmental concerns to rub along easily with trade and investment issues. Several pending and

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[63] Bjorklund, *supra* note 60, at 180–86.

[64] 5 U.S.C. 552.

[65] R.S.C. 1985, c. A-1.

[66] Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN STATE L. REV. 1269, 1288–89 (2009).

recently decided cases against Canada[67] involving regulations to protect the environment will continue to pose challenges about the proper interpretation of Article 1110, the role of environmental concerns in interpreting Chapter 11 obligations, and the role of civil society in the arbitration of disputes that incontrovertibly raise issues of general public interest.

[67] *See, e.g.*, Chemtura Corp. v. Canada, Award, Aug. 2, 2010, available at http://ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration; Dow AgroSciences LLC v. Canada, Notice of Arbitration, Mar. 31, 2009, available at http://www.naftaclaims.com.