NAFTA chapter XI and Canada's environmental sovereignty: investment flows, article 1110 and Alberta's Water Act.

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ABSTRACT

This article addresses the potential affect of Chapter XI of the North American Free Trade Agreement (NAFTA) on Canada's ability to effectively protect its natural resources' through regulation. Specifically, the article discusses a case study involving Alberta's Water Act and how its' objectives could be undermined by Article 1110 of NAFTA. The article first outlines the historical and current position of Foreign Direct Investment Agreements and provides a perspective on Canada's involvement in both bilateral and multilateral agreements up to and including NAFTA. This is followed by a case law review of the relevant NAFTA Chapter XI tribunal decisions A case study regarding the interaction of Alberta's Water Act with a potential claim under Chapter XI is then considered. Using this case study, and in the context of the

applicable case law, the article ultimately evaluates the potential policy implications that Chapter XI introduces with respect to Canada's environmental sovereignty.

RESUME

Cet article adresse l'affectation potentiel du chapitre XI de l'accord du libre-echange nord-americain sur la capacite du Canada de proteger effectivement ses ressources naturelles a travers la reglementation. Specifiquement, l'article discute d'une etude de cas impliquant la Loi sur la protection des eaux de l'Alberta et comment ses objectifs pourraient etre minos par Article 1110 de l'ALENA. L "article decrit premierement la position historique et actuelle des' accords d'investissement direct etranger et fournit une perspective sur l'intervention du Canada dans des accords bilateraux et multilateraux y compris celle de l'ALENA. Ceci est suivi d'un examen de jurisprudence des' decisions appropriees de tribunal du chapitre XI de l'ALENA. Une etude de cas concernant l'interaction de la Loi sur la protection des eaux de l'Alberta avec une reclamation potentielle sous le chapitre XI est alors consideree. Utilisant cette etude de cas, et dans le cadre de la jurisprudence applicable, l'article evalue finalement les implications potentielles de la politique que le chapitre XI presente en ce qui concerne la souverainete environnementale du Canada.

I INTRODUCTION

When the Parties to the North American Free Trade Agreement (1) negotiated its provisions, there was significant concern amongst academics, environmentalists, the media and the general public. Much of the outcry centred on the substance of Chapter XI, NAFTA's "Investment" Article, which attracted "virulent criticism" on the basis that it imposed "severe constraints on national sovereignty." (2) In particular, concerns were expressed that Chapter XI's provisions would prevent Canada from protecting its natural environment. (3) While few Chapter XI cases have gone through the full NAFTA dispute settlement process, and even fewer have specifically dealt with environmental issues, Chapter XI remains "controversial" (4) and concerns over environmental sovereignty persist. On the other hand, writers (5) and NAFTA jurists (6) have cited the lack of disputes to alleviate the criticisms that surround Chapter XI. In light of this continuing controversy, this article explores how a dispute arising under Alberta's Water Act (7) might be resolved under the NAFTA dispute settlement regime, given the existing body of NAFTA jurisprudence.

This article begins in Part II by providing a background to investment agreements in general, and Chapter XI of NAFTA specifically. Part III then presents an overview of the evolution of the substantive provisions of Chapter XI related to expropriation. In Part IV, the NAFTA dispute resolution case law dealing with Article 1110 of Chapter XI is explored. This examination includes a discussion of the Chapter XI claims that were resolved outside the formal procedures of a NAFTA Tribunal. Part V then analyzes how a "regulatory taking" claim arising under this statutory regime might be resolved under the Chapter XI dispute mechanisms. Part V! addresses the broader implications of Article 1110 jurisprudence in relation to Canadian environmental sovereignty. Finally, Part VII provides conclusions and offers policy alternatives for Canada as it deals with Article 1110 and the future of its environmental sovereignty.

II BACKGROUND

Foreign Direct Investment

Foreign Direct Investment (FDI) is defined as "an investment made to acquire a lasting interest in enterprises operating outside of the economy of the investor." (8) Although Chapter XI of NAFTA incorporates a broad definition of investment that might include smaller-scale acquisitions of securities by foreign entities, (9) NAFTA is principally concerned with FDI. FDI is of particular importance to NAFTA parties as it is this type of investment that is most vulnerable to the regulatory environment of a state, given the risk that the whole of the investment could be subject to a regulatory taking. (10)

During the late 1980s and throughout the 1990s there was an exceptional increase in worldwide levels of FDI. (11) For example, according to Canada's Department of International Trade, in 1990 Canada directly invested approximately $98.4 billion overseas, but by 2004 this amount rose to approximately $445.1 billion. (12) This dramatic rise in investment flows was both the impetus behind, and the result of, a series of investment agreements, of which Chapter XI of NAFTA is one. In particular, investors and developed states sought to establish a legislative framework that would govern international investment and provide rules to manage investor risk, and developing states recognized the potential benefits that FDI could bring to their economies. (13)

It might seem that investment regimes are heavily weighted in favour of developed states because investors gain access to emerging markets, and are the beneficiaries of reduced labour costs (14) and potentially more relaxed regulatory regimes. (15) Indeed, critics of investment agreements claim that such benefits to the developed world result in "economic imperialism" whereby the developed world influences and controls the economies of less developed countries (LDCs). (16) Despite these objections, the developing world also has the potential to benefit a great deal from FDI. LDCs obtain capital, infrastructure, technological know-how, and the managerial expertise needed to grow their economies. (17) As such, the facilitation of FDI through avenues such as Chapter XI of NAFTA can have measurable economic affects for not only investors, but also for the investment recipients.

Past, Present and Future Canadian Treatment of FDI

Historically, the Canadian approach to promoting FDI was through the negotiation and formation of bilateral investment agreements, which created binding commitments between Canada and another signatory state. (18) These bilateral agreements are known as Foreign Investment Protection Agreements (FIPAs). Since 1990, over twenty such agreements have been negotiated by the Canadian government. These agreements continue to remain in force. (19) In fact, Canada continues to enter into FIPAs, many of which are now modeled on Chapter XI type provisions. (20)

This bilateral approach to investment changed with the negotiation and ratification of the Canada--United States Free Trade Agreement (FTA) in 1987. (21) Investment provisions (Chapter XVI) were incorporated into the FTA, and served as the basis for Chapter XI of

NAFTA. Moreover, similar provisions will likely be incorporated into the several new investment regimes that are being contemplated by Canada and the world community. For example, one potential future multilateral investment agreement is the proposed Free Trade Area of the Americas (FTAA). (22) This agreement may include up to thirty-four states from North, Central, and South America, and undoubtedly will contain investment provisions similar to those contained in Chapter XI of NAFTA. (23) Such an agreement could serve as a catalyst for major increases in the flow of FDI. (24) However, those groups that opposed NAFTA are surely troubled by a much broader agreement that might include the bulk of the states in the Western Hemisphere. (25)

A second example is the Multilateral Agreement on Investment (MAI), a proposed widespread investment agreement that would provide investment regulation and protection for any state party investing in the economy of any other state party. (26) It is expected that should a MAI ever be formalized and completed, its provisions would in many ways mirror those of NAFTA's Chapter XI. (27) Perhaps more than any other investment agreement, the MAI has been especially controversial. (28) If Chapter XI of NAFTA becomes the model for the MAI, the LDCs of the world could be subject to costly litigation initiated by sophisticated and financially powerful corporate investors. The potential threat of costly litigation may lead some LDCs to formulate policy that would prevent investor-led disputes from arising. This level of influence by powerful companies could potentially affect the regulatory sovereignty of the LDCs. (29) Indeed, it has even been suggested that to stimulate their lagging economies, LDCs will compete with each other for FDI dollars. Some believe that this could result in a "race to the bottom" whereby some states may choose not to regulate in areas such as the environment and the labour market to appear as more attractive investment recipients. (30) Given the increasing breadth of forthcoming free trade agreements such as the FTAA and the MAI, this article's case study is highly relevant because it assesses the potentially ongoing controversy surrounding Investment provisions in free trade agreements.

Policy Objectives of NAFTA Chapter XI

The general policy objectives of an investment regime are to provide a "rules-based" (31) framework that regulates foreign investment. While it might be expected that the United States (as the largest worldwide--and regional--provider of FDI (32)) was the strongest proponent of an investment regime within NAFTA, Canada and Mexico also supported the inclusion of these provisions. (33)

Prior to its ratification of NAFTA, Canada lagged behind the rest of the world in terms of inflows of FDI, and there was a relatively limited amount of Canadian investment in Mexico. (34) Moreover, at the same time that Canada had entered into the FTA with the United States, the United States was also busy entering into Bilateral Investment Treaties (BITs) with states from around the world. (35) These developments led to a policy change within the Canadian government from one that was wary of US investment, and the associated influence that the United States may have over Canada, to one that encouraged and promoted inflows of FDI. (36) The concern was that without a stronger investment agreement with the United States and Mexico, Canada would fall further behind and become even less of a "destination" for US

investment dollars. (37) As such, Chapter XI of NAFTA was not only a priority for the United States, in that it would help manage the risk of US investors in Canada and Mexico, it was also desirable for Canada as it helped solidify the Canadian economy as a primary market for US investment.

Chapter XI also enabled Mexico to attract far more foreign investment from both Canada and the United States. Prior to NAFTA, both states had direct investment in Mexico; however, these investments were considered somewhat risky as all foreign investment in Mexico was governed by internal Mexican law, which was not always favourable to foreign businesses operating in Mexico. (38) Chapter XI provided foreign investors with a transnational dispute resolution process which was, from the perspective of the investor, much more favourable and more likely to protect the value of a foreign investment. As such, not only the United States, but also Canada and Mexico, had the potential to gain considerably from the policy underlying Chapter XI of NAFTA.

III CANADA'S INVESTMENT OBLIGATIONS UNDER THE FTA AND NAFTA

Chapter XVI of the FTA

Chapter XVI of the FTA was one of the first attempts to integrate investment provisions into a broader free trade agreement. The key provisions of Chapter XVI of the FTA were Articles 1602 (National Treatment), 1603 (Performance Requirements), and 1605 (Expropriation Provision). (39) The expropriation provisions are the most important for the purposes of this article. These essentially sought to ensure that foreign investments would not be subject to any arbitrary or discriminatory expropriation on the part of the host state.

Canada also retained the ability to review direct acquisitions of Canadian enterprises by US investors. Annex 1607.3 (40) effectively amended the provisions of the Investment Canada Act, (41) and provided the Canadian Government with a five-year window to review FDI from the United States. (42) Within the five-year period, if the Canadian Government was not satisfied with the terms of the acquisition, it had the ability to refuse to allow the investment to proceed. While this Chapter provided a number of protections to investors, Canada clearly remained apprehensive about opening its doors too widely to US investment.

Chapter XI of NAFTA

The substantive provisions of Chapter XI of NAFTA are much wider in scope than those that were found in Chapter XVI of the FTA. For the most part however, the National Treatment (Article 1102), (43) Performance Requirements (Article 1106), (44) and Expropriation (Article 1110) (45) provisions are similar, although much more detailed, to those in the FTA. Furthermore, NAFTA prevents Canada from reviewing acquisitions by foreign investors from the United States and Mexico; there is no comparable provision to Annex 1607.3. As such, NAFTA is much more reflective of the Canadian policy shift, which sought to encourage FDI growth.

Substantively, Article 1110 is not much different than the original expropriation provisions found in the FTA. A state is able to expropriate for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and on payment of compensation. (46) Virtually identical provisions were found in Article 1605 of the FTA. The main differences are a result of clarifications in the newer agreement regarding how compensation is to be paid. The Chapter sets out a series of definitive rules governing how a Party must compensate an investor in the case of an expropriation. (47)

NAFTA also includes an environmental provision (Article 1114: Environmental Measures), (48) which the FTA did not include. This provision purports to allow NAFTA Parties to legislate and regulate with respect to environmental protection. The Parties are able to adopt, maintain, or enforce measures, which protect their domestic environment even if they may have concomitant restrictions on investment. Article 1114, however, has limited substantive strength. Of significant importance is the fact that this provision only allows environmental regulation that is "'otherwise consistent with this Chapter." (49) Therefore, if an environmental measure is taken that could be construed as a "regulatory taking" or an expropriation, this environmental protection clause could not validate the governmental action. Moreover, the compensation provisions of Chapter XI would still apply.

Although lacking in substantive strength, Article 1114 at least recognizes that the NAFTA signatories should have some internal flexibility with respect to environmental protection. A much more controversial addition to NAFTA however, is Article 1116 (Claim by an Investor of Party on Its Own Behalf). (50) This provision, of which there was not an equivalent in Chapter XVI of the FTA, allows a private investor to initiate an arbitration claim directly against the government of a NAFTA Party. Under the terms of Article 1116, any breach of a Chapter XI provision can give rise to a private cause of action against a national government. It is this provision that has led to many of the assertions that Chapter XI is responsible for an erosion of national sovereignty, because under these terms, unlike other fields of public international law, it is not a state claiming against another state but a company, or even an individual, seeking compensation from a state. (51)

Like them or not, the provisions of Chapter XI have now become the dominant features of bilateral, and proposed multilateral, investment agreements worldwide NAFTA is now the baseline agreement from which other agreements have been created and have evolved. (52) The provisions of NAFTA have not always been easy for Tribunals to interpret. The following section details the history of Chapter XI cases, and specifically outlines how Article 1110 of Chapter XI has been interpreted to date.

IV THE INCONSISTENT TREATMENT OF CANADA'S INVESTMENT OBLIGATIONS: EXPROPRIATION & REGULATORY TAKING DECISIONS

While the cases from NAFTA Tribunals have dealt with the full scope of the Chapter XI provisions, this section restricts its review to the cases that have dealt with Article 1110, as the decisions dealing with expropriation and "regulatory taking" are most useful to this analysis.

Case Law Review

Ethyl Corporation v. Government of Canada (53)

Ethyl Corporation, the Claimant, was a US corporation that produced and distributed MMT, a fuel additive designed to increase the level of octane in unleaded gasoline. In 1978, to expand its operations, the Claimant incorporated a Canadian subsidiary to import and distribute MMT in Canada. In 1994, the Canadian Minister of the Environment announced that the government was taking steps to ban all MMT imports. Ethyl maintained that MMT was neither harmful to the health of Canadians nor to the environment, and as a consequence, the Canadian Government was prohibited from banning the additive. The Government subsequently introduced a bill that legislated the previous action taken by the Minister. (54)

Pursuant to Article 1110, the Claimant contended that the Government Bill resulted in interference that was tantamount to an expropriation of its Canadian enterprise. As such, Ethyl asserted that it was owed compensation equivalent to the fair market value of the expropriated investment. The Claimant also argued that the media coverage surrounding the Government's bill created a negative impression of MMT, and of Ethyl itself. Therefore, Ethyl argued that the Government's actions were tantamount to an expropriation of its goodwill. Ethyl sought damages of $251 million. (55)

Ultimately, this claim was not resolved through the NAFTA dispute settlement regime. Rather, the parties reached a settlement agreement:

> Without even a ruling on the merits, Canada cowed under the threat of the $251 million claim and agreed to pay $19.3 million (for Ethyl's lost profits and legal costs), issue public statements regarding the safety of MMT, and repeal the law. (56)

As discussed below, this settlement may have serious implications for a NAFTA Party's ability to protect its environment through regulation.

Sun Belt Water Inc. v. Government of Canada (57)

In 1991, the Claimant, Sun Belt Water Inc., a California-based company, entered into a joint venture with Snowcap Waters Ltd., a British Columbia corporation. (58) Snowcap Waters Ltd. held one of six existing licences for the bulk export of water, and the two companies' joint venture was a multi-million dollar contract to export water by super-tanker from British Columbia to California. (59) Four days after the joint venture was signed, the Government of British Columbia imposed a moratorium on bulk-water exports, which was later confirmed by legislation. Sun Belt Water Inc. commenced Chapter XI proceedings, suing the Government of Canada for US$468 million, (60) claiming, inter alia, that the moratorium amounted to an expropriation of the profits that Sun Belt Water Inc. was expecting to materialize from the joint venture. (61)

Sun Belt is a difficult case to analyze due to a lack of official documentation from the proceedings. Nevertheless, it raises interesting issues that are relevant to the substance of this

article. From what can be garnered, while Sun Belt Water Inc. did not initially make a claim specifically related to Article 1110, it did assert that an expropriation had taken place. (62) Like Ethyl, the Sun Belt dispute never progressed through the NAFTA dispute settlement process. Instead, a settlement agreement was reached between the parties, although the amount remains unknown.

Pope & Talbot Inc. v. Government of Canada (63)

The Claimant in this dispute, Pope & Talbot Inc., is a US subsidiary of the Canadian forestry company, Pope & Talbot International Ltd. (64) The Claimant is involved in the harvesting, processing and manufacturing of softwood lumber products in British Columbia and exports the bulk (65) of its product to the United States. (66)

The dispute in this case revolved around Canada's implementation of the 1996 Softwood Lumber Agreement (SLA), which established limits on the amount of softwood that could be exported from certain Canadian Provinces into the United States. (67) In effect, the SLA required that Canada charge an export license fee on softwood exported from the covered provinces when such exports exceeded a defined amount, which varied from year to year. (68)

With respect to Article 1110, Pope & Talbot Inc. submitted that the implementation of the SLA "deprived the Investment of its ordinary ability to alienate its product to its traditional and natural market." (69) Pope & Talbot Inc. classified the SLA as a form of "creeping expropriation" (70) whereby private property was taken using regulatory means. Additionally, the Claimant argued that each time the quota was reduced, a further expropriation occurred. In the language of the Claimant, "[Article 1110] provides the broadest protection for the investments of foreign investors who may suffer harm by being deprived of their fundamental investment rights." (71)

The Government of Canada responded to the arguments of the Claimant by arguing that there was no expropriation because "the ability to alienate its product to [the US] market is not a property right." (72) Moreover, the Canadian Government submitted that there could be no expropriation because Pope & Talbot Inc. continued to export its softwood to the United States under the SLA. In support of this point, Canada suggested that under international law, "mere interference is not expropriation." (73) Finally, Canada argued that there could be no expropriation when the State was exercising a valid regulatory power; in effect, there could be no "creeping expropriation" as proposed by the Claimant. (74) In essence, the Government of Canada claimed that the Claimant had not been deprived of any "fundamental ownership rights," (75) and even if it was, the deprivation was done validly through legislative means.

The NAFTA Panel of Arbitrators, in reaching its decision regarding Article 1110, agreed with the Investor that it did possess a property interest which was entitled to protection under Chapter XI. (76) However, the Panel went on to hold that, even though there was a property interest, it had not been interfered with to a degree that would constitute an expropriation. (77) An important part of the decision was the Panel's holding that a regulatory measure, taken by a government, could have an expropriatory effect. In particular, the Panel held that "regulations can indeed be exercised in a way that would constitute creeping expropriation." (78) The Panel

stated that to find otherwise would leave a "gaping loophole in international protections against expropriation." (79) Notwithstanding this statement, the Panel concluded that there was no expropriation in this case because there was no nationalization, the regulation was not confiscatory, and the Claimant remained in control of the investment. (80) While the interference of the regulation may have reduced the profits of the business, substantial quantities of softwood were still exported, and substantial profits were still earned on those sales. (81) The ultimate conclusion of the Panel was that, for an expropriation to occur, there must be a "substantial deprivation" (82) and under these circumstances that threshold was not met.

Metalclad Corporation v. The United Mexican States (83)

In 1997, the Claimant, Metalclad, a US corporation, commenced Chapter XI proceedings against Mexico, alleging that the actions of a Mexican municipal government had interfered with its development and operation of a hazardous waste landfill site. Metalclad had invested considerable time and money in constructing and performing environmental assessments on a proposed location and throughout this process, was "assured" that it had sufficient authority to complete the project. However, following the expenditure of significant amounts of money, the municipal government denied Metalclad's application for a permit. Following this denial, the Governor of the municipal government issued an ecological decree, declaring an area of the municipality which encompassed the site of the Metalclad operations and facilities, a "Natural Area" for the protection of a rare cactus. (84)

In response, Metalclad alleged that these actions interfered with the development and operation of its hazardous waste landfill site in a manner that was contrary to Mexico's obligations under Chapter XI of NAFTA. (85) Among other things, Metalclad argued that Mexico had violated its obligations under Article 1110. The Claimant contended that the Mexican government had "expropriated" Metalclad's property, or committed an act "tantamount" to expropriation by denying Metalclad its assured permit. (86)

Ultimately, the three-panel arbitral Tribunal--the International Centre for Settlement of Investment Disputes--interpreted "expropriation" pursuant to Article 1110, to include:

> [N]ot only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State. (87)

By permitting the municipal government to deny the required permit, the Mexican government was found to have inequitably and unfairly treated Metalclad, and to have "taken a measure tantamount to expropriation" or "indirect expropriation." (88) The Tribunal also found that the municipal government's implementation of the ecological decree amounted to an expropriation contrary to Article 1110. (89) The NAFTA Tribunal awarded the Claimant approximately US$16.7 million.

The Tribunal's decision led to a resurgence of environmental criticism. It was suggested that the result reinforced long-held fears that NAFTA's rules for international investors opened the back door to attacks on environmental laws and regulations. (90) It was further suggested that NAFTA Parties should work to restrict the reach of Chapter XI's provisions into environmental regulation. (91)

S.D. Myers Inc. v. Government of Canada (92)

In 1998, the Claimant, S.D. Myers Inc., commenced Chapter XI proceedings against the Canadian Government, arguing that the Canadian Government had expropriated its investment. The business of S.D. Myers Inc. was focused on the remediation of PCBs. During the 1990s S.D. Myers sought to expand its US operations into the Canadian marketplace. (93) The Claimant intended to obtain Canadian PCB waste, and then to transport and treat it at its US facilities. When the Claimant entered the Canadian PCB marketplace, there was only one credible Canadian competitor. The market conditions were very suitable for the Claimant, given that it would have a significant cost advantage due to its geographical location relative to the existing Canadian company. (94)

The Canadian Government's policy at the time was that the destruction of PCBs should be carried out, to the maximum extent possible, within Canadian borders. (95) Consequently, the Claimant began a lobby campaign. (96) However, the Government remained steadfast that the destruction of PCBs should take place within Canada, and should be done by Canadians. (97) Nevertheless, while the Claimant proceeded with its initial plan, the Government countered by closing its border to the transport of PCBs. (98) As well, the Government took further legislative action and ultimately passed an order in council amending PCB waste export regulations. (99) The legislative action and the closure of the border ultimately delayed the Claimant's operations for approximately eighteen months. (100) As a result, the Claimant commenced Chapter XI proceedings.

The Claimant argued, inter alia, that Canada breached its obligations under Article 1110, (101) suggesting that this breach led to various detriments, including lost sales and profits and a loss of its investment. (102) The Claimant contended that Article 1110 obliged the Government of Canada to pay fair market value in the case of an expropriation or a measure tantamount to the expropriation of the property of an investor of another Party. (103) In this instance, the Claimant argued that the Government's orders were "tantamount" to an expropriation, amounting to a violation Article 1110 for which appropriate compensation had not been provided. (104)

In dealing with this issue, the Tribunal held that no expropriation had taken place. (105) It noted that the term "expropriation" in Article 1110:

> [C]arries with it the connotation of a "taking" by a governmental-type authority of a person's "property" with a view to transferring ownership of that property to another person, usually the authority that exercised its de jure or de facto power to do the "taking." (106)

In this instance, the Tribunal found that the Government's orders were "regulatory acts" that imposed restrictions on the Claimant, but that these regulatory actions were not tantamount to expropriation. (107) The Tribunal continued:

> Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs .... An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary. (108)

The Tribunal held that the closure of the border was temporary--the Claimant's venture into the Canadian market was postponed for approximately eighteen months, and this closure could not be characterized as an expropriation within the terms of Article 1110. (109) At most, the closure could be construed as a "delayed opportunity." (110) In construing the terms of Article 1110, the Tribunal determined that the Claimant:

> [R]elied on the use of the word "tantamount" in Article 1110(1) to extend the meaning of the expression "tantamount to expropriation" beyond the customary scope of the term "expropriation" under international law. The primary meaning of the word "tantamount" given by the Oxford English Dictionary is "equivalent." Both words require a Tribunal to look at the substance of what has occurred and not only at form. A Tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure. (111)

In effect, the Tribunal followed the Pope & Talbot decision, (112) where it was held that the drafters of NAFTA intended the word "tantamount" to embrace the concept of so-called "creeping expropriation," rather than to expand the internationally accepted scope of the term expropriation. (113)

Methanex Corporation v. United States of America (114)

In 1999, the Claimant, Methanex Corporation, a Canadian Investor, commenced Chapter XI proceedings against the Government of the United States contending that the State of California's ban of the gasoline additive MTBE resulted in an expropriation of its US investment. (115) Methanex alleged, pursuant to Article 1110, that a substantial portion of its share in the California and larger US oxygenate market was taken by patently discriminatory measures and handed over to the domestic ethanol industry. (116)

In response to this claim, the Tribunal held that there was no expropriation decree, no act of creeping expropriation, and no "taking" in the sense that property of Methanex was seized and transferred. (117) The Panel agreed that "an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation," (118) and stated:

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation. (119)

The Tribunal consequently dismissed the Claimant's assertions as unfounded and conspiratorial, (120) finding that the California ban was made for a public purpose, was non-discriminatory and was accomplished with due process; the ban was a lawful regulation and not an expropriation. (121) The key feature of the decision was that the California ban did not amount to an expropriation. Had the Tribunal reached the opposite conclusion, that the ban constituted an expropriation, compensation would still have been required under Article 1110 notwithstanding the Tribunal's finding that the ban had a valid "public purpose." (122) Even though there was no expropriation, the Tribunal nevertheless adopted the reasoning from Pope & Talbot where it was held that an "investor's access to the U.S. market is a property interest subject to protection under Article 1110." (123)

Conclusions on Article 1110 Case Law

The history of NAFTA Tribunal decisions demonstrates that there has been a lack of consistency in the interpretation and application of Article 1110. While it may seem that a claim of expropriation by a Claimant is difficult to sustain, there are troubling comments from the various Panels which suggest that the potential exists for a state to be held liable to a private entity for what might appear to be an otherwise valid regulatory measure. As can be seen from the previous section, Tribunals have evaluated the word "expropriation" in different ways, creating a spectrum of possible interpretations: "direct expropriation," "indirect expropriation," "tantamount to expropriation," and "creeping expropriation." One Tribunal has even gone so far as to classify what would appear to be an expropriatory measure as nothing more than a "lawful regulation."

Considering that the principle of stare decisis does not apply in NAFTA arbitrations, (124) these inconsistencies are not surprising. However, it is this lack of certainty that exposes NAFTA Parties to significant risk. If a claim under Article 1110 is upheld, a state may be liable to pay significant compensation and/or damages to the Claimant. Due to the uncertainty surrounding the outcome of any claim, the only options available to a state might be: (1) to settle, sometimes for a significant monetary sum (as in the Sun Belt litigation); (2) to change its regulatory scheme to bring it into compliance with Chapter XI; or, (3) worse yet to settle the claim and change the regulatory scheme (as was the case in Ethyl). None of these possibilities are desirable where the government is enacting reasonable environmental policies.

V EXAMPLE OF AN ARTICLE 1110 CLAIM ARISING UNDER ALBERTA'S WATER ACT

Factual Context

To provide an example as to how an expropriation dispute could limit Canada's environmental sovereignty consider the following hypothetical case study under Alberta's Water Act: a United States corporation owns all, or a portion of, an Alberta oil sands development; to facilitate bitumen recovery, (125) the corporation holds a water license under Alberta's Water Act; finally, due to a lengthy period of drought the Director, (126) pursuant to his or her powers under s. 55(2) of the Water Act, (127) cancels or suspends the corporation's water license on the basis that the aquatic environment of a particular region is in critical danger. This outcome could clearly result in a significant loss of investment. The water license itself has substantial value since bitumen recovery is not possible, or at a minimum is substantially more expensive, without a readily available water supply. Considering the magnitude of US investment which exists in Alberta's oil sands, (128) as well as the industry's extreme reliance on water for resource recovery, (129) such an example is within the realm of possibility. Accordingly, this hypothetical creates an interesting and reasonable case study to assess NAFTA's influence on Canada's environmental sovereignty.

Application of the International Investment Jurisprudence

Investor and Investment Thresholds

In terms of this case study, to commence an Article 1110 claim, the US corporation would have to satisfy two preliminary thresholds: first, that it is an "Investor" (i.e. a valid Claimant); (130) and, second, that the water license is an "Investment." (131) The definition of "Investor" is broad and encompasses, inter alia, a NAFTA member state, a state enterprise of a NAFTA member state and a national of a NAFTA member state. (132) The definition includes a "national" which is defined in Article 201 to include a citizen and a permanent resident. (133) In this example, the US corporation is an enterprise incorporated in the United States, a NAFTA Party. Accordingly, it would fit within the parameters of this definition.

Likewise, "Investment" is broadly defined under NAFTA, and includes "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes." (134) Arguably, a license is a form of "property," (135) but more importantly the oil sands development is also a form of property and would clearly be considered an investment. Any loss of the water license would reduce the economic viability and profitability of the investment. In particular, the US corporation owned the water license with the expectation that the use of such license would result in an economic benefit. In the result, it should not be too difficult to establish that the water license is a form of Investment as contemplated under Chapter XI.

Expropriation

Having met the Investor and Investment thresholds, the next question to analyze is whether there is an expropriation. Put another way, could the actions of the Government of Alberta be

considered a "regulatory taking" and, as such, tantamount to expropriation? There might be some difficulty with the argument that the cancellation or suspension is a direct expropriation based on several of the NAFTA Tribunal decisions. (136) While there is no principle of stare decisis in the NAFTA dispute resolution process, cases such as Pope & Talbot and S.D. Myers suggest that for a direct expropriation to occur there must be some government action that seeks to take over ownership of the investment, (137) or to nationalize the business. (138) On the facts of this case study, the Pope & Talbot and S.D. Myers threshold would be a difficult threshold to satisfy. Therefore, alternative grounds must be explored for an expropriation claim to have much chance of success.

Perhaps a more probable outcome would be that the cancellation or suspension of the license is an action that is "tantamount to an expropriation" (139) or, in the words of the Pope & Talbot Tribunal, a "creeping expropriation." (140) Indeed, some of the cases have also indicated that a state can be liable for an "indirect expropriation," which has been defined by the Metalclad Tribunal as:

> [N]ot only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State. (141)

As such, when the facts of the example and the case law are analyzed together, it is reasonable to conclude that a NAFTA Tribunal could find that the cancellation of the water license by the Government of Alberta is an indirect expropriation.

The overall analysis however, is somewhat more complicated, as the case law provides a number of additional considerations. The Metalclad Tribunal also cited with approval the international arbitration of Biloune et al. v. Ghana Investment Centre et al. (142) and stated, "... an indirect expropriation had taken place because the totality of the circumstances had the effect of causing irreparable cessation of work on the project." (143) Additionally, in S.D. Myers, the Panel defined creeping expropriation as: "... a lasting removal of the ability of an owner to make use of its economic rights." (144) Consequently, if it could be proven that the suspension of the water license was only a temporary measure put in place to resolve some acute short-term environmental issue, the case law could help to validate the expropriation.

Moreover, in Pope & Talbot, the Panel held that a regulatory scheme could result in "creeping expropriation" if that scheme substantially deprived the Investor of profits which would otherwise have resulted from the investment. (145) In this example, the ability of the US corporation to make profits from its oil sands operation has arguably been completely lost. As a result, this case study may be an example of when the "substantial detriment" threshold for a creeping expropriation is actually met. Should other production options be available, however, it is possible that the creeping expropriation complained of in this case study might be equivalent to the creeping expropriation discussed in Pope & Talbot. However, in Pope & Talbot, the

Tribunal also held that even though there were some negative economic ramifications for the Claimant due to the SLA, these ramifications did not create a detriment substantial enough to warrant a successful expropriation claim. (146) A similar argument may be available on the facts of this case study: even though fresh water is not be available to the company, there might be other alternatives, perhaps more costly ones, which would allow oil sands operations to continue. Thus, the magnitude of the alleged "detriment" may be mitigated, making it less "substantial" than the provision has been interpreted to require.

Finally, Article 1110(1) provides that a Party may directly or indirectly nationalize or expropriate an investment, or take a measure tantamount to the nationalization or expropriation of an investment, if such action is taken for a public purpose, is nondiscriminatory, is accomplished with due process, and appropriate compensation is paid. (147) In this example, the Government of Alberta's actions, made pursuant to its legislative powers to cancel or suspend water licenses, may have been (1) made for a public purpose (as the cancellation is an effort to protect the aquatic environment), (2) non-discriminatory (as the cancellations could be industry wide and affect both Canadian and foreign businesses), and (3) in accordance with due process (as the cancellation would have been in accord with the terms of the Water Act itself). However, even if these thresholds have been met, for the expropriatory action to be valid, the Government of Alberta would still have to pay compensation that is adequate given the terms of Chapter XI. Even though the Methanex case appears to indicate that an application of the "public purpose" provisions of NAFTA will not lead to an award of compensation, it is worth emphasizing that the Tribunal declined to characterize the actions of the California government as "expropriatory," making the application of the "public purpose" provisions from Article 1110 unnecessary, (148) Consequently, notwithstanding the Tribunal's decision in Methanex, even if the "public purpose" defence is raised, the Canadian public may still be faced with a substantial compensatory liability.

The foregoing analysis shows that a strong argument exists to suggest that the cancellation of a water license could constitute an indirect expropriation under Chapter XI. Even though there are potential arguments available that may aid in a mitigation defence, or that may even work to validate an expropriation on "public purpose" grounds, substantial compensation will still be owed to an Investor as a result of any revocation or suspension of a water license.

Outcome of the Claim

In the case of an oil sands operation that is shut-down as a result of a loss of its water license, one can conceive that compensation arising from a successful Chapter XI claim could be exceptionally high. Consider the loss of capital expenditures, the nullification of past expenditures, and the lost marketability of the future oil production. Even if the water license is only suspended for a limited period of time to address an immediate environmental concern, compensation could arguably still be payable to the Investor for the period during the suspension when income and profits were lost. It is not too difficult to contemplate that compensation for the shutdown of an oil sands operation as a result of the cancellation of a water license could amount to hundreds of millions, or perhaps even billions of dollars. (149)

The most likely way that the Governments of Alberta or Canada could avoid compensatory liability is through the "Environmental Measures" provisions in Article 1114, despite this provision's apparent limited strength. Article 1114 provides that nothing in Chapter XI shall be construed so as 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. (150)

Of the jurisprudence available thus far, only the Metalclad decision has dealt with this Article. In Metalclad, the Panel examined whether the Mexican government's denial of the Claimant's permit application could be reconciled under Article 1114. (151) The Tribunal reasoned that since the Government had already issued the necessary licenses, it must have been satisfied that the issuance of the license was consistent with, and sensitive to, all environmental concerns. The subsequent withholding of the necessary permits was unjustifiable. (152)

Given the facts of this case study, the Investor would undoubtedly make a similar argument--the Government of Alberta already issued the water license, and in doing so it must have impliedly been acknowledging that the issuance was consistent with, and sensitive to, the Province's environmental concerns. In respect of compensation, Article 1114 is clear that any environmental measure taken by a Government must be otherwise consistent with the provisions of Chapter XI. Consequently, even if a water license was expropriated for valid environmental purposes, the full range of compensation, as provided in Chapter XI, might still be available to the Investor. As has been indicated, the amount of this compensation could be enormous. Ultimately, although Article 1114 may act to validate an expropriation, it does not take away an Investor's entitlement to be compensated for any and all losses associated with the revocation of a water license.

Notwithstanding the discussion above, it is arguable that the Alberta Water Act alone should govern any compensation that might become payable as a result of an expropriation. In this case study, the Investor took its water license and any correlative rights thereunder, subject to the provisions of the Alberta Water Act. When the Investor applied for the water license the legislation clearly established that, under certain circumstances, the license could be suspended or cancelled outright. (153) Accordingly, it could be argued that the Investor assumed the risk that its water license could be suspended or extinguished by the Government of Alberta. With knowledge of the provisions of the Water Act, and having assumed the associated risks when taking the license pursuant to its legislative provisions, perhaps it could be further argued that this was not a case of expropriation at all. Rather, it was the unfortunate materialization of the downside risk that the Investor had hoped to avoid. Based on this reasoning, the Government of Alberta might be responsible for compensation payable under s. 158 of the Water Act, (154) but it would not be responsible for any additional compensation payable under the terms of Chapter XI.

Considering that the Investor took its license pursuant to the Alberta Water Act, it arguably should be bound by the compensation provisions within that statute (the compensation provisions are found in s. 158). Under the WaterAct, compensation is not defined, nor is a formula for calculation provided; rather compensation is payable "in the manner and amount that the Director considers appropriate." (155) As such, this reasoning would suggest that the ultimate

amount owing could be assessed by the Director at less than what a Tribunal might award under an Article 1110 claim.

The Investor however, may contend that Canada cannot argue that compensation is solely owed pursuant to the compensation provisions of the Alberta Water Act. Rather, compensation should be payable in accordance with the scheme set out in Article 1110. The Investor's position in this respect would be bolstered by the well-accepted position that, under international law, a state cannot evade its international obligations through the imposition of its domestic law. (156) In this instance, it would be argued that Canada cannot attempt to displace the compensation scheme under Article 1110 with that of the Alberta Water Act. NAFTA is an international treaty to which Canada is bound and its provisions cannot be circumvented by domestic legislation.

Based on the preceding analysis, it appears as if the Government of Alberta, and therefore the Government of Canada, may face difficult financial consequences if the Director suspends or cancels a water license for environmental protection purposes. There are strong arguments available to a US Investor that support the position that a cancellation or suspension of a water license is an indirect expropriation, or a measure tantamount to an expropriation, thereby resulting in substantial compensation being payable. Canada's most favourable positions, that the license was suspended for a public purpose or based on an environmental necessity, while certainly arguable, may ultimately still lead to significant compensation being payable under Chapter XI. As a result, we can see that the Governments of Alberta and Canada may have a significant policy decision to make. The terms of Chapter XI can affect how internal policy is formulated simply because Canada may wish to avoid the wide-ranging financial consequences that could arise from an Investor-led NAFTA claim.

Other Options for Canada

As has been demonstrated, there are a number of uncertainties associated with the cancellation or suspension of a water license held by a US Investor. While there are pubic purpose and environmental arguments available to Canada, which could be pursued through litigation, the available case law suggests that the public purpose argument, and an environmental measures defence, could still lead to significant exposure to a compensation award. Consequently, Canada may wish to consider what options, aside from litigation, it has available should a Chapter XI issue arise in respect of this type of environmental legislation.

First, Canada could prevent the dispute from proceeding to the NAFTA Tribunal, and avoid the possibility of an adverse finding. In other words, Canada could offer to settle with the Investor. Such a course of action might be desirable for several reasons. In particular, it could avoid the costs associated with litigating a case in a NAFTA forum. More importantly, however, a settlement could help avoid the embarrassment that a government would be faced with if a transnational Panel ruled against an internal legislative measure. Furthermore, the Government of Canada has chosen the settlement option in the past. (157) Rather than facing a drawn-out legal proceeding, with an unpredictable outcome, the Government of Canada paid the Claimants a cash settlement.

A settlement, however, also has some negative ramifications. Most obviously, Canada would still face financial constrictions. It is unlikely that a Claimant who expects to receive a substantial compensation award if the claim proceeds through the dispute resolution process will accept a settlement offer that is far below the perceived value of the claim. As a result, settlement values may approach the dollar amounts which were initially claimed. (158) If this turns out to be the case, the benefits of a settlement approach nullification. Furthermore, if Canada is perceived as a state that will settle in most circumstances, it may well become the target of an increasing number of claims. If investors sense that they can receive a settlement payout from the Canadian Government--no matter how strong or frivolous the substantive merits of the claim happen to be--they may attempt to litigate any regulatory or legislative scheme that has, will, or may affect their business. Such a possibility is clearly not in Canada's best interests. It certainly is not desirable for a state to constantly be fending off the claims of private investors through offers of monetary settlements. The result of a settlement scheme is that it may allow environmental legislation and regulation to survive, but would do so at a tremendous economic cost. Implementing this strategy would, in effect, require that Canada "purchase" its environmental sovereignty by settling its way out of Chapter XI claims. Canada would still have the ultimate ability to formulate environmental policy and regulate accordingly; nevertheless, the presence of external pressure by foreign investors undoubtedly constrains Canada's ability to enforce its environmental policy.

If it did not wish to litigate, or settle, Canada could alternatively do one of three things: (1) revoke the suspension or cancellation of the water license; (2) prevent the Director from exercising his or her statutory authority to cancel or suspend water licenses; or, (3) repeal s. 55 of the Water Act. These options are similar to what occurred in the Ethyl case; in addition to paying a monetary settlement, Canada also repealed the impugned legislative measure. (159) For obvious reasons, these options are certainly not constructive for Canada. The ability of the Government of Alberta to protect its waterways from over-withdrawal and degradation would be irreversibly affected. The environmental protection provisions in the Water Act, as they apply to a US investor, would be effectively neutered, and all the Government of Alberta could do is sit back and watch its watercourses be depleted. The environment would be irrevocably subservient to Chapter XI of NAFTA.

The implications for Canadian environmental sovereignty in this circumstance are clear. A private investor could essentially force the hand of a Canadian legislative body. A US investor, who is not accountable to the Canadian public, and who may have no concern for the Canadian environment, could potentially influence how internal Canadian environmental policy and legislation is treated. As a result of the potential for a significant compensation award to be issued, a single US investor may, through the threat or use of a Chapter XI claim, be able to cause Canadian legislation to be altered or even repealed.

Conclusions Based on the Case Study

Although this article raises serious concerns, it must be kept in mind that for the case study outlined in this article to come to pass, a situation of grave environmental peril would have to exist. The Government of Alberta favours, and indeed promotes, high levels of foreign

investment in its oil and gas industry. Although the Alberta Government has taken steps to protect its natural environment through legislation such as the Water Act, extreme and drastic environmental problems would need to exist before Alberta would compromise the pace of its economic development. While it is conceivable that the Province could experience conditions that would require instream flow needs to be addressed, the Government would likely attempt to maintain economic productivity through any other means possible (160) before resorting to what could be considered an expropriation of rights under the Water Act.

Nonetheless, with a prolonged and serious drought, and given the amount of water currently used by oil sands operators, it is not inconceivable that water withdrawals may need to be reduced--perhaps by a large amount. Consequently, the suspension or cancellation of water licenses may be the only remaining and viable option that the Government of Alberta has to meet the needs of the aquatic ecosystem.

The Government of Alberta (and therefore Canada), must consider an appropriate strategy moving forward in the event that such issues materialize. It would appear that Canada has very few attractive options. It is unrealistic that the Province would only cancel or suspend Canadian-held water licenses for the reasons suggested. Therefore, water licenses would probably be altered pursuant to s. 55 of the Water Act in a non-discriminatory fashion that similarly affects both Canadian and US investors. This could ultimately leave Alberta and Canada open to compensation claims arising under Chapter XI.

VI CANADIAN ENVIRONMENTAL SOVEREIGNTY

The case study outlined in the preceding paragraphs demonstrates how an Article 1110 claim could arise under the Alberta Water Act. However, when considering the relative ease with which a claim can be commenced under Chapter XI of NAFTA, it is conceivable that Article 1110 challenges could similarly arise in a variety of other environmental contexts in a number of other Canadian jurisdictions.

Some writers claim that Chapter XI environmental sovereignty struggles could become more prevalent, or may continue to linger, in a number of different natural resource industries, including fisheries, forestry and fresh-water exports. (161) Like the Water Act in Alberta, many Canadian provinces and territories have enacted legislation to protect the environment and the use of natural resources. (162) Consequently, it is not inconceivable that Chapter XI expropriation claims, similar to those discussed in the case study, could also arise under the substance of those statutes.

As this article suggests, when considering the significance of natural resources to Canada's development and prosperity, (163) concerns over environmental sovereignty go to the core of not only Canada's resource and trade policy, but also to Canada's ongoing economic growth and success. As such, these concerns must be appropriately dealt with. So long as NAFTA remains in force, environmental sovereignty concerns will continue to persist.

To address the Chapter XI issues that arise in respect of Canada's environmental sovereignty, it has been suggested that it might be useful for Canada to pursue the re-interpretation and

extension of both Articles 1106 and 1110. (164) Such a reinterpretation and extension may lead to the development of more specific language in NAFTA that allows for effective Chapter XI exceptions to be created for environmental protection, natural resource management and conservation matters. Consequently, these exceptions may limit the "stifling" effect that NAFTA has had on the development of environmentally necessary legislation. (165)

Others have gone further and argued that Canada will never gain sovereignty over its natural resources unless a more drastic approach is taken; that is, the negotiation of substantial amendments to the substance of NAFTA. (166) However, such solutions, although perhaps desirable, are highly improbable. NAFTA has been in force for over a decade, and despite harsh criticism and controversy, its terms have not yet been renegotiated or reinterpreted. Accordingly, Canada must be prepared to accept that the Investment provisions found in Chapter XI are here to stay. Canadian policy must be formulated such that the consequences that Chapter XI creates for Canadian environmental sovereignty can be effectively managed.

VII CONCLUSIONS: POLICY OPTIONS

This article demonstrates that Chapter XI of NAFTA limits Canada's environmental policy options. When faced with a Chapter X1 expropriation claim, Canada can choose to settle, and risk a multiplicity of lawsuits; or to litigate and hope that well-reasoned decisions that give some latitude for environmental protection are laid down, and that future Tribunals follow these decisions. From a cost/benefit perspective, litigation may be the most attractive of the unattractive options. Based on the jurisprudence, of those Chapter XI cases that have reached a decision on compensation, the amounts awarded tend to be substantially lower than the compensation sought. For example, in Pope & Talbot, the Claimant sought $381 million, but was awarded a mere $401,000; in S.D. Myers, the Claimant sought $20 million, but was awarded $4.8 million; and, in Metalclad, the Claimant sought US$90 million, but was awarded US$15.6 million.

The trend in these cases suggests that NAFTA Tribunals are reluctant to award huge sums for compensation when an expropriation claim is made. Clearly, this reluctance on the part of the Tribunals is a positive sign in terms of the overall threat that Chapter X1 poses to Canada's environmental sovereignty. Smaller compensation awards undoubtedly will not act as a great deterrent to environmental legislators when compared to awards that are more closely aligned with the compensation sought by Claimants that could create a chilling effect.

Notwithstanding the relatively low compensation awards to date, there is however, always the possibility that a Tribunal may award a massive amount for compensation, and thereby establish an unfavourable precedent; all that is needed is the right set of circumstances and a Claimant who can clearly demonstrate that it has been significantly harmed by a piece of Canadian environmental legislation. This ongoing uncertainty creates a situation of unacceptable risk. The Government of Canada should not need to rely on the shifting views of unaccountable international arbitration tribunals when crafting domestic environmental policy. Even though litigation might be the best policy decision for Canada to manage the consequences created by

Chapter XI, it does not eliminate the significant level of risk that still exists in respect of Canada's environmental sovereignty.

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(1) North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994), online: [NAFTA].

(2) J. Anthony VanDuzer, "NAFTA Chapter 11 to Date: The Progress of a Work in Progress" in Laura Ritchie Dawson, ed., Whose Rights.? The NAFTA Chapter 11 Debate (Ottawa: Centre for Trade Policy and Law, 2002) 47 at 49.

(3) Ibid.

(4) Ibid.

(5) See for example ibid. at 50; and Michael M. Hart & William A. Dymond, "NAFTA Chapter 11: Precedents, Principles and Prospects" in in Dawson, supra note 2 at 129.

(6) See for example the separate opinion of Bryan R Schwartz in S.D. Myers Inc. v. Government of Canada (2001), 40 I.L.M. 1408 at 1477 (United National Commission on International Trade Law) (Arbitrators: Edward C. Chiasson, J. Martin Hunter, Bryan R Schwartz) at paras. 24-29.

(7) R.S.A. 2000, c. W-3 [Water Act].

(8) United Nations Conference on Trade and Development, "Foreign Direct Investment," online: United Nations Conference on Trade and Development .

(9) NAFTA, supra note 1 at Article 1139 states, "investment means: (b) an equity security of an enterprise; (c) a debt security of an enterprise...."

(10) Michael M. Hart & William A. Dymond, "NAFTA Chapter 11 : Precedents, Principles, and Prospects" in in Dawson, supra note 2 at 149-150. The authors of this article characterize this type of risk as a "regulatory-taking."

(11) Christopher Wilkie, "The Origins of NAFTA Investment Provisions: Economic and Policy Considerations" in in Dawson, supra note 2 at 8.

(12) Office of the Chief Economist, Canadian Direct Investment Abroad (Stocks'), online: Foreign Affairs and International Trade Canada .

(13) VanDuzer, supra note 2 at 48.

(14) One of the general purposes of international trade is for trading partners to take advantage of the competitive advantages that each state offers. One such advantage offered by LDCs is the relatively low cost of labour.

(15) In general it may be true that developing states may have lesser regulatory controls over such things as the environment, and labour standards although this is certainly not always the case.

(16) See Aimee T. Gonzales, "Foreign Direct Investment and the Environment" (Presentation at the OECD General Forum on International Investment: New Horizons and Policy Challenges for Foreign Direct Investment in the 21st Century, November 2001) [unpublished], online: Organization for Economic Co-operation and Development ; Richard McNally, No Investment Agreement within the WTO: Redirecting Investment to Promote Sustainable Development (Gland, Switzerland: WWF International, 2001), online: Organization for Economic Co-operation and Development ; and Nick Mabey and Richard McNally, Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development (Surrey, UK: WWF-UK, 1999) online: Organization for Economic Co-operation and Development . For a definition of LDC see UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States, "Criteria for the identification of LDC's," online: United Nations .

(17) Wilkie, supra note 11 at 12.

(18) Ibid. at 15.

(19) For a comprehensive listing of FIPAs that are currently in force see Foreign Affairs and International Trade Canada, "Listing of Canada's Existing FIPAs" online: Foreign Affairs and International Trade Canada .

(20) Ibid. Agreements have been made with Asian, European African and South American states, including Thailand, Croatia, Egypt and Peru. Since July 1995, every FIPA entered into by the Canadian government has included provisions which mirror those of NAFTA, Chapter XI; see Wilkie, supra note 11 at l6.

(21) Canada-U.S. Free Trade Agreement, 2 January 1988, Can. T.S. 1989 No. 3, 27 I.L.M. 281 (entered into force I January 1989) [FTA].

(22) Negotiations for the FTAA are ongoing and currently the proposed FTAA Agreement is on its Third Draft.

(23) Dennis Browne "Commentary" in Dawson, supra note 2 at 42.

(24) While the FTAA potentially could dramatically increase flows of FDI, there is also the possibility that such an agreement would include numerous reservations from major Latin American states that might mirror the reservations of Mexico within NAFTA. The Annexes of NAFTA include schedules of reservations for each Party and Mexico's are significantly more expansive than either Canada's or the United States' (see NAFTA, supra note 1 at Annex I-VII.;

see also Foreign Affairs and International Trade Canada, "Current FTAA Negotiations: Background Information on Investment Negotiations," online: Foreign Affairs and International Trade Canada , where it is indicated that potential FTAA members will have the ability to exclude specific economic sectors from FTAA investment provisions, and will have the ability to file reservations for certain measures which would otherwise be a violation of the proposed investment regulations. Another indicator of the potential scope of the investment provisions that could be included in the FTAA can be found in the Andean Investment Codes. Under Decision 291 the Andean Community has attempted to establish measures that would facilitate foreign investment in the region. However, these provisions are limited in strength as they ultimately defer to domestic legislation on the topic of investment. Moreover, under Decision 292 the Andean community extends most-favoured nation treatment only to Andean multi-national enterprises, and not to businesses from outside of the region. Together, these provisions give with one hand and take away with another. Foreign investment is not liberalized as much as it appears to be. A similar hurdle may arise in negotiations over the FTAA. These states may be eager to enter into an agreement, but reluctant to give it any strength (see Carlos Garcia-Fernandez "International Investment Agreements and Instruments" (Presentation at the OECD General Forum on International Investment: New Horizons and Policy Challenges for Foreign Direct Investment in the 21st Century, November 200), online: Organization for Economic Co-operation and Development [unpublished].

(25) For a discussion of the fears expressed by environmentalists prior to the entry into force of NAFTA see Greg Block, "Independent Review of the North American Free Trade Agreement for Environmental Cooperation (NAAEC)" (1997) SB79 A.L.I.-A.B.A. 291 at 304. For a discussion of the environmental groups who continue to express similar concerns regarding the FTAA see "Hemispheric Environmental Groups Fighting Exclusion from FTAA" Americas Trade (2 April 1998) at 17.

(26) Negotiations to finalize the MAI ceased in 1998.

(27) For a draft version of the MAI see Negotiating Group on the Multilateral Agreement on Investment "The Multilateral Agreement on Investment: Draft Consolidated Text," online: Organization for Economics Co-operation and Development . The MAI's provisions appear to be similar to those found in Chapter XI of NAFTA. In particular, the draft MAI contains clauses such as National Treatment and Most Favoured Nation, Performance Requirements, Expropriation and Compensation, and Investor-State Procedures. Moreover, the OECD notes that the "investment provisions in the NAFTA treaty have been portrayed as the blueprint for the MAI..." (see E.V.K. FitzGerald et al., "The Development Implications of the Multilateral Agreement on Investment" (Report commissioned by the Department for International Development, March 1998), online: Organization for Economic Co-operation and Development .

(28) For a brief but useful summary of the arguments against the MAI, which have led to the controversy surrounding the proposed multi-lateral agreement (as well as an account of the arguments that the proponents of the MAI put forth) see Michele Sforza-Roderick, Scott Nova & Mark Weisbrot, "A Concise Guide to the Multilateral Agreement on Investment Supporters' and

Opponents' Views" (Report for the Preamble Center for Public Policy), online: Global Policy Forum .

(29) Ibid.

(30) Ibid.

(31) VanDuzer, supra note 2 at 48.

(32) At the end of 2003 it was calculated that the United States has invested approximately US$1.8 trillion overseas, including approximately US$192 billion in Canada and US$304 billion in Latin America (see U.S., Congressional Research Service, U.S. Direct Investment Abroad." Trends and Current Issues (Washington D.C.: The Library of Congress, 2005), online: Congressional Research Service Report).

(33) Wilkie, supra note 11 at 18.

(34) Ibid at 18-19.

(35) Ibid. at 19.

(36) Ibid.

(37) Ultimately the result of Chapter XI of NAFTA was, in fact, a dramatic increase in US investment in Canada. United States FDI in Canada almost quadrupled between 1990 and 2004. See Office of the Chief Economist, supra note 12.

(38) Maureen Appel Molot "NAFTA Chapter 11 : An Evolving Regime" in in Dawson, supra note 2 at 179.

(39) FTA, supra note 21.

(40) Ibid. at Annex 1607.3.

(41) R.S., 1985, c. 28(1st Supp.).

(42) Governmental review was available based on the size of the investment. Only large-scale acquisitions were covered by the provision (investments over $25 million in the first year). The ability of Canada to review an acquisition was to be reduced every year for five years (only investments over $50 million in the second year and over $100 million in the third year, etc.) until all investments were allowable and outside the purview of the Government.

(43) NAFTA, supra note I.

(44) Ibid.

(45) Ibid.

(46) Ibid.

(47) Ibid.

(48) Ibid.

(49) Ibid.: Article 1114 reads, "[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."

(50) Ibid.

(51) Similar concerns have been raised about the proposed MAI; see Sforza-Roderick, Nova & Weisbrot, supra note 28.

(52) Wilkie, supra note 11 at 16.

(53) Ethyl Corporation v. Government of Canada (Notice of Intent to Submit a Claim to Arbitration), 10 September 1996, online: Foreign Affairs and International Trade Canada [Ethyl].

(54) Ibid. The MMT Act prohibited both the import and inter-provincial trade of MMT. The Claimant argued that since MMT could still be sold in Canada (provided that it was manufactured and sold within the same Province), that this was a violation of Article 1102, since it treated Investors trading in MMT less favourably than their Canadian counterparts.

(55) David MacArthur, "NAFTA Chapter 11: on an Environmental Collision Course with the World Bank?" (2003) Utah L. Rev. 913 at 913.

(56) Ibid.

(57) Sun Belt Water Inc. v. Government of Canada (Notice of Intent to Submit a Claim to Arbitration), 27 November 1998, online: Foreign Affairs and International Trade Canada [Sun Belt].

(58) Samrat Ganguly, "The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health" (1999) 38 Colum. J. Transnat'l L. 113 at 148-149.

(59) Sun Belt, supra note 57.

(60) This damage claim was later increased exponentially to US$10.5 billion.

(61) Sun Belt, supra note 57.

(62) On October 12, 1999 Sun Belt filed an additional Notice of Claim and Demand for Arbitration alleging US$10.5 billion in damages. This new Notice included a claim under Article 1110.

(63) Pope & Talbot Inc. v. Government of Canada (Interim Award), 26 June 2000 (NAFTA Arbitral Tribunal), online: Foreign Affairs and International Trade Canada [Pope & Talbot].

(64) Ibid. at para. 2.

(65) Ibid. at para. 29. Approximately 90% of the softwood produced by Pope & Talbot Inc. was exported to the United States.

(66) Ibid. at para. 4.

(67) Ibid. at para. 6.

(68) Ibid. at para. 30.

(69) Ibid. at para. 81.

(70) Ibid. at para. 83.

(71) Ibid.

(72) Ibid. at para. 87.

(73) Ibid. at para. 88.

(74) Ibid. at para. 90.

(75) Ibid at para. 91.

(76) Ibid. at paras. 96 and 98.

(77) Ibid. at para. 96.

(78) Ibid. at para. 99.

(79) Ibid.

(80) Ibid. at para. 100.

(81) Ibid. at para. 101.

(82) Ibid. at para. 102.

(83) Metalclad Corporation v. The United Mexican States (Award), 30 August 2000, (NAFTA Arbitral Tribunal online: Secretaria de Economia [Metalclad].

(84) Ibid. at para. 59.

(85) Ibid. at para. 1.

(86) Ibid. at para. 104

(87) Ibid. at para. 103.

(88) Ibid. at paras. 104 and 107.

(89) Ibid. at para. 111.

(90) Lucien J. Dhooge, "The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United Mexican States" (2001) 10 Minn. J. Global Trade 209.

(91) Metalclad, supra note 83.

(92) S.D. Myers Inc. v. Government of Canada (Partial Award) (2001), 40 I.L.M. 1408 (NAFTA Arbitral Tribunal) [S.D. Myers].

(93) Ibid. at paras. 90 and 92.

(94) Ibid. at para. 112. S.D. Myers PCB treatment facility was located in Ohio, which is geographically closer to the major Canadian manufacturing centres in Ontario and Quebec than the only suitable Canadian PCB treatment facility which is located in Alberta.

(95) Ibid. at para. 108.

(96) Ibid. at para. 113.

(97) Ibid. at para. 116.

(98) Ibid. at paras. 117 and 118.

(99) Ibid. at para. 126.

(100) Ibid. at para. 284.

(101) Ibid. at para. 143.

(102) Ibid. at para. 144.

(103) Ibid. at para. 279.

(104) Ibid. at para. 143.

(105) Ibid. at para. 288.

(106) Ibid. at para. 280.

(107) Ibid. at para. 281.

(108) Ibid. at paras. 282 and 283.

(109) Ibid. at para. 284.

(110) Ibid. at para. 287.

(111) Ibid at para. 285.

(112) Pope & Talbot, supra note 63.

(113) S.D. Myers, supra note 92 at para. 286.

(114) Methanex Corporation v. United States of America (Final Award on Jurisdiction and Merits) (2005), 44 I.L.M. 1345 (NAFTA Arbitral Tribunal) [Methanex].

(115) Ibid at para. 1 (Part I, Preface). MTBE is an octane enhancer, designed to make vehicles more efficient and to reduce their emissions.

(116) Ibid at para. 28 (Part 11, Chapter D).

(117) Ibid. at para. 6 (Part IV, Chapter D).

(118) Ibid. at para. 7 (Part IV, Chapter D).

(119) Ibid.

(120) Ibid at para. 12-13 (Part IV, Chapter D).

(121) Ibid at para. 15 (Part IV, Chapter D).

(122) Article 1110(1) of NAFTA, supra note 1 reads: "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 non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6 (emphasis added)."

(123) Methanex, supra note 114 at para. 17 (Part IV, Chapter D).

(124) NAFTA, supra note 1 at Article 1136(1).

(125) Bitumen is a viscous tar-like substance, or a particularly heavy form of oil, that must be extensively processed to create synthetic crude oil which can then be further refined into consumer petroleum products. To extract bitumen, a number of methods can be employed including open pit mining, cyclicsteam stimulation (CSS), and steam assisted gravity drainage (SAGD); All the noted forms of extraction are particularly water-intensive. There are currently new technologies under development and testing that may eventually limit the amount of water needed to extract bitumen from the oil sands. However, at the current time, the predominate methods of extraction are highly water intensive. See for example Alberta Department of Energy, "What is Oil Sands?," online: Government of Alberta .

(126) Water Act, supra note 7 at s. l(k).

(127) Water Act, supra note 7 at s. 55(2) reads, "Subject to the regulations, the Director may suspend or cancel a licence issued under this Act if, in the opinion of the Director, a significant adverse effect on the aquatic environment occurred, occurs or may occur that was not reasonably foreseeable at the time the licence was issued, and compensation may be payable under section 158."

(128) In a 2006 speech to the US State Department, former Alberta Premier Ralph Klein noted that approximately 50% of the investment in Alberta's energy sector comes from the United States see Ralph Klein, "Alberta's Central Role in North American Energy Security" (Speech given in Washington, D.C., 28 June 2006) [unpublished], online: Government of Alberta ; furthermore, Alberta Department of Energy, "Oil and Gas Industry Investment," online: Government of Alberta calculated that for 2003 the total investment in Alberta's oil, gas and oil sands was $20.5 billion. Accordingly, the amount of US investment in the oil sands is significant.

(129) Significant amounts of water are required for the recovery of both conventional oil and gas reserves, as well as in the development of oil sand deposits such as those that exist in the Athabasca Basin in Northern Alberta. Canada's National Energy Board estimates that 2 to 4.5 cubic metres of water are required to produce a single cubic metre of synthetic oil from a mining operation in Alberta's oil sands, see National Energy Board, "Canada's Oil Sands--Opportunities and Challenges to 2015: An Update Questions and Answers," online: National Energy Board . Moreover, a recent oils sands project that has received preliminary approval by a Joint Panel of the Alberta Energy and Utilities Board and the National Energy Board has been issued a water withdrawal license which allows an average yearly withdrawal of 68 million [m.sup.3] of fresh water from the Athabasca River. This represents approximately 2.3% of the average annual flow (Report of the Joint Review Panel Established by the Alberta Energy and Utilities" Board and the Government of Canada (27 February, 2007) EUB Decision 2007-013, online: Energy and Utilities Board at s. 14.1.1.

(130) NAFTA, supra note 1 at Article 1139. If the thresholds are met the "Investor" becomes a "Claimant."

(131) Ibid.

(132) Ibid.

(133) NAFTA, supra note 1 at Article 201.

(134) Ibid.

(135) Errington v. Errington [1952] 1 All E.R. 149 (C.A.). This case supports the position that a contractual license can enjoy the status of an equitable interest in land. As such, it is possible that an Alberta water license would similarly enjoy status as property. Further evidence that a water license can constitute a property right can be found in s. 58 of the WaterAct, supra note 7, where water licenses are described as "appurtenant to the land" and consequently, water licenses "run with the land."

(136) While direct expropriation is alleged in several of the cases which we have discussed, a Tribunal has yet to find, in any case, that a direct expropriation has actually occurred. See also Matthew C. Porterfield, "International Expropriation Rules and Federalism" (2004) 23 Stan. Envtl. L. J. 3 where the author notes that "all of the expropriation claims brought against the United States under Chapter XI have been based upon theories of 'indirect expropriation' rather than actual, physical seizures of property."

(137) S.D. Myers, supra note 92 at para. 280-281.

(138) Pope & Talbot, supra note 63 at para. 100.

(139) NAFTA, supra note 1.

(140) Pope & Talbot, supra note 63 at para. 83.

(141) Metalclad, supra note 83 at para. 103.

(142) (1993), 95 I.L.R. 183 at paras. 207 and 210.

(143) Metalclad, supra note 83 at para. 108.

(144) S.D. Myers, supra note 92 at para. 283.

(145) Pope & Talbot, supra note 63 at para. 102.

(146) Ibid. at para. 96.

(147) NAFTA, supra note 1.

(148) Methanex, supranote 114 at para. 7(Part IV, Chapter D).

(149) The compensation provisions of Chapter XI are found in Article 1110 paragraphs (2) through (6). Article 1110(2) provides clear guidelines as to the compensation which is payable in the case of a Chapter XI expropriation. Compensation under the NAFTA "shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ..." From an Investor's perspective, considering the time value of money, being able to immediately realize all potential future income streams is an extremely favourable and attractive outcome. Moreover, due to the extensive nature of the compensation provisions of Chapter XI, even if the water license was only suspended for a limited period of time to address an immediate environmental concern, arguably, compensation could still be payable to the Investor for the interim period, during the suspension, when income and profits were lost. See NAFTA, supra note 1 at art. 1110(2)(a).

(150) NAFTA, ibid.

(151) Metalclad, supra note 83 at para. 98.

(152) Ibid.

(153) Water Act, supra note 7 at s. 55(2). Under that subsection, the Director may suspend or cancel a licence issued under the Water Act if, in her opinion, a significant adverse effect on the aquatic environment occurred, occurs or may occur that was not reasonably foreseeable at the time the licence was issued (compensation may be payable under s. 158(1)). To the knowledge of the authors, this section has not yet been the subject of litigation or arbitration. Consequently, it is not clear whether the Director's powers will be broadly or narrowly construed.

(154) Ibid., s. 158.

(155) Ibid., s. 158(1)(a).

(156) Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Art. 27 (entered into force 27 January 1980).

(157) Sun Belt, supra, note 57; Ethyl, supra, note 53.

(158) In Ethyl the settlement reached was $13 million, far below the amount claimed by Ethyl ($250 million). However, because the legislation was also repealed, the consequential future losses of the Investor were mitigated and therefore factored out of the settlement value.

(159) As part of the settlement, Canada agreed to reverse its ban on MMT imports by bringing forward legislation to repeal Bill C-29 and the Manganese-based Fuel Additives Act, S.C. 1997, c. 11 [MMT Act]. The MMT Act prohibited the importation and inter-provincial trade of certain manganese-based substances, with MMT being the only substance listed in the schedule to that legislation.

(160) For example, in an emergency the Director could exercise its power under s. 105 of the Water Act to implement any measure necessary to protect the aquatic environment.

(161) J. Owen Saunders, "Trade Agreements and Environmental Sovereignty: Case Studies from Canada" (1994-1995) 35 Santa Clara L. Rev. 1171.

(162) See for example: Fish and Wildlife Conservation Act, S.O. 1997, c. 41, s. 75; Forest Act, C.C.S.M. 1987, c. F150, s. 39; Forest Protection Act, R.S.Y. 2002, c. 94, s. 15(2); Water Resources Act, S.N.L. 2002, c. W-4.01, s. 19; Water Rights Act, C.C.S.M. 1988, c. W80, s. 9.2; Wildlife Act, S. Nu. 2003, c. 26, s. 46(1); Endangered Species Act. 2007, S.O. 2007, c. 6 (comes into force on June 30, 2008 or an earlier day to be named by proclamation of the Lieutenant Governor).

(163) According to Statistics Canada, natural resources constituted 13.2% (or $158.4 billion) of Canada's GDP in 2004. Clearly, Canada has a tremendous interest in ensuring that it is able to maintain control over its natural resources and environmental laws (see Natural Resources Canada, "Statistics and Facts," online: Statistics on Natural Resources).

(164) Francisco S. Nogales, "The NAFTA Environmental Framework: Chapter 11 Investment Provisions and the Environment" (2002) 8 Ann. Surv. Int'l & Comp. L. 97 at 141.

(165) Ibid at 129.

(166) Scott Gordon, "Canada's Fresh Water and NAFTA: Clearing the Muddied Waters" (2006) 15 Dal. J. Leg. Stud. 69.

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