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Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime

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Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime

Chris Tollefson+ 

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One of the lasting impressions left by the 1999 World Trade Organization (WTO) Ministerial meetings in Seattle is the sense that we are entering a new era in international relations. This was not just another meeting of trade ministers. Congregated in Seattle was a bewildering array of non-state actors vying for influence in what has become one of the world's most powerful fora. While transnational corporations and civil society organizations have long played an influential role in international affairs, the events in Seattle reinforced a growing perception that these increasingly formidable players are beginning to reshape the norms and procedures of international relations, forcing the rules in this arena to change.

Indeed the North American Free Trade Agreement of 1994 (NAFTA) provides two vivid illustrations of how international law is already changing to reflect the growing power of transnational corporations and global civil society. The first is NAFTA's investor-state claim process (Chapter 11 of

1. The at times circus-like atmosphere of Seattle sharply contrasted with the cloistered ambience of the trade meetings that launched, in Punte del Este, the Uruguay Round in 1986. Recalls Sylvia Ostry, then a Canadian trade negotiator, "Faxes didn't arrive, and nor did our newspapers. It felt like we were on Mars." The Battle in Seattle, ECONOMIST, Nov. 27, 1999, at 21. Dr. Ostry has more recently observed that "the late 1990s were probably a defining decade, perhaps a transition to a new political economy of international policy-making." Sylvia Ostry, A Clarion Call to Whatever, LITERARY REV. OF CAN., Summer 2001, at 5.

2. The WTO was created in 1994 to "oversee an integrated dispute settlement regime and to undertake a pro-active trade policy surveillance role." See MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 30 (1999). It performs this role with respect to the General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, and a variety of other agreements to which WTO member states must subscribe.

3. For the purposes of this Article, I use the term "civil society" to encompass organizations and associations that exist outside of the state and the market. This definition includes the full spectrum of what would commonly considered to be "interest groups" including advocacy NGOs, charities and other non-profits organizations, labor unions as well as professional and trade associations. In this paper, I use the term "NGO" synonymously with "civil society organization" although I recognize that NGO is often used in both broader and narrower senses. For instance, under Article 45 of the North American Agreement on Environmental Cooperation, "NGO" is defined to include "any profit or non-profit group not affiliated or directed by government." U.S.-Can.-Mex. North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC]. At the same time, many use the term NGO in a much stricter fashion to denote cause-oriented advocacy groups. See Steve Charnovitz, Two Centuries of Participation: NGOs and Global Governance, 18 MICH. J. INT'L. L. 183 (1997).


NAFTA) that gives private investors the right to seek compensation directly from a NAFTA party-government ("Party") for enacting certain measures that adversely affect their investments in the host country. To date, NAFTA remains the only multilateral trade agreement containing such protections despite concerted efforts by various countries to secure approval for a similar provision under the auspices of the Organization for Economic Co-operation and Development (OECD) (the failed Multilateral Agreement on Investment initiative of 1997-98). A second illustration is the citizen submission procedure established under the North American Agreement on Environmental Cooperation (NAAEC) also known as the NAFTA "Environmental Side Agreement." Under Articles 14 and 15 of this Agreement, citizens and non-governmental organizations (NGOs) gained the right to complain to the NAAEC Secretariat that a Party has failed "to effectively enforce" its environmental laws.


6. For a useful discussion of the nature of this initiative, and an analysis of the reasons for its failure, see Trebilcock & Howse, supra note 2, at 357-65.

7. NAAEC, supra note 3.

transnational corporations and global civil society. Unfortunately, popular and academic debate with respect to this thesis has been hampered by a failure to use the concept of sovereignty in a consistent and coherent manner.

Whether it can be said that state sovereignty is in decline depends, in part, on whether one defines sovereignty in terms of control or authority. Those that contend globalization has undermined state sovereignty often focus on the former: the declining capacity of states to regulate the flow of capital, pollutants, diseases and ideas across territorial boundaries. But sovereignty also implies authority. At the core of the critique leveled by many environmental and social justice organizations against trade and investment liberalization agreements is the contention that such agreements compromise the ability of states to pursue domestic policy priorities unconstrained by external authority structures or requirements. The idea that statehood entails freedom from external interference has traditionally been characterized as "Westphalian sovereignty," a reference to the 1648 Treaty of Westphalia that is often credited with ensconcing "the territorial state [as] the cornerstone of the modern state system."

A variety of rejoinders tend to be offered to the foregoing critique of free trade agreements. It is said, for example, that in entering into such agreements states are not relinquishing so much as exercising sovereignty. This line of argument is premised on an alternative notion of sovereignty: the ability to "be a player" within the international community of states. In an economically interdependent world that imposes serious limits on unilateral action, it is a state’s "international legal sovereignty"—its ability to pursue its interests on the international stage—that matters most. According to this view, any adverse impacts on Westphalian sovereignty are more than offset by the benefits that derive from membership in a rules-based trade regime.

The concept of Westphalian sovereignty has been buffeted by a variety of scholarly critiques that have challenged its historical accuracy and its descriptive utility. The orthodox belief that the contemporary state system was born at Westphalia has been questioned by Andreas Osiander. Osiander argues that the key attributes that have come to be identified with the concept of Westphalian sovereignty did not emerge until the late nineteenth century, as a justificatory ideology for the modern industrial state. Moreover, he contends that the high level of state autonomy that existed during the period in which Westphalian sovereignty enjoyed ascendancy was "historically exceptional

13. Id. at 1230.
and transitory”; over the long term, the global system has been characterized by complex “networks... of cooperation and of mutual restraint.”

Westphalian sovereignty has also been the subject of neorealist and social constructivist critiques. The neorealist variant is exemplified in the recent work of Stephen Krasner, who argues that Westphalian sovereignty is a mere flag of convenience, of little value in predicting state behavior. States, he contends, have always invoked the concept strategically as a discursive vehicle to justify the pursuit of their own self-interest. They ignore it just as easily when it suits their purpose—a practice he colorfully terms “organized hypocrisy.” Westphalian sovereignty seems to enjoy even less support within the social constructivist school. In contrast to the neorealists, proponents of this approach contend that the conduct of international relations is being fundamentally changed by the ever-increasing influence of non-state actors and the exigencies of economic interdependence. These forces condition and explain the nature of state participation in international affairs. According to Abram and Antonia Chayes, sovereignty today is thus about “status”—the ability of states to participate effectively as members of the international system, which in turn is a function of their compliance with evolving international norms and their cultivation of complex relationship networks.

Westphalian sovereignty, they suggest, if it “ever existed outside books on international law and international relations... no longer has any real world meaning.”

Finally, the Westphalian model of sovereignty has been taken to task by the critical school international relations scholars for rendering “invisible” the growing international power of private capital. According to this view, transnational corporations have succeeded admirably in securing international legal rights (of which Chapter 11 is but one illustration) while simultaneously avoiding international legal responsibilities. A key reason for their success is the persistence of the ideology of Westphalian sovereignty, particularly its premise that states are the exclusive “subjects” of international law. Sovereignty must thus be reconceived in a way that holds transnational corporations internationally accountable for their actions. To this end, transnational corporations must be given international legal personality and made “subjects” of international law.

A variety of phenomena, including the growing influence and power of non-state actors, challenge settled assumptions about Westphalian sovereignty. Notwithstanding these developments, however, the concept retains powerful resonance in the trade and environment debate and has

15. Id. at 283.
18. Id. at 26-27.
21. Id. See also William Twining, Globalization and Legal Theory: Some Local Implications, in 49 CURRENT LEGAL PROB. 1, 6 (1995) (arguing that the “concept of legal personality” may be “ripe for a revival in the global context”).
considerable utility as a heuristic device in illuminating both state discourse and state behavior. While the origins of the concept are murky, the notion that statehood is defined by a sovereign ability to determine domestic priorities is well-entrenched and, as the NAFTA experience reveals, remains a critical variable in determining state action. However, the NAFTA experience also tends to support the conclusion that the way states perceive and respond to threats to their Westphalian sovereignty is context-dependent; in particular, it matters greatly on which side of the trade and environmental divide the relevant threat is seen to arise.

Although the NAFTA investor claim and citizen submission processes are still young, they are beginning to yield important decisions. This Article scrutinizes these new procedures and analyzes the legal issues that they present for investors, NGOs and states, particularly in terms of their implications for the ability of governments to regulate for the protection of public health and the environment, and to manage natural resources in a sustainable manner. It argues that when designing the NAFTA regime, the Parties paid little heed to the potentially far-reaching Westphalian sovereignty implications of the investor claim process. It now appears that Canada has awoken to some of these implications and has advocated that Chapter 11 be reviewed and clarified with a view to affirming the right and ability of the Parties to enact non-discriminatory measures aimed at protecting public health and the environment. Until recently, this suggestion has received a lukewarm response from the other NAFTA Parties. In contrast, throughout both the initial design and subsequent implementation of the citizen submission process under the NAAEC, the Parties—initially, Canada and Mexico, and more recently, the United States—have tended to exhibit a highly protectionist approach to defending their Westphalian sovereignty. These same NAFTA Parties have also tended to respond in protectionist


25. See the discussions of recent developments, infra Section III.F.
fashion to attempts by civil society organizations to secure participation rights under the investor-state process.

In short, there is an asymmetry between how NAFTA Parties perceive and respond to threats to their Westphalian sovereignty in relation to transnational investors, on the one hand, and civil society organizations, on the other. A goal of this Article, therefore, is to document and reflect on this asymmetry; an asymmetry that, in my view, lends support to Krasner’s organized hypocrisy thesis. Based on the foregoing analysis, I conclude by arguing that if states are to reap the potential social and economic benefits of trade and investment liberalization, they must abandon their tendency to regard engagement with civil society in sovereignty-protectionist terms. Instead, they must strive to collaborate more closely with civil society in order to more effectively incorporate environmental, public health and other social values into trade law principles and decision making.

II. INVESTOR CLAIMS UNDER NAFTA CHAPTER 11

A. Introduction

The most controversial feature of NAFTA in recent years has been Chapter 11. While trade scholars have regularly commented upon the unprecedented scope of the protections it accords foreign investors, only in 1998, when the Canadian Government paid 12.5 million dollars (U.S.) to settle a Chapter 11 claim brought by U.S.-based Ethyl Corporation, did its potential scope and implications begin to receive widespread attention. Since then, a Chapter 11 tribunal has ordered the Mexican Government to pay close to $17 million (U.S.) in damages, and damages assessments are pending in two other cases in which Canada has been found liable.

Chapter 11 imposes a variety of distinct obligations or “disciplines” on NAFTA Parties in their dealings with NAFTA investors. These disciplines themselves are not particularly new. Drawing on well-established principles of international trade law, they have direct antecedents in NAFTA’s predecessor,
the Canada-U.S. Free Trade Agreement. What is new is that under NAFTA, investors gain the right to privately enforce these disciplines against a host state. In particular, Chapter 11 now allows investors to secure compensation from a host state for violations of these disciplines that cause harm to their investments.

Critics of Chapter 11 portray it as a Bill of Rights for transnational corporations, conferring on them the right to sue host governments for enacting bona fide, non-discriminatory public health and environmental regulations. They contend that not only can Chapter 11 be used to force governments, and hence domestic taxpayers, “to pay polluters to stop polluting,” but that it is likely to profoundly “chill” the willingness of governments to regulate in the public interest.

During the NAFTA negotiations, Chapter 11 was primarily championed by the United States due to concerns about the investment environment in Mexico, particularly constraints on investment access and compensation for expropriation of business assets. Although historically the Mexican government had vigilantly insisted on its right to regulate investment policy, Mexican NAFTA negotiators were prepared to support Chapter 11 in order to promote foreign direct investment.

For foreign investors, Chapter 11 offers significant new procedural rights that exist in no other multilateral agreement. Under other multilateral trade regimes, including GATT, companies that suffer damages due to the actions of a foreign government have no right of private action against the host state; their only remedy is to persuade their home state to pursue a trade complaint on their behalf. Where this remedy is unavailable or inadequate (which is almost invariably the case), the investor’s only option is to pursue its complaint under the sometimes inhospitable judicial system of the host country.

Chapter 11 relieves the investor of the limitations, uncertainties, and expenses associated with this latter option by offering instead a broad new right to directly sue its host government for damages in a legally binding, international adjudicative forum. In contrast to domestic courts designed with procedural safeguards to guarantee openness and independence, and to

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33. Foreign investors enjoy rights analogous to those provided under Chapter 11 under the provisions of bilateral agreements that exist between many countries. There are now well over 1,800 of these agreements, known as Bilateral Investment Treaties (BITs), worldwide. The United States and other countries regard BITs as a means of laying the policy groundwork for broader multilateral investment initiatives in the OECD and the WTO. See J. Martin Wagner, International Investment, Expropriation and Environmental Protection, 29 GOLDEN GATE U. L. REV. 465, 471 (1999); S.D. Myers v. Government of Canada (UNCITRAL), Nov. 12, 2000, ¶ 118 (Separate Opinion of Dr. Schwartz, concurring, except with respect to performance requirements), available at http://www.naftaclaims.com [hereinafter Schwartz separate opinion] (on file with The Yale Journal of International Law). To date, there have been relatively few claims pursued through these various BITs for reasons that “are not entirely clear.” TREBILCOCK & HOWSE, supra note 2, at 357.
provide a full hearing to all interested parties, Chapter 11 cases are adjudicated pursuant to private commercial arbitral rules under which many of these procedural safeguards are absent. 34

B. Use of the Procedure

Since coming into force, eighteen Chapter 11 claims are known to have been commenced, although the secrecy surrounding the claims process means that this number could well be higher. 35

Most of the known claims to date have been against Canada (eight) and Mexico (six); only four cases have been brought against the United States. 36 Seven of these eighteen claims involve government decisions in the areas of environmental management or public health; four involve resource management policies or decisions. Of the eleven Chapter 11 claims that fall into either of these categories, four have been filed against Mexico, six against Canada, and one against the United States.

Four of the six claims brought against Mexico concern the denial or withdrawal of licenses or rights pertaining to the operation of waste management or disposal facilities. Two of the claims against Canada have challenged bans imposed on toxic substances due to public health and environmental concerns, as is the case with the one "environmental" Chapter 11 claim against the United States. The remaining four claims against Canada pertain to natural resource management decisions. 37

To date, there have been final awards in five Chapter 11 cases. 38 In three of these, the investor’s claim has succeeded in whole or in part. In the first, Metalclad Corporation was awarded damages in the amount of $16.685 million (U.S.) on the basis of a finding that the Mexican Government had interfered with its development and operation of a hazardous waste landfill. 39 The second successful claim, also brought by an American company (S.D. Myers), alleged that the Government of Canada violated Chapter 11 by banning the export of PCB waste to the United States, where S.D. Myers operated a PCB waste treatment facility. Damages in this case have yet to be quantified. 40 Both of these cases are now before the courts by way of

34. See discussion infra Section II.E.

35. In this category, I include all claims in which a “notice of intent to arbitrate” has been filed. One indicator of the opacity of the process is the fact that Chapter 11 decisions are not available from the NAFTA Secretariat’s official web page. Many of the citations in this Article to Chapter 11 decisions are found on a privately maintained website, http://www.naftaclaims.com. The Canadian Department of Foreign Affairs and International Trade has recently begun to post documents relating to claims involving Canada at http://www.dfait-maeci.gc.ca/nafta-nac/NAFTA. See also H. Mann, Private Rights, Public Problems: A Guide to NAFTA’s Chapter on Investor Rights (2001), available at http://www.iisd.org/trade/private_rights.htm.

36. For further particulars with respect to these claims, see the chart in Appendix I.

37. Of the three remaining claims brought against the United States, two complain of unfair treatment by American courts or under American law (Loewen Corp. v. The United States of America; and Mondev International v. The United States of America). The third (ADF Group Inc. v. The United States of America) involves a challenge to preferential government procurement policy.

38. See supra note 22.

39. Metalclad, supra note 27, ¶¶ 73, 137.

40. See S.D. Myers, supra note 28, at 25.
applications to have the awards set aside.\textsuperscript{41} In a recently released award, the investor claim in \textit{Pope and Talbot} was also upheld in part.\textsuperscript{42} The Government of Mexico has prevailed in the two claims that arbitral tribunals have dismissed.\textsuperscript{43}

The most high-profile ongoing case is a $1.4 billion claim filed against the United States Government as a result of a ban imposed on the fuel additive MTBE by the Governor of California.\textsuperscript{44} The ban, to be implemented by the end of 2002, was announced due to concerns about the harmful effects of MTBE on the groundwater drinking supplies. The claimant is Methanex, a Canadian company that is the world's leading producer of methanol, a key element of MTBE.\textsuperscript{45}

C. \textit{Who May Claim?}

An investor claim may be brought in relation to any "measure" that is adopted or maintained by a Party.\textsuperscript{46} The definition of "measure" is extraordinarily broad and open-ended. It specifically includes any "law, regulation, procedure, requirement or practice" of a Party.\textsuperscript{47} As such, there is no explicit requirement that the measure have legal force. For example, statements made by government officials, in the course of their public duties, that cause damage to an investor's reputation might be actionable if they can be characterized as an expropriation of the investor's goodwill.\textsuperscript{48}

The definitions of "investor" and "investment" are similarly expansive.\textsuperscript{49} "Investor" means anyone seeking to make, making, or having an

\begin{footnotesize}
\textsuperscript{41} The Government of Mexico applied to set aside the award in \textit{Metalclad} in the Supreme Court of British Columbia. This application succeeded in part. See United Mexican States v. Metalclad Corp., 2001 B.C.S.C. 0564 (per Tysoe J.), \textit{available at} http://www.dfait-maeci.gc.ca/tna-nac/trans-2may.pdf. The Government of Canada is pursuing a similar application in the S.D. Myers case in the Federal Court of Canada. See News Release, \textit{Canada Seeks Application to Set Aside NAFTA Tribunal Award}, \textit{available at} http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=Min_Pub_Docs/103908.htm. Article 1130 provides that arbitrations shall be held at a defined location within the territory of a Party. In both of these cases, the arbitrations were held in Canadian jurisdictions and, as such, the appellants have sought review pursuant to the applicable arbitral rules under the laws of that jurisdiction.

\textsuperscript{42} See \textit{Pope & Talbot (Phase II)}, supra note 28.

\textsuperscript{43} The two Mexican cases are Robert Azinian v. United Mexican States (ICSID Additional Facility), Nov. 1, 1999 (dismissed on the ground, inter alia, that the contract annulment complained of did not amount to an act of expropriation), \textit{available at} http://www.naftaclaims.org (on file with The Yale Journal of International Law); and Waste Management, Inc. (No. 1) v. United Mexican States (ICSID Additional Facility), June 2, 2000 (dismissed on grounds that the tribunal lacked jurisdiction to consider claim due to fact that claimant had not properly waived its right to pursue claims in other fora as required by Article 1121(2)(b)), \textit{available at} http://www.naftaclaims.org (on file with The Yale Journal of International Law).

\textsuperscript{44} Bart Jansen, \textit{Trade Group Files Suit to Halt Ban on Fuel Additive MTBE}, \textit{The Times Colonist}, Feb. 2, 2000, at D-9.


\textsuperscript{46} NAFTA, supra note 4, art. 201.

\textsuperscript{47} Id.

\textsuperscript{48} \textsc{Howard Mann \& Konrad Von Moltke}, \textit{NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Claim Process on the Environment} 23 (1999) [hereinafter \textsc{Mann \& Von Moltke}].

\textsuperscript{49} See, e.g., \textit{Pope & Talbot} v. Canada, June 26, 2000, (Interim Award), \textit{available at} http://www.dfait-maeci.gc.ca/tna-nac/pubdoc7.pdf [hereinafter \textit{Pope & Talbot (Phase I)}] (holding that
\end{footnotesize}
“investment.”50 “Investment” includes not only direct foreign investment in a company or property located in the host Party, but also a wide range of interests in virtually any form of enterprise operating in a host country.51 The recent decision in S.D. Myers interprets these already broad provisions in a fashion that is generous to investor interests. In this case, the claim was advanced on the basis that the “investor” was a U.S.-based private company (S.D. Myers) and that its “investment” was Myers Canada, a company incorporated in Canada. The Canadian Government argued that S.D. Myers lacked standing to claim under Chapter 11 since it held no shares in Myers Canada and there was no joint venture agreement between the two entities. The tribunal rejected this argument on the ground that since the two legal entities were effectively controlled by the same individual, technical arguments with respect to corporate structure should not defeat “an otherwise meritorious claim.”52

D. Nature of the Rights

Chapter 11 imposes six categories of disciplines on NAFTA Parties, which, when breached, are actionable by NAFTA investors.53 The disciplines that have the greatest potential to affect Westphalian sovereignty with respect to environmental protection and resource conservation are: the right to national treatment (Article 1102) and to most-favored nation (MFN) treatment (Article 1103); the right to international minimum standard of treatment (Article 1105); the right to be free from certain performance requirements (Article 1106); and the right to be compensated for nationalization or expropriation of an investment and for “measures tantamount to nationalization or expropriation” (Article 1110).

The relationship between these new “private” rights and the traditionally accepted prerogative of governments to take action to protect public health and the environment is not specifically addressed in the NAFTA text and is the source of considerable controversy and uncertainty. Unlike the GATT, Chapter 11 of NAFTA does not contain a generally applicable provision that prescribes how these competing private and public interests are to be balanced.54 Under the GATT, this balancing function is performed by Article XX (General Exceptions). This provision allows a state to defend a trade restrictive measure on the basis that it is “necessary to protect human, animal

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51. The definition would appear to potentially include “foreign investments held by mutual fund companies and other forms of pooled investment funds” and to permit foreign minority shareholders (and, in some circumstances, bondholders) to instigate an investor claim even without the consent of the local enterprise involved. See MANN & VON MOLTKE, supra note 48.
52. S.D. Myers, supra note 28, ¶ 229.
53. In addition to those set out below, Chapter 11 proscribes the imposition of nationality requirements for senior management positions with respect to NAFTA investments (Clause 1, Article 1107) and obliges Parties to permit all financial transfers relating to an investment of a NAFTA investor to occur freely and without delay (Clause 3, Article 1110). NAFTA, supra note 4.
54. The only discipline in Chapter 11 that is specifically made subordinate to environmental considerations is Article 1106, paragraph 6. While the Article generally prohibits Parties from imposing performance requirements, it creates a limited exception for measures that are capable of satisfying a test based on language borrowed from Article XX of the GATT. See discussion infra at note 57.
or plant life or health.” To date, however, states that have sought to justify health and environmental regulations under Article XX have enjoyed limited success. This has provoked criticism that the justificatory test is overly onerous and should be reconsidered. In the meantime, however, Article XX has at least provided a vehicle for arguments about health and environment to be mounted and considered in the context of trade disputes.

Does the absence of an Article XX-like provision in Chapter 11 of NAFTA mean that a government cannot defend against an investor claim on the basis that its actions were motivated by bona fide health or environmental concerns? If this were true, those who have characterized the implications of Chapter 11 as “revolutionary” would be vindicated, as such an interpretation would represent a truly remarkable and unparalleled restriction on Westphalian sovereignty. Many would argue, however, that such an interpretation is implausible. For one, it is inconsistent with language in the preamble of NAFTA and the NAAEC affirming that environmental protection and economic development can and should be mutually supportive. It also appears to conflict with Article 1114 (Environmental Measures) of Chapter 11, a provision that is often cited in support of the argument that NAFTA is one of the greenest trade agreements ever negotiated. This provision states: “Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”

Several trade experts have argued that the permissive nature of the language of Article 1114—in particular the caveat that such environmental measures must be “otherwise consistent with this Chapter”—suggests that it should be regarded as merely aspirational and of no legal consequence. In

56. See SHRYBMAN, supra note 30, at 24; T.J. Schoenbaum, International Trade and Protection of the Environment: The Continuing Search for Reconciliation, 91 AM. J. INT’L L. 268, 274-80 (1997) (presenting a detailed analysis of Article XX and stating that the burden of justifying the use of Article XX “has not been carried often, largely because of the strictness with which the provisions are interpreted”).
57. George Hoberg argues that, notwithstanding the poor record of governments with respect to justifying environmental and health measures under Article XX, arbitral interpretations of this provision leave the regulatory sovereignty of governments much more intact than many critics have suggested. Hoberg, supra note 55, at 191. Editor’s Note: See also Steve Charnovitz, The Law of “PFMs” in the WTO: Debunking the Myth of Illegality, 27 YALE J. INT’L L. 59, 92-101 (2002) (analyzing application of Article XX in WTO jurisprudence).
58. The Government of Canada has relied heavily on this argument in its intervention in the appeal of the Metalclad decision before the Supreme Court of British Columbia. See Corcoran, supra note 24.
60. NAFTA, supra note 4, at 1114 (emphasis added).
61. See BARRY APPLETON, NAVIGATING NAFTA 195 (1994); JON R. JOHNSON, INTERNATIONAL TRADE LAW 225 (1998) (“[The] provision [does not] contain any obligations in respect of the
his separate opinion in *S.D. Myers*, however, Dr. Schwartz observes that such an interpretation is implausible in that it implies Article 1114 is "empty rhetoric."\(^6\)

Another source of interpretive uncertainty is whether a government remains entitled, without being liable for damages, to invoke the precautionary principle to defend measures it has taken—ostensibly to protect human health or the environment—that are the basis of an investor claim. The ability of governments to take a precautionary approach to dealing with threats of serious or potentially irreversible damage to the environment is reflected in Principle 15 of the Rio Declaration,\(^6\) and is increasingly being recognized to be part of customary international law. Again, however, there is no explicit language in Chapter 11 that formally affirms the right of governments to invoke this principle as a basis for defending actions that have given rise to an investor suit. Despite this, a persuasive argument can be made that the preamble to NAFTA, the existence of the NAAEC, and Article 1114 all suggest that Chapter 11 should be interpreted in a manner that is consistent with the norms embodied in Rio’s Principle 15.

Virtually none of the arbitral decisions under Chapter 11 to date have grappled with these critical interpretive issues. An encouraging exception is the tribunal’s decision in *S.D. Myers*. As will be discussed, both reasons in this case reflect a laudable aspiration to recognize the right of governments to invoke environmental and health protection as grounds for defending claims under Chapter 11, even though it is by no means clear that this is what the drafters of the chapter intended or even contemplated.

We can now consider in more detail the scope and implications of the rights investors have acquired under some of the key Chapter 11 disciplines.

1. **National Treatment and Most Favored Nation Treatment**

National treatment and most favored nation (MFN) treatment require a Party to treat foreign investors and their investments as well or better than it treats other investments in that country. Taken together, these disciplines mean that a NAFTA investor is entitled to the better of (a) how the Party treats domestic investors and investments (national treatment) or (b) how the Party treats investors from any other nation (MFN treatment).

The ostensible aim of these provisions is to ensure that NAFTA investors are not discriminated against on the basis of nationality. To this end, the provisions require a Party to treat the investments of foreign NAFTA investors that could be described as substantive.

\(^6\) In this vein, see the opinion of Dr. Schwartz in *S.D. Myers* where he states, “I do not think that Article 1114 must be viewed as empty rhetoric... I view Article 1114 as acknowledging and reminding interpreters of Chapter 11 (Investment) that the parties take both the environment and open trade very seriously and that means should be found to reconcile these two objectives and, if possible, to make them mutually supportive.” Schwartz separate opinion, supra note 33, ¶ 118. For an extended discussion of Article 1114, see John Wickham, *Toward a Green Multilateral Investment Framework: NAFTA and the Search for Models*, 12 GEO. INT’L ENVTL. L. REV. 617, 621-25 (2000).

investors “no less favorably” than it treats investments made by its own nationals or those made by MFN investors “in like circumstances.”

Concerns have been raised that the terminology of “like circumstances” will constrain the ability of governments to defend bona fide regulatory decisions that are based on legitimate environmental or health considerations, but result in foreign investors being treated differently from domestic companies. These Westphalian sovereignty concerns are based on the prospect that “like circumstances” will be interpreted in a manner that is analogous to the way that the concept of “like products” has been interpreted under GATT Article III. Article III has been interpreted to prevent states from discriminating between products with the same physical characteristics on the basis of how the products were produced or harvested (in trade parlance, “process and production methods” or “PPMs”). Thus, under Article III, products are often deemed to be “like” based on whether they are “directly competitive or substitutable.”

Critics have argued that if this market substitution interpretation is imported into Chapter 11, it will severely curtail the ability of governments to tailor environmental regulations in a site, substance, or context-specific fashion without incurring Chapter 11 liabilities. Governments often regulate investments—domestic and foreign—based on concerns about the impacts of an investment’s specific process and production methods on the natural and human environment in which it is sited. As such, it has been argued that “like circumstances” must be interpreted to allow governments to treat similar investments differently based on site specific environmental impacts and considerations, the carrying or absorptive capacity of the receiving environment now and in the future, and the sustainability of the raw material inputs.

To date, the most extended arbitral consideration of “like circumstances” is found in the S.D. Myers case. The tribunal emphasized that a determination of whether an investor and a domestic competitor are in “like circumstances” should rely on, among other things, whether there are circumstances “that would justify government regulations that treat [investors] differently in order to protect the public interest.” However, without addressing whether such circumstances might exist in the case before them, the tribunal concluded that S.D. Myers and its Canadian competitors were in “like circumstances” by virtue of the fact that they were operating in the same “business sector.”

64. Mann & Von Moltke, supra note 48, at 28-31.
65. Schoenbaum, supra note 56, at 289. Editor’s Note: See also Charnovitz, supra note 57, at 101 (arguing that while PPM-based import bans may be inconsistent with GATT Article III, “if undertaken for an environmental purpose, such measures still may qualify for an Article XX exception”).
67. Id. at 30-31.
68. S.D. Myers, supra note 28, ¶¶ 243-251.
69. The separate reasons of Dr. Schwartz do address this critical question. He concludes that the record before the tribunal did not disclose the existence of “unlike circumstances” that would have warranted differential and adverse treatment. Schwartz separate opinion, supra note 33, ¶¶ 160-62.
70. S.D. Myers, supra note 28, ¶¶ 250-251.
2. **International Minimum Standard of Treatment**

Article 1105 complements the protections that investors receive under Articles 1102 (national treatment) and 1103 (MFN treatment). The duties imposed by Articles 1102 and 1103 are relative in nature; as such, a Party’s compliance with these disciplines is defined in relation to how that Party treats other investors and investments. In contrast, Article 1105 imposes an absolute duty that renders irrelevant how the Party treats other investors or investments. In other words, it is designed to ensure that investors and investments of another Party receive treatment that is in accordance with an absolute minimum standard. As explained in a recent arbitral ruling, Article 1105 “is a floor beneath which treatment of foreign investors must not fall, even if a government is not acting in a discriminatory manner.”

Early commentators predicted that Article 1105 was unlikely to affect Westphalian state sovereignty in relation to the pursuit of domestic environmental and social policy. This was based on the assumption that the ambit of Article 1105 coincided with existing norms of customary international law. Within this body of law, violations of the international minimum standard of treatment are typically only found to arise in situations involving egregious abuses of state power, often involving physical violence. This high threshold is regarded as reflecting the strong deference international law generally extends to the right of domestic authorities to regulate matters within their borders.

Recent tribunal rulings have defied initial expectations by interpreting the scope of Article 1105 in a manner that extends well beyond recognized norms of customary international law. A case in point is *Metalclad*. In this case, the tribunal relied on language in the NAFTA preamble and in Chapter 18 of the NAFTA to hold that Article 1105 imposed on the Parties broad “transparency” obligations to ensure that all legal requirements applicable to investments were “capable of being readily known to all affected investors.” Thus, according to the tribunal, where a party is aware that there is regulatory uncertainty or confusion that might adversely affect an investor or an investment, it is obliged to ensure that the applicable requirements are promptly determined and clarified for the investor’s benefit.

On the facts of the case, the tribunal held that the Government of Mexico had failed to come to the aid of an investor that was encountering legally “improper” local and state government opposition with respect to the siting of a hazardous waste treatment facility. In its view, Mexico’s failure to intervene on behalf of the investor to resolve these difficulties constituted a violation of Article 1105.

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72. See *MANN & VON MOLTKE*, *supra* note 48, at 34.
73. See *Tollefson*, *supra* note 27, in text accompanying note 102.
74. *S.D. Myers*, *supra* note 28, ¶ 263.
75. See *Metalclad*, *supra* note 27, at 26-32; *Interim Award in Pope & Talbot (Phase I)*, *supra* note 49.
76. See *Metalclad*, *supra* note 27, at 26.
77. *Id.* at 31.
78. In its Final Award, the tribunal in *Pope & Talbot (Phase II)* reached a similar conclusion.
The tribunal's holding with respect to Article 1105 was subsequently set aside on judicial review. The reviewing court held that Article 1105 only protected investors against state action that violated the minimum standard of treatment recognized in customary international law. In its view, there was no evidence that "transparency" had become a principle of customary international law nor did the tribunal have authority to import such an obligation into Chapter 11 based on language elsewhere in the NAFTA.

The open-ended interpretation of Article 1105 enunciated in Metalclad and Pope & Talbot has also prompted unprecedented action on the part of the NAFTA Free Trade Commission (the "Commission"), a three-member supervisory body comprised of trade representatives nominated by each of the NAFTA Parties. The Commission is empowered to issue "interpretive statements" that are binding in all subsequent arbitrations under Chapter 11. Since the late 1990's, the Government of Canada has advocated that the Parties negotiate an interpretive statement to clarify the scope and meaning of various aspects of the Chapter, including its controversial "expropriation" provisions. Until the tribunal decision in Metalclad, Mexico strongly resisted this suggestion, while support for such a statement within U.S. government circles was lukewarm.

Given this history, it is notable that less than three months after the court's ruling on Metalclad, the Commission released its first-ever interpretive statement. The statement affirms the court's conclusion that the obligations of the Parties under Article 1105 are limited to providing treatment in accordance with minimum standards of treatment prescribed in international customary law. The statement goes on to provide that a breach of a NAFTA provision outside Chapter 11, or provisions contained in other international agreements, does not necessarily constitute a breach of Article 1105.

3. Prohibition on Performance Requirements

Historically, governments have employed measures that impose conditions on foreign investment in order to advance domestic policy objectives such as job creation, community economic development and technology transfer. Under Article 1106, the imposition of "performance requirements" of this kind is generally prohibited, subject to some exceptions. This provision has been criticized as constraining the ability of...
governments to sustainably manage natural resources and to protect public health and the environment. Three prohibitions are considered to be particularly serious derogations from Westphalian sovereignty. These include prohibitions on requiring foreign investors, as a condition of establishing or operating an investment, to achieve a given level or percentage of domestic content; to use goods or services that are domestically produced or provided, including hiring or using local workers or suppliers; or to transfer technology, production process or other proprietary knowledge to domestic workers or businesses.

The issue of performance requirements has only arisen in a few of the arbitral decisions to date, most notably in the interim ruling in *Pope & Talbot* and in the *S.D. Myers* decision. In the latter case, Article 1106 was characterized, in a separate opinion, as severely restricting the ability of host states to impose performance requirements on investors. 85

Unlike other Articles found in Chapter 11, Article 1106 specifically exempts “environmental measures” taken by governments. Borrowing language from Article XX of the GATT, this exemption is notionally available where a government can demonstrate that a measure is not a disguised trade barrier and is necessary “to protect human, animal or plant life; or [is] necessary for the conservation of . . . exhaustible natural resources.” 86 As noted earlier, the arbitral case law that has developed under Article XX concerning what is deemed to be “necessary” has been criticized as being onerous in that it requires governments to establish that it is impossible to achieve their health or conservation goals in a less trade-restrictive manner. 87

Whether sustainable resource management measures can be justified under this exception is uncertain. In the province of British Columbia, for example, forest legislation requires companies that harvest timber from Crown land either to use the timber within the province or manufacture it within the province into lumber or other sawn wood products. 88 Increasingly, there are calls to strengthen these local processing requirements in order to better maximize use of the resource, promote local value-added manufacturing and support the development of alternative community and First Nation-owned forest tenures. 89 The constraints imposed by Chapter 11 on domestic policy initiatives of this kind became a source of considerable debate and concern in 1999, when MacMillan Bloedel, Canada’s largest forest company, was taken over by U.S.-based Weyerhaeuser. 90

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85. *S.D. Myers, Schwartz separate opinion, supra note 33, ¶ 190.*
86. *See NAFTA, supra note 4, art. 1106(6) (emphasis added).*
87. The European Community successfully invoked Article XX in defending a ban on the import of asbestos and asbestos products that was the subject of a trade challenge brought by Canada. *See WTO Dispute Settlement Decision, European Community—Measures Affecting Asbestos and Asbestos-containing products, WT/DS135/R (November 8, 2000) at http://www.wto.org; see also Schoenbaum, supra note 56, at 276; Hoberg, supra note 55, at 206-07.*
90. For a thorough Chapter 11 analysis of the takeover see Jessica L. Clogg, *Re: Proposed Acquisition of MacMillan Bloedel by Weyerhaeuser—NAFTA Chapter 11 Implications,* available at
Another concern is that export or import bans on the flow of goods across borders could be construed to violate Article 1106. This concern is highlighted by the *Ethyl* and *S.D. Myers* claims. In both of these cases, the Canadian Government—purporting to act on the basis of health and environmental concerns—restricted the cross-border movement of goods. The *Ethyl* case involved a ban on the importation into Canada of a fuel additive (MMT) produced by Ethyl; the *S.D. Myers* case involved a ban on the export of PCB waste to the United States, where Myers operated a waste treatment facility. The investor claimants in these cases argued that the bans violated Article 1106 by effectively forcing them to relocate their operations, in order to meet domestic content and purchasing "requirements," if they wished to carry on business in Canada.

If this analysis of Article 1106 is correct, it has been argued that any border measure affecting the flow of goods or services between NAFTA Parties is vulnerable to challenge as a performance requirement, no matter how general and incidental its impact is on a foreign investor or investment. In defending the *Ethyl* and *S.D. Myers* claims, the Canadian Government argued against this broad interpretation, contending that the prohibition on performance requirements should be construed as applying only to express conditions or obligations placed on the presence or operation of a business in the territory of a Party.

In *S.D. Myers*, the tribunal was unable to arrive at a common view of how Article 1106 should be interpreted. While the tribunal and Dr. Schwartz agreed that it was necessary to look beyond the actual, express conditions imposed on the investor by the host government (to "look at substance, not only form"), they parted company as to whether Canada had violated Article 1106. The tribunal concluded that it had not. In his separate opinion, however, Dr. Schwartz held that the effect of the ban was to require S.D. Myers to undertake physical disposal of the PCB waste in Canada and that this constituted a prohibited "Canadian content" requirement in contravention of Article 1106(1)(b).

4. *The Right to Compensation for Expropriation*

The most controversial aspect of Chapter 11 is the scope and nature of the rights it confers on investors to be compensated for government expropriation. Civil society critics fear Article 1110 will deter governments from enacting regulations to protect public health and the environment. They argue that if governments are obliged to compensate investors for adopting...
new environmental regulations during the life span of a foreign investment, this will effectively freeze the applicable law as of when the investment is made. From then on, it is claimed, a government may be liable to pay compensation whenever it imposes any additional environmental or conservation requirements on the investor that might be dictated by new scientific knowledge, emerging cumulative impacts analyses or evolving social or environmental values.

These concerns rest on the potential that Article 1110 will be interpreted to require governments to compensate for *bona fide*, non-discriminatory environmental regulation. Such an interpretation would entail a significant departure from existing international law. It has traditionally been assumed that governments are entitled to take regulatory action that adversely affects the value of a property without paying compensation as long as the action is taken in good faith. Thus, non-discriminatory municipal bylaws, taxation measures, and environmental laws that diminish the value of a property do not normally give rise to a right to government compensation. The standard rationale offered for this result is that to do “otherwise would make it impossible for governments to carry out their legitimate functions” and would represent a serious derogation from their sovereignty.

There are two recognized situations in which international law imposes a liability on governments to compensate property owners for expropriating or “taking” property rights. The first is where government physically confiscates or nationalizes foreign-owned property, in the process acquiring title to the property in question. The second is where government causes serious harm to an investor’s property rights by exercising its regulatory authority in an improper or discriminatory manner. In international law this is referred to as “indirect,” “disguised,” or “creeping expropriation.” In this situation, the owner of the property retains title, but the value of their property is drastically diminished or eliminated by arbitrary or unfair state action including exorbitant taxation, forced sale of property or shares, arbitrary cancellation of business licenses or permits, or harassment or expulsion of the investor.

A threshold issue is whether Article 1110 mirrors or expands upon the protection extended to investors under existing international law. Most commentators agree that since the terms “expropriation” and “indirect expropriation” are not defined in NAFTA, tribunals must draw on customary international law jurisprudence, paying little or no attention to the meaning that these concepts have acquired under the domestic laws of the Parties. This begs the question: Does Article 1110 create a broader right to

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94. MANN & VON MOLTKE, *supra* note 48, at 46.
95. Id.
98. Id.
100. See id. at 283-84.
compensation for government regulation than exists under current international law?

Investor claimants have argued that it does, seeking to align Article 1110 with the broader property rights protections applicable under American law against "regulatory takings." Investors rely on three arguments based on the language and structure of the Article. First, they contend that Article 1110 broadens the definition of compensable government taking by including "measures tantamount to expropriation." Second, they note that Article 1110 states that the requirement to compensate does not depend on whether the challenged government action is taken for a public purpose. (Indeed, the language of the Article clearly contemplates that a right to compensation may exist even if the government has taken the impugned action for a valid public purpose). Third, they emphasize that, unlike the discipline relating to performance requirements discussed above, Article 1110 does not contain an exemption for "environmental measures" necessary to protect human, animal or plant life, or for the conservation of natural resources.102

Using these arguments, Ethyl contended that a right to compensation for expropriation occurs "whenever there is a substantial and unreasonable interference with the enjoyment of a property right."103 Another investor has asserted, in a similar vein, that a compensable expropriation arises whenever "government action interferes with [an investor's] use or enjoyment of property."104

Early arbitral attempts to define "expropriation" for the purposes of Article 1110 have been disappointingly cursory and uneven. On the one hand, several Chapter 11 tribunals have dismissed the contention that Article 1110 broadens the right to compensation for expropriation otherwise available under international law. For instance, in Pope & Talbot, the tribunal emphatically rejects the suggestion that the phrase "measures tantamount to expropriation" represents an expansion of the prevailing concept of expropriation under international law.105 The decision in S.D. Myers affirms even more forcefully that Article 1110 should not be interpreted in a manner that expands the internationally accepted liability of states to compensate for regulatory takings. The tribunal observes that while there is a possibility that government regulatory conduct could form the basis for a valid claim to compensation, it is "unlikely" that such conduct could form the basis for "legitimate complaint under Article 1110."106 The separate opinion provides an even more explicit response to civil society concerns about Article 1110. These reasons conclude that, considered in its proper legal context, "it is not possible to see [Article 1110] as a generous invitation for tribunals to impose liability on governments that are engaged in the ordinary course of protecting health, safety, the environment and other public welfare concerns."107

102. The only explicit exceptions set out in Article 1110 are extremely narrow and pertain to intellectual property and the effect of non-discriminatory measures relating to a debt security or loan. NAFTA, supra note 4, art. 1110(7) and (8).
103. MANN & VON MOLKE, supra note 48, at 42 (citing Notice of Arbitration filed by Ethyl).
104. Id. at 43 (quoting Notice of Claim filed by Loewen).
105. Interim Award in Pope & Talbot (Phase I), supra note 49, at 34.
106. S.D. Myers, supra note 28, ¶ 281.
107. Schwartz separate opinion, supra note 33, ¶ 214.
At the same time, however, early arbitral articulations of the actual scope and meaning of Article 1110 have tended to be disquietingly expansive. By far the broadest interpretation of Article 1110 is found in Metalclad. In this case the tribunal held that indirect expropriation occurs when, by virtue of a regulatory requirement, the investor suffers "a 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" regardless of whether the requirement benefits the host state. In adopting this approach, the tribunal ignored, without giving reasons, the traditional international law requirement that the party alleging that it has suffered "indirect" or "disguised" expropriation show that the impugned government action was taken for an improper purpose. Moreover, again without providing supporting authority, the tribunal held that Article 1110 imposed an obligation to compensate not only for loss of property use but also for the loss of the economic benefits associated with ownership of the property. Similarly, in Pope & Talbot, the tribunal rejected Canada's argument that non-discriminatory regulation enacted in the exercise of police powers should be exempted from the reach of the chapter. Contending that such regulations can constitute a compensable form of "creeping expropriation," it opined that "a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation." The Westphalian sovereignty implications of these early arbitral rulings have not escaped the notice of the NAFTA Parties. It is not certain whether they anticipated, on entering into the NAFTA, the potential impacts of Article 1110 on the fiscal viability and legal validity of measures aimed at protecting public health and environment. It is clear, however, that all three Parties support a concept of expropriation that is significantly narrower than that which has been articulated in these early rulings. Momentum now appears to be building in favor of issuing an interpretive statement on Article 1110. Such a statement might well take the form of a declaration that would exclude from challenge non-discriminatory measures based on a public purpose that are consistent with a legitimate objective as defined in Article 915(1). As noted earlier, the Government

108. Metalclad, supra note 27, at 34.
109. Pope & Talbot (Phase I), supra note 49, at 35. To this, one is tempted to respond that if this is a "gaping loophole," it is certainly quite an established one, well-grounded in customary international law. It is noteworthy that in support of this conclusion the tribunal relied not on arbitral authority but on the Restatement Third Foreign Relations Law of the U.S., which is generally regarded as articulating a lower threshold as to what constitutes a compensable taking than is often accepted as customary international law. See Soloway, supra note 32, at 103; David Schneiderman, NAFTA's Takings Rule: American Constitutionalism Comes to Canada, 46 U. TORONTO L.J. 499, n.11 (1996).
110. The U.S. Government intervened before the tribunal in Metalclad to argue that Article 1110 does not expand the traditional meaning of "expropriation" in customary international law, the Government of Canada adopted the same position as intervener when the matter went to judicial review, and Mexico has asserted the same position throughout the claim process. See Submission of the U.S. Government in The United Mexican States v. Metalclad (ICSID Case No. ARB(AF)/97/1), ¶ 9, Outline of Argument of the Government of Canada in The United Mexican States v. Metalclad (B.C.S.C), ¶¶ 65-67 and Petitioner's Outline of Argument in The United Mexican States v. Metalclad (B.C.S.C.), ¶¶ 360-591. All three are on file with The Yale Journal of International Law.
111. Chapter Nine of NAFTA sets standards with respect to the creation, maintenance and
of Canada has been an active proponent of such a statement since the late 1990s. With the Commission's recent release of its first interpretive statement, and continuing civil society pressure to clarify or reform Chapter 11, the likelihood of the Parties negotiating an interpretive statement that addresses Article 1105, and potentially other Chapter 11 disciplines, is greater than ever.

E. Institutional Issues

As noted earlier, Chapter 11 disputes are arbitrated pursuant to procedures and in fora originally designed for, and predominantly used to resolve, private commercial disputes. After commencing a Chapter 11 claim, the investor may elect to have the dispute adjudicated under one of three sets of international arbitral rules. Whichever set of rules is selected then governs the arbitral procedure, unless otherwise stipulated in NAFTA. Since NAFTA is generally silent on procedural issues relating to Chapter 11 claims, the process of adjudicating such claims is largely governed by the procedures contained in, and discretion conferred by, the applicable arbitral rules.

Under Article 1123 of NAFTA, investor claims are to be adjudicated by a three-member tribunal. The disputing parties are each entitled to select a member; they are then jointly required to appoint a third member to act as tribunal chair. Although this appointment procedure is well accepted in commercial arbitration, it has come under heavy criticism as being inappropriate to the adjudication of disputes under Chapter 11 on several grounds. One concern is neutrality—raised by the prospect of parties being operation of technical regulations and sanitary measures by the Parties. Article 915(1) prescribes the legitimate objectives that such regulations and measures may validly serve. These "legitimate objectives" are defined to include:

(a) safety,
(b) protection of human, animal or plant life or health, the environment or consumers,
(c) sustainable development,
(d) considering, among other things, where appropriate, fundamental climatic, or other geographical factors, technological or infrastructural factors, or scientific justification, but does not include the protection of domestic production.


112. See discussion in text accompanying notes 23-24.

113. Canada's trade minister recently confirmed that he has sent a letter to his American and Mexican counterparts to this effect on this issue. MacKinnon, *supra* note 24, at B-1.

114. See IISD's analysis of the interpretive statement in *Note on NAFTA, supra* note 23, at 4-5.

115. These are: The International Centre for the Settlement of Investment Disputes (the "ICSID") Rules, the ICSID Additional Facility Rules, and the United Nations Commission for International Trade Law Arbitration (the "UNCITRAL") Rules.


117. Soloway, *supra* note 32, at 108-11 (arguing that the NAFTA negotiators have erred by incorporating the UNCITRAL and ICSID Rules); see also *The NAFTA Cone of Silence*, GLOBE AND MAIL, Aug. 26, 1998 (contrasting the transparency of domestic judicial processes in those governing
able to designate one of the panel members. A second concern is whether nominees appointed under this procedure will have sufficiently broad expertise to adjudicate issues outside of traditional trade law, with implications that transcend trade, entailing public policy analysis, and assessment of complex environmental and health issues.

Legitimacy concerns are further exacerbated by the procedures and norms that normally govern the adjudication of such cases. Unlike judicial proceedings, these tribunals typically operate in a realm of secrecy—a shroud that is given legal force by virtue of "confidentiality orders" that tribunals regularly make in Chapter 11 cases, with the consent of the disputing parties.

Throughout the entire Chapter 11 claim process, up to and including the arbitral award itself, the only mandatory public notification or disclosure occurs when a claimant is required to notify the NAFTA Commission Secretariat of its desire to convene an arbitral panel. Upon receipt, the Secretariat must publish this notice on a public registry. As a result, at present, it is impossible to know reliably how many investor claims have been threatened or are pending.

An important emerging issue is in what circumstances third parties should be allowed to file amicus or intervener briefs and have access to the information and arguments filed by the Parties in Chapter 11 cases. Increasingly, international organizations have come to appreciate the benefit associated with receiving briefs and submissions from interested third parties, and made procedural accommodations to this end.

For instance, in an unprecedented move in late 2000, the Appellate Body of the WTO issued guidelines that specifically invited NGOs to apply for leave to participate as amicus in a forthcoming appeal in the EC asbestos ban case. Curiously, having received a number of submissions seeking intervener status, the Appellate Body, under apparent pressure from WTO member countries, ultimately decided to reject all of the applications it received without giving reasons.

Chapter 11 cases); Can We Talk?, GLOBE AND MAIL, Sept. 1, 1998, at A14 (arguing that Chapter 11 cases should not be governed by the same confidentiality rules normally applicable in private commercial disputes).

118. In the WTO, this concern has been addressed by vesting in the WTO Secretariat the power to suggest a hearing panel in each case, subject to an objection for cause by one of the parties. In the event of an objection, the Director General is empowered to appoint the panel. MANN & VON MOLTKE, supra note 48, at 14.


120. See Note on NAFTA, supra note 23, at 1-2; see also Fulvio Fracassi, Confidentiality and NAFTA Chapter 11 Arbitrations, 2 Chi. J. OF INT'L. L. 213 (2001) (expressing doubt whether, absent the consent of the parties, private commercial arbitrations are governed by a principle of confidentiality and asserting that, in any event, such a principle ought not to apply in Chapter 11 arbitral proceedings).

121. Id. See MANN & VON MOLTKE, supra note 48, at 51-56 (discussing Art. 1126 (10)).

122. NAFTA, supra note 4, art. 1126(13).


In two separate applications, Canadian and American NGOs have recently sought amicus status in the Chapter 11 claim being pursued by Methanex. The NGOs sought the right to observe the proceedings and make oral and written submissions to the tribunal on the broad policy questions raised by the cases. Methanex and the Government of Mexico opposed their application, invoking the private commercial arbitral principle that third parties can only be granted access to material submitted or standing to make submissions with the consent of the disputing parties. The applicants claimed that this principle should not apply to arbitrations under Chapter 11, and that there were strong public interest grounds for the tribunal to exercise its discretion to grant their request.

After concerted lobbying by civil society groups, both the American and Canadian Governments lent their qualified support to these applications. In its legal brief, Canada expressed general support for greater transparency in the investor claim process and urged the tribunal to allow the petitioners to file written submissions. The United States, as Respondent, argued that, as a general rule, amicus submissions should be permitted where they are likely to assist the tribunal. The United States also supported the petitioners’ request that they be allowed to attend hearings and receive copies of all filed documents.

The tribunal’s decision represents a cautious yet important step towards making the arbitral process under Chapter 11 more transparent and publicly accountable. A key element of the decision is the tribunal’s conclusion that it has discretion, in appropriate cases, to receive and consider written amicus submissions. At the same time, however, the tribunal concluded that without the agreement of all parties to the arbitration, it could not allow the petitioners to attend the hearing or to receive documents generated within the arbitration. Moreover, the tribunal did not make a final decision as to whether this was an

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125. The Canadian organization is the International Institute for Sustainable Development. The Earthjustice Legal Defense Fund is acting on behalf of several U.S.-based NGOs.


127. Mark MacKinnon, Canada, U.S. Support Role for NGO in NAFTA, GLOBE AND MAIL, Nov. 24, 2000, at B7. For a highly critical editorial reaction to expanding NGO participation in Chapter 11 proceedings, see Peter Foster, Who Let the NGO Dogs Loose on NAFTA?, FINANCIAL POST, Dec. 1, 2000, at C-19, which characterizes such participation as “the thin end of the wedge the allows NGOs to undermine NAFTA in the name of bogus transparency.” It lauds the Mexican government’s opposition to NGO involvement in the process as “the only hope for preventing...the NGO hordes...from nullify[ing] the protections of property that Chapter 11 provides.”

128. Methanex Amicus Decision, supra note 126, ¶ 10.

129. Id. ¶ 16-23.

130. As this Article goes to print, a new ruling on third party intervention in Chapter 11 cases has been rendered in the matter of United Parcel Serv. v. Gov’t of Canada, available at http://www.dfait-maeci.gc.ca/tna-nae/IntVent_oct.pdf. In this case, the applicants sought to be added as parties to the proceeding or, alternatively, to be given amicus status to make written submissions. All three NAFTA parties opposed adding the applicants as parties but again, as in Methanex, were divided over the issue of whether the applicants should be allowed to make written submissions. Canada and the United States did not oppose the applicants being given an opportunity to make written submissions on the merits, while Mexico took the position that the tribunal had no jurisdiction to make such an order. In the result, the Tribunal dismissed the application for party status. It did, however, hold that it had authority to receive written submissions from interveners and indicated that it would consider doing so at a later stage in the proceeding.
appropriate case in which to exercise its discretion to accept written amicus submissions, deferring the decision until later in the arbitral process when it would be in a better position to assess whether such submissions would be of assistance in its deliberations.\footnote{131}

American and Canadian Government support for civil society participation in the \textit{Methanex} arbitration reflects an emerging sense that the procedural rules and institutional assumptions governing Chapter 11 cases must be significantly overhauled to enhance transparency and public participation. To this end, specific reforms that have been advocated include making the legal documents filed in such cases accessible on an electronic public registry, specific provisions for amicus and intervener applications to be brought and for the general public to attend hearings, and a requirement that tribunal decisions be published.\footnote{132}

Headway towards these goals was made with the release of the Commission's recent interpretive statement.\footnote{133} In this statement the Commission confirmed that, subject to limited exceptions, nothing in either NAFTA or in the applicable arbitral rules precludes the Parties from releasing (or compels them to keep confidential) any documents submitted to or issued by a Chapter 11 tribunal. The statement also committed the Parties to make timely, public disclosure of all documents submitted to, or issued by, a Chapter 11 tribunal with the exception, inter alia, of information a Party is bound to withhold under "the relevant arbitral rules, as applied."\footnote{134} It is certainly possible to interpret the statement with skepticism, particularly insofar as it does not fetter the discretion of tribunals to make confidentiality orders (of the type that have been routinely made in the past) that would prevent a Party from making information available to the public. Nonetheless, civil society organizations have generally welcomed the statement as an encouraging development, and one that they hope future tribunals will bear in mind when interpreting the applicable arbitral rules and exercising their discretion in future cases.\footnote{135}

III. \textbf{CITIZEN SUBMISSIONS UNDER ARTICLES 14 & 15 OF THE NAAEC}

A. \textit{Introduction}

The citizen submission procedure is a key component of the NAAEC,\footnote{136} the environmental side agreement to NAFTA brokered in 1992-1993 by President Clinton to consolidate support for NAFTA in Congress.\footnote{137} While Chapter 11 of NAFTA has received more mass media attention, the citizen complaint procedure is arguably its counterpart in terms of its importance to the long-term legitimacy of the NAFTA-NAAEC regime.

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133. \textit{Interpretive Statement}, supra note 83.
134. \textit{Id.}, at ¶ A2a.
136. NAAEC, supra note 3.
The NAAEC created a new institution: the Commission for Environmental Cooperation (CEC) based in Montreal. The CEC is governed by a Council. The Council is composed of Cabinet-level appointees from each of the three member countries with domestic responsibility for environmental protection. The affairs of the CEC are administered by a full time Secretariat located in Montreal, under the direction of an Executive Director. The CEC also receives ongoing advice and information from the Joint Public Advisory Committee (JPAC) comprised of fifteen citizens, five from each of the three NAFTA countries. The NAAEC also contemplates that each Party may convene a National Advisory Committee (NAC) comprised of members of the public to advise it on the implementation and further elaboration of the Agreement.

The CEC has two key functions. The first is to foster cooperation and coordination among the Parties on hemispheric environmental issues and trade and environment linkages through joint research and regional initiatives. The second function is to be an environmental watchdog mandated to oversee, under the direction of the Council, the enforcement of environmental laws by the Parties. The vehicle through which it performs this latter role is the citizen submission process, which is elaborated in Articles 14 and 15 of the NAAEC.

Any resident of a Party may file a submission with the Secretariat claiming that a Party "is failing to effectively enforce its environmental laws." Providing the submission satisfies certain procedural prerequisites set out in Article 14(1), the Secretariat then considers whether the submission warrants requesting a "response" from the Party against whom it is made based on criteria set out in Article 14(2). These criteria include whether the submission raises matters that deserve "further study" and whether the submitter has pursued "private remedies" available under domestic law. Once the Secretariat has received and considered the response of a Party, it may then recommend to the Council that a "factual record" be prepared. Approval to prepare a factual record requires a two-thirds vote by Council. When completed, the factual record is delivered to the Council, which, again by a two-thirds vote, may decide to release some or all of its contents to the JPAC and/or to the public.

In preparing the factual record, the Secretariat may consider information provided by third parties including governments, non-governmental organizations, and experts. The terminology "factual record" is significant. This record contains a summary of submissions received in relation to the complaint, a summary of other relevant factual information, and the facts as

138. NAAEC, supra note 3, art. 16.
139. NAAEC, supra note 3, art. 17.
140. Independent Review Committee, supra note 123, at 4-5.
141. This Article does not focus on the specifics of these requirements, which are well canvassed in JOHNSON & BEAULIEU, supra note 59, and David L. Markell, The Commission for Environmental Cooperation's Citizen Submission Process, 12 Geo. Int'l Envtl. L. Rev. 545 (2000).
142. NAFTA, supra note 4, art. 15(1)
143. Id. art. 15(2).
144. Id. art. 15(7).
found by the Secretariat relating to the matters raised in the complaint.\textsuperscript{145} Most observers agree, however, that "given its name, it probably cannot include an evaluation or judgment by the Secretariat,"\textsuperscript{146} or any recommendations for remedial action. Nor is it necessarily contemplated that the Council will take any specified action or make recommendations following receipt or release of the factual record.

As with the investor-state claim process, the NAAEC came about as the result of prevailing political forces and perceptions, particularly those in the United States. NAFTA had been negotiated under the Bush administration, and was opposed by many traditional supporters of then-Governor Clinton in the labor and environmental communities. In his Presidential campaign, Clinton promised to "fix the NAFTA" to address these concerns. One of the key environmental concerns with NAFTA related to the prospect that it would override domestic environmental protection law—a prospect highlighted by the 1991 GATT decision that held that a U.S. law protecting dolphins by banning tuna imports constituted an invalid trade restriction.\textsuperscript{147} A second concern was that NAFTA would create strong incentives, particularly for Mexico, to lower environmental standards and to relax enforcement of environmental laws to attract trade and investment.\textsuperscript{148}

To a limited degree, the NAFTA text that had already been negotiated addressed these concerns. Language in the investment chapter exhorted, without requiring, Parties not to lower, waive, or derogate from their environmental standards to attract investment.\textsuperscript{149} Other provisions recognized the right of Parties to adopt their own non-discriminatory level of environmental protection.\textsuperscript{150} NAFTA was also made subordinate to certain international environmental treaties.\textsuperscript{151}

These provisions did not mollify U.S. environmental groups.\textsuperscript{152} These groups lobbied the newly-elected Clinton administration for an international commission to oversee the enforcement of environmental laws in the NAFTA region with the power to impose sanctions for non-compliance. The clear preference of the NAFTA Parties, including the United States, was to achieve environmental objectives via suasion and cooperation. Relinquishing adjudicative authority over assessing domestic environment performance to a supra-national body was strongly opposed by all Parties as an unacceptable intrusion on Westphalian sovereignty.


\textsuperscript{146} \textit{JOHNSON} & \textit{BEAULIEU}, supra note 59, at 158.


\textsuperscript{148} \textit{JOHNSON} & \textit{BEAULIEU}, supra note 59, ch. 40.

\textsuperscript{149} NAFTA, supra note 4, art. 1114(2).

\textsuperscript{150} Id. art. 1114(1).

\textsuperscript{151} Id. art. 104.

\textsuperscript{152} For a comprehensive discussion of the role of environmental NGOs in the NAFTA negotiations, see \textit{JOHN J. AUDLEY, GREEN POLITICS AND GLOBAL TRADE: NAFTA AND THE FUTURE OF ENVIRONMENTAL POLITICS} (1997).
As a result, Clinton secured support of the NAFTA partners for a compromise that left Westphalian sovereignty largely intact with respect to the determination of environmental standards and environmental enforcement. On the one hand, the NAAEC imposed a new obligation on each Party to effectively enforce its environmental laws and regulations, an obligation that would be subject to a citizen complaint process supervised by a fact-finding body (the Secretariat) that received instructions from a tripartite Council. Ultimately, however, the effective enforcement obligation was left effectively unenforceable. Under this compromise, the only way a Party could be sanctioned for breaching this obligation was in the unlikely event that the Council voted to pursue a complaint against a Party to an arbitral panel. For this to occur, a Party would be required to initiate proceedings in its own name, independently of citizen submission process, under a complex “party-to-party” dispute settlement process provided for in Part Five of the NAAEC.\textsuperscript{153}

B. Use of the Procedure

Since 1995, thirty-one citizen submissions have been filed with the CEC Secretariat.\textsuperscript{154} Each of the NAFTA Parties has been the subject of a roughly comparable number of complaints: eight have targeted the United States, thirteen have been filed against Mexico, and ten have been brought against Canada. The volume of submissions brought each year has been relatively constant.\textsuperscript{155}

Twenty-one files are now closed. Of these, thirteen have been dismissed or terminated by the Secretariat under Article 14 and four have been terminated by the Secretariat under Article 15(1). In one case the Council has turned down a recommendation that a factual record be prepared pursuant to Article 15(2). One case has been withdrawn. Factual records have been prepared and made public in two cases.

There are ten active files. In five of these cases (including the first-ever case involving the United States), the Council has recently instructed the Secretariat to prepare factual records.\textsuperscript{156} Prior to receiving these instructions, the Secretariat was currently preparing a factual record in just one case.\textsuperscript{157}

\begin{itemize}
  \item \textsuperscript{153} See NAAEC, supra note 3, arts. 22-24, 31-36.
  \item \textsuperscript{154} CEC Secretariat, Citizen Submissions on Enforcement Matters: Status, available at http://www.cec.org (visited Oct. 22, 2001). All citations in this Article to CEC decisions are cited from this source, which is the official web page of the CEC Secretariat. The decisions are available under Citizen Submissions on Enforcement Matters: Registry and Public Files of Submissions.
  \item \textsuperscript{155} For a summary of information on these complaints, see the chart in Appendix II.
  \item \textsuperscript{157} Grupo Ecológico Manglar A.C. (Re United Mexican States) SEM-98-006, available at http://www.cec.org. In a recent Article, it is suggested that the current resources of the Secretariat are inadequate to deal with the impending burden of preparing factual records that are likely to be ordered in
\end{itemize}
The Secretariat's first factual record involved an allegation that the Mexican Government had failed to comply with environmental assessment requirements in authorizing construction of a pier at Cozumel. The other factual record that has been released involved allegations that the Canadian Government had failed to enforce the Fisheries Act against B.C. Hydro, a provincial Crown power utility.

Citizen submissions have been received on a wide variety of subject matters, including allegations with respect to failures to effectively enforce air, land and water pollution laws, species protection laws, and environmental assessment regulations.

C. Who May File a Submission?

Any "non-governmental organization or person established or residing in the territory of a Party" may file a submission. The definition of NGO is broad and includes any profit or non-profit group that is not affiliated or directed by government.

Most submissions have been filed by environmental or public health organizations. However, in three cases, private corporations have filed complaints. The best known of these is a submission filed by Methanex, a Canadian-based fuel additive company with American operations, whose product—MTBE—was scheduled to be banned by the state of California. In addition to seeking damages in connection with this ban under Chapter 11, as noted earlier, Methanex also filed a citizen submission alleging that the state of California was failing to effectively enforce its groundwater protection laws against various point source polluters.

The vast majority of submissions have been filed by environmental NGOs (ENGOs) against their home government. In several cases, however, where the non-enforcement allegation presents transboundary implications, ENGOs from both sides of the border have collaborated in bringing the complaint. In two cases, ENGOs from all three countries have jointly filed the submission.


159. B.C. Aboriginal Fisheries Comm'n (Re Canada) SEM-97-001, at http://www.cec.org [hereinafter B.C. Hydro].

160. Submission Guidelines, supra note 145, § 2.1.

161. NAAEC, supra note 3, art. 45.1 (defining "non-governmental organization").


164. Both the Methanex and Neste submissions were dismissed by the Secretariat on June 30, 2000, because of the pendancy of other proceedings including Methanex's claim for damages under Chapter 11 of NAFTA. Determination A14/SEM 99-001/06/14(3), available at http://www.cec.org.

165. See Biodiversity Legal Foundation (Re United States) SEM-95-001 (addressing U.S. failure to enforce endangered species legislation due to rider on military readiness Act), available at
D. Oversight of the Submission Process by the Secretariat

In overseeing the submission process, the Secretariat performs two distinct functions: interpreting and applying the legal language of the NAAEC and administering the process to ensure that submissions are processed in a timely and efficient manner. The Secretariat has received high marks on the former front. As one close observer has put it, “Secretariat’s decisions appear to be grounded on carefully reasoned legal interpretations of the Agreement rather than on fear of adverse reactions by, or the desire to curry favor with, either the Parties or the Submitters.”

In terms of timely and effective administration of the submission process, the assessment is more mixed. A common complaint is that the process is too slow, and concerns have been raised that a very serious backlog of work with respect to the preparation of factual records is imminent. A key reason for these delays is what might be termed “institutional tensions.” If these tensions can be reduced, the timeliness of the process will likely improve. Before considering the sources of these tensions, and the prospects for their minimization, I will consider the legal interpretive issues with which the CEC has been, or will soon be, grappling.

E. Nature of the Right

1. Defining “Environmental Law”

Before processing a complaint, the Secretariat must conclude that the complaint alleges that a “Party is failing to effectively enforce its environmental law.” A key threshold issue for the Secretariat, therefore, is what constitutes an “environmental law.”

The NAAEC defines “environmental law” as any “statute or regulation of a Party” that has as its primary purpose the protection of the environment or human life or health. Explicitly excluded from this definition are worker health and safety laws and laws that have as their primary purpose the harvesting of natural resources whether for commercial, subsistence or aboriginal uses. This does not mean, however, that all natural resource

170. Id. art. 45.2(a).
171. Id. art. 45.2(a).
172. Id. art. 45.2(b).
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management laws secure immunity from review under the NAAEC. As Professor Knox points out, in order to determine whether its primary purpose is to protect the environment or human health, a specific provision must be assessed on an individual basis, not by reference to the primary purpose of the statute of which it forms a part. Laws that are specifically contemplated as falling within the definition include those pertaining to pollution prevention, abatement or control; control of hazardous substances and wastes; and protection of flora, fauna, and natural areas.

Intriguingly, there is no requirement that a complaint relate to an environmental amenity that is traded among the NAFTA Parties, nor that the complaint claim that the alleged pattern of non-enforcement has trade implications or consequences. To date, only a few complaints have explicitly tried to address this latter connection.

The Parties deliberately exempted from the citizen submission process complaints pertaining to a government’s decision to rewrite its environmental laws or standards in a manner that might detract from their effectiveness. Instead, they decided that the concern about the downward pressure of trade on environmental laws, and inter-jurisdictional “pollution haven” competition, would be dealt with by way of a non-enforceable exhortation.

The obligation to defer to legislative action is recognized in several decisions of the Secretariat. In two of its early cases, the Secretariat declined to proceed with complaints that were based on allegations that legislative riders, passed by the U.S. Congress, nullified the ability of federal regulators to effectively enforce laws protecting endangered species. In a similar vein, the Secretariat held that it could not investigate a complaint that Canada had failed to enforce the United Nations Convention on Biological Diversity. Although Canada had signed and ratified the Convention, the Secretariat concluded that the Convention was not part of Canadian domestic law, since the federal government had not formally implemented it by way of statute or regulation. It should be noted, however, that the Secretariat has not excluded the possibility that its jurisdiction might, in other circumstances, extend to issues “concerning a Party’s international obligations.”

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173. See Knox, supra note 157, at 82-83.
174. NAAEC, supra note 3, art. 45.2(a).
175. See Why Exactly Does this NAFTA Commission Exist?, GLOBE AND MAIL, May 23, 2000, at A-14 (describing the NAAEC as one of the “strangest” international treaties and advocating that the CEC charter be rewritten to require that complainants establish that the alleged lack of effective environmental law enforcement was an attempt to secure a trade advantage).
176. B.C. Hydro, supra note 159; B.C. Mining, supra note 156.
177. JOHNSON & BEAULIEU, supra note 59, at 165 (“There was no reason to restrict NGO submissions . . . to ‘enforcement matters.’ NGOs should have been allowed to present evidence establishing that a NAFTA party is lowering environmental norms in an attempt to attract investments. The possibility of preparing a factual record based on such evidence would have been a useful addition to the NAAEC.”); see also NAAEC, supra note 3, art. 3.
178. See Biodiversity Legal Foundation, supra note 165; Sierra Club, supra note 166.
2. *Defining “Failure to Effectively Enforce”*

If the Secretariat concludes that a complaint relates to the enforcement of an “environmental law,” it must then consider whether there is evidence that a Party is failing “to effectively enforce” the law.

It is notable that, for the purposes of a citizen complaint, there is no need to allege or establish that a pattern of non-enforcement exists. In this regard, the citizen submission provisions differ from the Party-to-Party dispute resolution provisions of the NAAEC, which are triggered by an allegation that there is a “persistent pattern of failure” by a Party “to effectively enforce its environmental law.”

a. *Deemed Exemptions to the Obligation to Effectively Enforce*

The NAAEC specifically provides that a Party shall be deemed not to have failed in this obligation in two situations. The first is where the alleged failure “reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters.” The second arises where the alleged failure “results from bona fide decisions to allocate resources to enforcement in other environmental matters determined to have higher priorities.”

As yet, it remains unsettled whether a Party is entitled to invoke these exemptions upon being asked by the Secretariat to respond to a particular citizen submission. If this course of action were open to a Party, the Secretariat would be obliged to entertain evidence and reach conclusions as to whether either of these exemptions apply as a threshold issue prior to deciding to recommend the preparation of a factual record. To make a determination of this kind would impose onerous information gathering responsibilities on the Secretariat. To assess whether there were grounds to justify invocation of the first exemption, the Secretariat would require a comprehensive familiarity with the Party’s record of enforcement in similar instances; to assess whether the latter exemption applied would require familiarity with a Party’s environmental budgeting and priority identification processes.

Moreover, such an approach imposes the duty to grapple with vexing and sensitive legal questions on the Secretariat. In relation to the first exemption, the Secretariat would be required to decide whether a Party has exercised its discretion “reasonably.” The Secretariat would consider a variety of factors to make this determination, including whether the Party fettered its discretion, acted or failed to act for improper reasons, or took into account irrelevant considerations. Presumably, the Secretariat would also have to consider whether the submitter had presented evidence that negated a Party’s reliance on this exemption. The Secretariat would face similar interpretive

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181. NAAEC, *supra* note 3, art. 22.1.
182. *Id.* art. 45.1(a)-(b).
183. This might include evidence that the Party had engaged in a persistent pattern of non-enforcement and that the failure could not therefore be considered the product of a reasoned, case-specific exercise of discretion. The *B.C. Hydro* complaint illustrates this strategy. This complaint identified thirty-seven instances where Canada’s fisheries law was violated without prosecutorial action being taken, noting that, since 1990, only two prosecutions have been pursued. Similar evidence was put
difficulties were it called upon, as a threshold issue, to decide if a Party should be allowed to escape the obligation to enforce effectively its environmental laws due to internal budgetary priorities. To meet the test prescribed by this exemption, it would not be enough for a Party to claim that its budgetary resources limit its enforcement capabilities. Rather, a Party would need to satisfy the Secretariat that it had deliberately chosen to allocate funds to other environmental priorities that would otherwise be available for enforcement.

The complexity and political sensitivity surrounding the resolution of these issues would strongly suggest that the Secretariat should not deal with them as threshold matters. Instead, if a Party were inclined to rely on these exemptions, the better approach would be for it to so stipulate (and provide relevant documentation) during the factual record preparation process. This stipulation and accompanying documentation would then form part of the factual record without the necessity of a determination as to the merits or applicability of the grounds upon which the exemption was claimed.

b. *What Constitutes a “Failure” to Effectively Enforce?*

The above exemptions deem specified government conduct not to constitute “failures” to effectively enforce environmental laws. This leaves unsettled the broader question of what *does* constitute such a failure. The relevant definition contained in Article 45(1) contemplates complaints that allege either “action or inaction” on the part of “agencies or officials” of a Party. Thus, a submission may allege that a “failure” to effectively enforce has occurred either by virtue of inadvertent governmental action or inaction (i.e., poor internal communication, lack of agency coordination, or regulatory negligence) or due to more overt and deliberate forms of government action (i.e., allocating inadequate resources, adopting policies that are inconsistent with the requirements of an environmental law or pursuing a practice of non-adversarial, “sympathetic” regulation).

However, the Secretariat has emphasized that an alleged failure to effectively enforce must be related to a specific governmental enforcement obligation such as adequate compliance monitoring or to other duties that are prescribed in domestic law. Thus, a failure to implement a general legislative direction (such as promoting pollution prevention), the attainment of which is left to regulatory discretion, is not regarded by the Secretariat as a matter over which it has jurisdiction.

c. *What Constitutes “Effective Enforcement”?*

A closely related issue of considerable contention, which has arisen in the context of *B.C. Hydro*, concerns how to define “effective enforcement.” An interpretation apparently favored by some Parties is to measure the

184. *NAAEC, supra* note 3, art. 41.1.
186. Following the Council’s meeting in Banff in July 1999 (which led to some relatively minor amendments to the submission guidelines to be promulgated), the Parties engaged in an ongoing
effectiveness of enforcement exclusively in terms of whether the efforts undertaken have actually protected the environment from harm. \(^{187}\) Under this approach, the factual record could address neither the level of compliance with the law in question nor the effectiveness of the law in meeting its environmental purpose. \(^{188}\)

Canada’s NAC is on record as strongly opposing this proposal to narrow the Secretariat’s interpretive mandate. \(^{189}\) It contends that environmental harm is but one indicator of effective enforcement, just as is the question of whether the law has met its environmental purpose. In its view, the ultimate issue to be addressed by a factual record is whether the government has secured compliance with the law in question.

Several considerations strongly support the more liberal interpretation urged by Canada’s NAC. First of all, the NAAEC does not require Parties to protect the environment from harm. In deference to their Westphalian sovereignty, Parties are allowed to freely choose their own preferred level of environmental protection. What the NAAEC does require is that Parties “effectively enforce” environmental laws they enact, which are presumably designed to achieve a Party’s chosen level of environmental protection. In short, the citizen submission process is not about preventing environmental harm \textit{per se} but rather holding governments responsible for enforcing environmental laws. Focusing on environmental harm also presents substantial informational challenges. Environmental harm is not always easy to document or assess; typically, documenting and assessing compliance is much more straightforward. Finally, preventing environmental harm is not the only goal of environmental regulation. To focus narrowly on whether environmental harm has occurred means ignoring the broader question of whether and to what extent the environment has been put at risk by non-compliance.

\(^{187}\) Letter of Advice from NAC Canada 2-3 (June 18, 1999), available at www.naaec.gc.ca/english/nac/advice/adv991.htm [hereinafter NAC Letter of Advice]. This was also the position advanced by Mexico, and rejected by the Secretariat in its decision to accept the submission, in \textit{Cozumel Pier}, supra note 158. See discussion in Knox, supra note 157, at 94-95.


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F. Institutional Issues

1. The Institutional History

Almost from its inception, the citizen submission process has provoked questions about the role of the Secretariat and the nature of its relationship to the Parties and with the Council. In addition to administering the citizen complaint process, the Secretariat is vested with more "traditional" responsibilities of providing technical, administrative, and operational support and advice to the Council. This has led some to question whether it is desirable or even possible to house within the CEC both a "watchdog" role and these more traditional, cooperative functions that form the bulk of its work program. In particular, some Parties have raised the concern that, in carrying out this former function, the Secretariat has acted in a manner that is adversarial to the Party being investigated.

On the fourth anniversary of the NAAEC, the Council commissioned an independent review committee (IRC) to report on and advise with respect to these and other issues. Its report was a strong endorsement of the concept and design of the citizen complaint process. According to the IRC, "any adversarial aspects of the process are outside the role or control of the Secretariat, but arise from the empowerment of individual citizens or groups to initiate a submission 'against' a Party." In its words, the process reflected a laudable "trend toward increased citizen involvement in international mechanisms to address environmental issues." The report characterized the process as "belonging" to the 350 million citizens of North America "who are empowered to initiate it, and for whose benefit it was developed."

The IRC concluded its review by expressing the hope that the "current tension" around the citizen complaint process could be reduced. This could be achieved if the Parties worked hard at "scrupulously apply[ing] the NAAEC," rather than seeking to amend the process, and if they "respected the discretion provided to the respective decision-makers at different points in the process." Subsequent experience has proven this to be wishful thinking. If anything, in the years following the IRC review, institutional tensions surrounding the submissions procedure have escalated.

In the lead-up to the Council/JPAC summer meeting in 1999, the Council sought public input on a package of amendments to the submission guidelines aimed at clarifying and, in many respects, circumscribing the powers of the Secretariat. Ultimately, under pressure from the NGOs, JPAC and the NACs, major changes to the guidelines were postponed. However, virtually as soon as this decision was made, the Parties engaged in a second "confidential" round of discussions with respect to a proposed new set of

190. Independent Review Committee, supra note 123, at 22.
191. Id. at 21-22.
192. Id. at 5.
193. Id.
194. Id.
195. Id. at 54-55.
The proposed changes in this round were more far-reaching than those advanced in the preceding one, including the creation of a Council-appointed working group with responsibility to oversee the Secretariat's preparation of factual records.

When these discussions came to light a few months before the Council/JPAC meeting held in Dallas in June of 2000, civil society groups organized a continental coalition to lobby against the contemplated changes. Ultimately this coalition emerged from the Dallas meeting claiming victory. At the meeting, the Council not only deferred amending the guidelines, but also passed a resolution that has the potential for making future discussions about the design and implementation of the submissions process considerably more transparent and inclusive. This resolution tasks JPAC with the ongoing role of providing advice to the Council on issues relating to the "implementation and elaboration" of the submissions process. Under the resolution, any Party, the Secretariat, or a member of the public may raise issues "concerning the implementation or elaboration" of the submissions process with the Council, who may then refer the matter to JPAC for its consideration. It also requires the Council to provide written reasons for any decision made "following advice received by JPAC." Finally, the resolution mandates that JPAC conduct a public review of the history of the submissions process, with a view to submitting a report to the Parties on the "lessons learned."

The decision to enhance the role of JPAC is a positive development. However, the issues and uncertainties that precipitated the showdown in Dallas linger and seem likely to resurface.

2. Current Tensions

a. The Ability of the Secretariat to Access Information

One area of continuing tension concerns the ability of the Secretariat to carry out its fact-finding function. The NAAEC imposes a general obligation on the Parties to provide the Secretariat with such information as is necessary

199. This JPAC report was presented at the 2001 Council meeting held in Guadalajara, Mexico. Lesson Learned: Citizen Submissions under Articles 14 and 15 of the NAAEC: Final Report to the Council of the CEC (June 6, 2001), available at http://www.cec.org. The Report emphasized both the need for the Secretariat's independence to be respected, and the need to expedite the process. It also made various suggestions aimed at enhancing the transparency of the process. One such suggestion was to require the Secretariat and Council to provide, as a matter of course, reasons for their decisions. Another was to abolish the controversial 30-day "blackout" period (which prevents the Secretariat from informing a submitter that it has recommended preparation of a factual record to the Council) and to eliminate the requirement that the Secretariat refrain from disclosing the reasons for such a recommendation until the Council has acted. Finally, the Report recommended that a Party that has been the subject of a factual record should be required to report on what actions, if any, it has taken in response to the record within a reasonable time. In response, the Council agreed to reduce the "blackout period" to five days and to permit, at that juncture, the Secretariat to publish the reasons for its recommendation. The Report's other recommendations would, in its words, "require further consideration." Council Communiqué (June 29, 2001), available at http://www.cec.org.
to administer the submissions process. In reality, however, the Secretariat must rely on the cooperation of the Party whose actions are being investigated to disclose this information voluntarily. As Johnson and Beaulieu wryly observe, "depending on the circumstances, there might... be a temptation for the party complained against to procrastinate or to be lax in collecting damning evidence." Moreover, if a Party deems a request for information to be "excessive or... unduly burdensome," it may notify the Council, which, by a majority vote, can impose restrictions on the scope of the request.

In a significant gesture of deference to Westphalian sovereignty, a party is also entitled to decline to disclose information if it would not be required to disclose such information under its own laws pertaining to business or proprietary information, personal privacy or confidentiality in government decision-making. If a Party chooses to provide such information to the Secretariat, it may require the Secretariat to keep the information confidential.

Governments have not been timid in invoking the benefits of these provisions. In two cases, the Government of Mexico designated as "confidential" material that it provided to the Secretariat in response to a complaint. In one of these cases, it has asserted confidentiality over its entire response. Pursuant to newly enacted Submission Guidelines (the "Guidelines"), the Secretariat has requested, in these instances, that Mexico provide a summary of the information designated "confidential" and an explanation of its confidentiality claim. Without this information, the Secretariat would find itself in the unenviable position of having to provide reasons for dismissing the complaint, or alternatively, ordering production of a factual record, without being able to make reference to the contents of the government’s response. Accordingly, it is hoped in the interests of transparency that parties will normally see fit to provide summaries of this kind to the Secretariat when requested.

Confidentiality has also become a concern during the factual record preparation process. In preparing a factual record in the B.C. Hydro case, the Secretariat convened an expert panel to assist in its investigation. The panel established a procedure under which it solicited submissions from the submitters, B.C. Hydro, and the Government of Canada in three successive meetings. Parties were invited to attend as observers at the meetings when their counterparts where scheduled to make submissions.

200. NAAEC, supra note 3, art. 21.1
201. JOHNSON & BEAULIEU, supra note 59, at 156.
202. NAAEC, supra note 3, art. 21.2
203. Id. art. 39.1
204. Id. art. 39.2
206. In the Environmental Health Coalition case, id., the Government of Mexico has recently reconsidered its position and withdrawn its confidentiality claim. See Council Communiqué, supra note 199.
207. Submission Guidelines, supra note 145, § 17.3. The Guidelines were approved by JPAC on June 28, 1999.
While the submitters and B.C. Hydro cooperated fully in this arrangement, Canada refused to meet with the panel, either alone or in the presence of the other parties.208 Although it eventually agreed to answer questions in writing, due to the vague and incomplete nature of the answers provided, a protracted process of "follow-up questions" ensued.209 One of the apparent reasons that Canada objected to this procedure was a concern about disclosing sensitive information.210 Consequently, Canada has proposed that the submission Guidelines be amended to require that information submitted to the Secretariat (or its independent experts) in connection with the preparation of a factual record be kept secret until the Council has made a decision on whether to make the factual record public.211

To sequester all information—confidential, "sensitive," or otherwise—tendered by parties as part of the factual record process would be a significant and troubling departure from the NAAEC and current Guidelines. The present regime is one that emphasizes transparency. Subject only to confidentiality claims allowed under the NAAEC or the Guidelines, the Secretariat is required to place all information it considers in preparing a factual record (including submissions from the complainant and Party) in an open public file.212 Under this regime, the touchstone for non-disclosure is confidentiality; that a Party might deem disclosure of the information embarrassing or sensitive is not a justification for secrecy.

A further difficulty with the approach proposed by Canada is that, if it were adopted, and the Council subsequently exercised its discretion to not make a factual record public, all of the information considered by the Secretariat in preparing the record would be permanently sequestered.

b. The Secretariat's Discretion over Preparation of Factual Records

The B.C. Hydro process has also prompted Canada to raise concerns about the Secretariat's authority to determine the process by which the factual record is prepared. In particular, it suggests that the Secretariat and independent experts working on its behalf are not, and should not be, empowered to "engage in an interactive public meeting process to gather information during the factual record process."213 This suggestion is motivated

210. Telephone Interview with Randy Christensen (March 10, 2000).
211. Environment Canada Discussion Paper, supra note 188.
212. Submission Guidelines, supra note 145, §16(1) ("The Secretariat will maintain a file on each submission at its headquarters in a manner suitable for public access, inspection and photocopying. . . subject to confidentiality provisions of the Agreement and of the guidelines, the file will contain . . . any other information considered by the Secretariat under Article 15(4) of the Agreement.").
213. NAC Letter of Advice, supra note 145 (quoting letter that Norine Smith, Assistant Deputy Minister, Environment Canada sent to the Chair of NAC Canada on May 11, 1999). Along the same lines, Knox reports that "Canada had opposed Secretariat requests to have joint meetings with a panel of experts, the submitters, and officials from the governments of Canada and British Columbia, and had
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in part, as discussed in the preceding section, by Canada’s apparent desire to avoid being forced publicly to disclose sensitive or embarrassing information.

Canada’s reluctance also appears to be motivated by another consideration: the potential that a “public” factual record preparation process will shine an unwanted spotlight on the allegations being investigated. Canada claims that this is an undesirable result that undermines the “integrity of the Council’s decision on whether or not to make the final factual record public.” This is because, according to Canada, such a process encourages “the public, submitters, governments, and other stakeholders to draw conclusions on, or debate the merits of, the assertions that are the subject of the factual record” before the Council decides whether to make the record public. In the run-up to the Dallas meeting, this concern had crystallized into a proposal that the Council appoint a working group to oversee the manner in which the Secretariat carried out its factual record preparation duties.

Canada’s apparent aversion to the spotlight is somewhat paradoxical in that it is precisely this spotlighting attribute that many observers suggest is among the CEC’s most useful and important functions. It would also appear to be inconsistent with Article 1(h) of the NAAEC, which underscores that an objective of the Agreement is to “promote transparency and public participation in the development of environmental laws, regulations and policies.”

This paradox aside, of arguably even greater concern is a proposition implicit in Canada’s position: that the Secretariat lacks the discretion to determine its own procedure. The NAAEC neither explicitly authorizes nor prevents the Secretariat from embarking on the quasi-public investigative process adopted in B.C. Hydro. Under Canadian and American domestic law, in matters of procedure, tribunals are entitled to establish their own rules and practices as long as they do not conflict with the objectives of the general authority they have been granted. This approach is also consistent with the IRC’s admonition that those involved in the complaint process respect the “discretion provided to decision-makers at different points in the process.”

The positive developments in Dallas notwithstanding, it is fair to say that the Parties have not heeded this admonition particularly well in the past, and there is reason to worry that this pattern may be difficult to break. As one longtime NAAEC observer has put it, as the caseload of the Secretariat increases, there will be an increasing incentive “for the Parties to take control

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214. Environment Canada Discussion Paper, supra note 188.
215. Id.
216. JOHNSON & BEAULIEU, supra note 59, at 166 ("[O]ne of the CEC’s most useful functions will be to cast the spotlight on public authorities that fail to fulfill their obligations—in particular, the obligation to effectively enforce domestic environmental laws. These NAAEC provisions constitute a formal and permanent instrument enabling NGOs to direct the spotlight themselves."). See also Independent Review Committee, supra note 123, at 5 (noting that the complaint process serves as “some 350 million pairs of eyes to alert the Council of any ‘race to the bottom’”); Markell, supra note 141, at 572 n.131 (discussing the increasing popularity of “spotlighting” strategies).
217. NAAEC, supra note 3, art. 1(h).
218. Independent Review Committee, supra note 123, at 22.
of the procedure away from the Secretariat by micromanaging the Secretariat's discretion in considering submissions and preparing factual records.\textsuperscript{219} This observation appears particularly prescient given important developments that occurred as this Article went to press.

In late November 2001, the Council voted to proceed with factual records in five cases recommended by the Secretariat. In four of these cases, however, the Council imposed restrictions on the scope of the factual records, declining to follow the Secretariat's recommendations to approve broader reviews.\textsuperscript{220} In all of these cases (three involving Canada and one involving the United States), the Secretariat had recommended factual records that would have examined broad governmental environmental enforcement patterns and practices. In relation to the three submissions involving Canada (Oldman River II, B.C. Mining, and B.C. Logging), the Council restricted the Secretariat's factual inquiry to single episodes of alleged non-enforcement. In relation to the submission involving the United States (involving alleged non-enforcement of the Migratory Birds Treaty), it limited scope of the inquiry to two specific violations of the treaty cited by the submitters. In all four cases, the Council also required the Secretariat to provide the Parties with "workplans" with respect to preparation of the proposed factual records, a requirement that was not imposed when approving factual records in earlier cases.\textsuperscript{221}

The U.S. government's own advisory committee (the "GAC") was bluntly critical after learning, prior to the Council meeting, that the U.S. Council representative intended to vote for a factual record in the Migratory Birds case only on the condition that scope of the record be limited to "two anecdotal violations identified in the submission."\textsuperscript{222} The GAC claimed that this "partial-yes" position with respect to the "first submission requiring a substantive response from our federal government" would "eviscerate" the independence of the Secretariat by denying it the latitude it has thus far exercised to define the scope of the factual record.\textsuperscript{223}

The GAC also expressed concern about reports that the U.S. representative intended to insist on the right to approve the factual record workplan\textsuperscript{224} (a proposal which appears to have evolved into the new requirement that the Secretariat prepare factual record workplans for the Parties' review and comments). The GAC states:

> [This proposal] undermines the submission process in the same manner that was previously attempted by other Parties in the endless negotiations that occurred regarding the [submission] Guidelines. . . . There the ultimate goal was to curtail the Secretariat's independence and limit the transparency of the process. Ironically, in those circumstances, the U.S. successfully championed the Secretariat's independence by

\begin{itemize}
  \item 219. Knox, supra note 167, at 9.
  \item 221. Id.; see also Council Resolutions, available at http://www.ceceee.org (last visited Dec. 20, 2001).
  \item 222. Letter of Advice to the EPA Administrator Christine Whitman from the Chair of the Governmental Advisory Committee to the U.S. Representative to the CEC (October 19, 2001), at 2.
  \item 223. Id. at 1-2.
  \item 224. Id. at 2 (suggesting that "if the Secretariat's independence is undercut in the manner proposed by the U.S., there will be no future credibility to the submission process").
\end{itemize}
thwarting those Guideline changes and creating a process, with the JPAC’s involvement, to set the process on the correct course. By its current approach, the U.S. would fundamentally reverse the progressive steps that have been made in this area.\(^{225}\)

Not unexpectedly the Council’s recent factual record decisions have provoked a strong reaction from within the environmental movement. Leading Canadian environmentalist Dr. Martha Kostuch predicts that the decisions will substantially increase opposition to trade liberalization: “I think any environmentalist, in light of [these decisions], would have to totally oppose any expansion of free trade.”\(^{226}\)

c. **The Authority of the Secretariat to Interpret and Apply the NAAEC**

A final area of controversy has concerned the scope of the Secretariat’s authority to interpret the NAAEC and the submission Guidelines. Neither the Agreement nor the Guidelines specifically elaborate the Secretariat’s authority in this regard, particularly in a situation where a Party disagrees with the interpretation adopted by the Secretariat, as occurred in *B.C. Hydro*.

Two principles provide a starting point for considering this question. First of all, under the tripartite relationship contemplated by the NAAEC, the Secretariat answers to the Council, not to the Parties. Thus, for example, if a Party is concerned about a request for information made by the Secretariat during preparation of a factual record, the Party is instructed to raise the issue with the Council. If the Council decides the Party’s concern is well founded, by a two-thirds vote the Council may issue a binding directive to the Secretariat. Secondly, it is the job of the Council to address “questions and differences that may arise between the Parties regarding the interpretation or application of this Agreement” (emphasis added).\(^{227}\) The NAAEC specifically forbids the Parties from seeking to influence or direct the actions of the Secretariat.\(^{228}\)

In the lead-up to the Dallas meetings, it came to light that the Council was considering several proposals aimed at limiting the authority of the Secretariat to interpret and apply the Agreement. One proposal would have required the Secretariat to seek direction from the Council, even if no Party had raised an objection, whenever it “encountered an issue of interpretation.”\(^{229}\) The Council was also asked to consider imposing a requirement that the Secretariat halt its work and seek a Council ruling whenever a disagreement arose between the Secretariat and a Party in the interpretation or application of the NAAEC.\(^{230}\)

The former proposal as drafted is clearly unworkable. Dealing with issues of interpretation is a central and inescapable feature of the Secretariat’s current mandate. It is responsible for making interpretive judgments on a

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\(^{225}\) *Id.* at 3.


\(^{227}\) NAAEC, *supra* note 3, art. 10(1)(d).

\(^{228}\) See NAC Letter of Advice, *supra* note 187 (discussing Article 11(4)).

\(^{229}\) Environment Canada Discussion Paper, *supra* note 188.

\(^{230}\) *Id.*
broad range of questions. 231 With well over a dozen complaints on its docket at any one time, imposing on the Secretariat an obligation to seek routinely the advice of the Council whenever it encounters an interpretive issue presents obvious logistical difficulties. Logistics aside, such a proposal would have a seriously detrimental impact on the Secretariat’s independence and perceived legitimacy. The obvious danger with the second proposal is that it could be used by a Party as a delaying tactic, seriously impairing the ability of the Secretariat to process submissions in a timely and efficient manner.

At the Dallas meeting, the Council decided against issuing specific guidelines that would govern when a disagreement arose between a Party and the Secretariat. Instead, it opted to create a formal “troubleshooting” role for the JPAC in such situations. As a result, the Dallas resolution invites “any Party, the Secretariat, members of the public, or the JPAC itself” to bring issues of “implementation and elaboration” relating to the submission process to the Council. 232 On receipt, the Council may refer the matter to the JPAC which, in turn, is empowered to “conduct a public review to provide advice to the Council as to how those issues might be addressed.” 233 Significantly, the resolution provides that pending the completion of such a process, the Secretariat is mandated to continue processing any pending submissions. 234

IV. COMPARISONS AND CONCLUSIONS

The investor claim and citizen submission processes are strikingly similar yet, at the same time, remarkably distinct. Both are experiments in transnational governance that create new roles for non-state actors whose interests have traditionally been represented in international fora by their home governments. Moreover, while both processes are still in their infancy, they have already provoked considerable concern and defensiveness on the part these same governments. This discomfort appears to be due in part to the inevitable interpretive uncertainty surrounding key legal concepts at the core of these processes. But it arises as well from the perception that these processes have the potential to affect Westphalian sovereignty in unanticipated ways.

In intent and design, these processes could not be less alike. Securing Mexican agreement to an investor-state claim process was a key goal for the American and, to a lesser extent, Canadian negotiators. Available evidence strongly suggests that NAFTA Parties perceived Chapter 11 as the logical and necessary extension of the trade liberalization agenda. When faced with criticisms about the potentially constraining impact of NAFTA on domestic

231. These include: whether the complaint relates to an “environmental law,” whether it alleges a failure “to effectively enforce” such a law; whether a complaint meets the six listed threshold criteria under Article 14(1); whether the complaint merits a response from a Party with regard to the four criteria listed in Article 14(2); and whether the complaint justifies a recommendation that a factual record be prepared under Article 15.1. NAAEC, supra note 3, art. 14-15.
233. Id.
234. Id.
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policy, the Parties have responded by, as duly elected governments, invoking their sovereign representative status on the international stage.\textsuperscript{235}

In contrast, the Parties did not originally contemplate that the arrival of NAFTA would herald a new role for civil society. Only when it became apparent that the development of labor and environmental side agreements were necessary to ensure political and legislative support for NAFTA were the Parties spurred to action. In so doing, they were careful to ensure that these agreements left their Westphalian sovereignty intact.

This imperative is clearly reflected in the design of the citizen submission process. Legislative choices with respect to determining domestic environmental priorities and standards are fully immunized from review. Complainants are confronted with a veritable steeplechase of procedural pre-conditions.\textsuperscript{236} The Secretariat is denied the authority to reach legal conclusions or make recommendations as part of the factual record process. Parties retain broad powers to refuse to produce documents and to invoke open-ended confidentiality claims over relevant information. Moreover, the Council (with the Party against whom the allegations are being made exercising full voting rights) is empowered to overrule, by a majority, a Secretariat recommendation to prepare a factual record, and to decline to publish a record that has been prepared. Finally, as we have recently witnessed, the Council retains the authority to define how factual records are prepared.

Westphalian sovereignty concerns played a decidedly more modest role in the design of the investor claim process. Indeed, various features of the regime suggest that the paramount and overriding goal of Chapter 11 is to create a powerful, private, market-based vehicle to ensure that governments eschew measures that might be construed as restricting foreign investment. By virtue of the definition of “measure,” any government policy, decision or law can trigger a claim for compensation. Governments can even be required to pay compensation with respect to non-discriminatory measures taken for a \textit{bona fide} public purpose. Claimants elect the forum in which their claim is heard, and are entitled to appoint a member of the adjudicative panel, whose decisions are final and binding.

Despite the careful and largely successful efforts by the Parties to circumscribe the impact of the citizen submission process on Westphalian sovereignty, intriguingly some of the Parties—initially Mexico, more recently Canada and the United States—still consider the process too robust. As a result, there have been ongoing efforts to circumscribe the mandate and discretion of the Secretariat. Canada has also led the way in voicing concerns

\textsuperscript{235} See infra text accompanying note 10; Soloway, supra note 32, at 113 ("For the Mexican government, the promise to protect foreign investors was not viewed as a policy constraint. Rather it was viewed as an opportunity to make a ‘credible commitment’ in order to attract desperately needed foreign capital for infrastructure development.”).

\textsuperscript{236} See JOHNSON & BEAULIEU, supra note 59, at 153 (“The steeplechase will unfold as follows for complainants: (1) establishing that the submission is of the right kind; (2) persuading the Secretariat to request an explanation from the party; (3) following the explanation, getting the Secretariat to still recommend the establishment of a ‘factual record;’ (4) bringing the Council to approve such recommendation with a two-thirds majority; (5) hoping that the Council will allow the publication of the completed ‘factual record.’")
about the textual uncertainty surrounding the meaning of key terminology in Chapter 11. Only recently, however, have we seen evidence that Canada's NAFTA partners share these concerns.

The prospect that civil society organizations may soon be able to participate in Chapter 11 proceedings also offers some basis for guarded optimism that future arbitral decisions will be attuned to the broader public policy implications of the decisions they are called upon to make. But while the significance of opening the door for civil society to participate in the Chapter 11 process should not be minimized, a larger challenge awaits. While a participatory revolution may have occurred in international environmental law, so far it has spread slowly to the realm of trade and investment. Indeed many commentators have argued that one of the lessons of the historic showdown in Seattle is that governments have for too long compartmentalized the trade liberalization agenda, marginalizing concerns about non-trade interests and ignoring the non-economic impacts of globalization.\footnote{See, e.g., Pierre-Marc Johnson & André Beaulieu, The Road to a Better World, GLOBE AND MAIL, Dec. 30, 1999, at A15.}

An institutional illustration of this phenomenon in the NAFTA context is the regrettable lack of interaction between the NAFTA Free Trade Commission and the CEC despite the exhortation in Article 10(6) of the NAAEC for these institutions to collaborate around trade and environment issues.\footnote{Cooperation between these NAFTA trade and environment institutions is specifically mandated by Article 10(6) of the NAAEC but has yet to occur. For further discussion, see Howard Mann, NAFTA and the Environment: Lessons for the Future, 13 TUL. ENVTL. L.J. 387, 399-400 (2000).}

A central reason governments have resisted integrating civil society organizations into Chapter 11 processes is the same concern that has bedeviled the citizen submission process: a protectionist approach to sovereignty. The argument implicit throughout much of this Article is that this protectionist stance in relation to civil society is anomalous and unjustified, particularly in light of the far more pressing and substantial threats to sovereignty posed by the parallel investor claim process. Moreover, I would argue that this protectionist posture might, paradoxically, ultimately serve to constrain the ability of states to successfully pursue their trade and investment liberalization agendas. In this regard it is instructive to consider the record of expanding NGO involvement in international environmental law in the last decade or so. A strong argument can be made that the participatory revolution that has occurred in this context has actually enhanced state sovereignty by providing support and legitimacy for the expansion of state regulation internationally into a variety of new global subject matters.\footnote{See Kal Raustiala, The “Participatory Revolution” in International Environmental Law, 21 HARV. ENVTL. L. REV. 537, 585 (1997) (“While strengthening the roles of NGOs, this transformation simultaneously strengthens and legitimates the joint and coordinated arrogation of new state powers through the creation of new public international law.”). For an earlier iteration of this theory see Elizabeth Barratt-Brown, Building a Monitoring and Compliance Regime Under the Montreal Protocol, 16 YALE J. INT’L L. 519, 546-47 (1991). The theory that states secure “new powers” through engagement with civil society at the international level is evocative of the Chayes' contention that the realization of state sovereignty increasingly depends on external engagement. Chayes, supra note 17, at 27 (“In today’s setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.”).}

There is no reason, in principle, why a similar engagement with civil society would not...
yield analogous benefits when trade and investment liberalization initiatives collide with domestic health and environmental priorities.

One legacy of the failure of states to engage with civil society is the public perception that the inevitable price of trade and investment liberalization is diminished national sovereignty with respect to the protection of public health and the environment, and the stewardship management of natural resources. If states remain committed to the trade and investment liberalization agenda, they must confront this perception by responding directly to public concerns, expressed and inchoate, about the sovereignty implications of the agenda in these realms.

A key challenge on the horizon is the Free Trade Area of the Americas ("FTAA") agreement. Thirty-four states in the American hemisphere have committed to concluding FTAA negotiations by the year 2005. As yet, however, there is little or no indication whether or to what extent the FTAA will address environmental or other civil society concerns. Meanwhile, a broad coalition of U.S.-based environmental advocacy organizations has gone on the offensive. Dissatisfied with the failure of the NAFTA regime affirmatively to recognize the right of governments to protect public health and the environment, the coalition has published a set of principles that it argues "should inform all aspects of U.S. trade policy." These principles of "environmentally responsible trade" include ensuring that trade agreements (1) do not weaken national or international health or environmental standards (2) encourage environmental progress and discourage harmful environmental impacts; and (3) are developed and implemented through open and democratic processes.

Among other things, the Coalition's statement calls for clear "environmental exceptions" to trade and investment rules for laws and regulations that protect public health, the environment and natural resources. It also seeks to impose, under all new trade agreements, an obligation on states to effectively enforce environmental laws and regulations and to refrain from lowering environmental standards to gain trade advantages; an obligation, it argues, that should be subject to the same dispute settlement and enforcement mechanisms that otherwise apply under such agreements.

It is unlikely that states will immediately embrace the idea that they must engage with civil society around trade and environment issues in order to maintain and enhance their sovereignty in the global economy. Indeed, the NAFTA governments appear to perceive no contradiction, in sovereignty

240. See TOWARD FREE TRADE IN THE AMERICAS (José M. Salazar-Xirinachs & Maryse Roberts eds., 2001).
242. The members of this Coalition are: the American Lands Alliance, the Center for International Environmental Law, the Consumer's Choice Council, the Defenders of Wildlife, Earthjustice Legal Defense Fund, Friends of the Earth, the Institute for Agriculture and Trade Policy, National Wildlife Federation, Natural Resources Defense Council, Pacific Environment, Sierra Club and World Wildlife Fund.
243. COALITION FOR ENVIRONMENTALLY RESPONSIBLE TRADE, PRINCIPLES FOR ENVIRONMENTALLY RESPONSIBLE TRADE (2001).
244. Id. at 1, 2.
245. Id.
terms, in pursuing a highly liberalized policy with respect to foreign investors while simultaneously adopting a protectionist posture in dealings with civil society. It is hoped that this Article demonstrates why the existence of this asymmetry and the challenges it poses are of much more than passing academic interest.
## APPENDIX I: CLAIMS UNDER NAFTA CHAPTER 11

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<th>Outcome</th>
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<td>1. Halchette Distribution Services (unknown)</td>
<td>Mexico</td>
<td>Unknown</td>
<td>1995</td>
<td>Abandoned</td>
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<tr>
<td>2. Signa S.A. (Mexico)</td>
<td>Canada</td>
<td>Pharmaceutical regulations that restricted access to Canadian market for new drug</td>
<td>1995-1996</td>
<td>Claim abandoned; domestic court struck down legislation that formed the basis of the claim</td>
</tr>
<tr>
<td>4. Metalclad Corporation (U.S.A.)</td>
<td>Mexico</td>
<td>Hazardous waste facility denied state and local operating permits; area that facility operated in rezoned as ecological reserve</td>
<td>1997-ongoing</td>
<td>Final Award for claimant Aug. 25, 2000 ($16.685 million U.S. in damages); award set aside in part by the British Columbia Supreme Court May 2, 2001; appeal pending</td>
</tr>
<tr>
<td>7. S.D. Myers, Inc. (U.S.A.)</td>
<td>Canada</td>
<td>Ban on the export of PCB waste</td>
<td>1998-ongoing</td>
<td>Award for claimant in reasons rendered on Nov. 13, 2000: quantification of damages pending; application to set aside filed in Federal Court of Canada</td>
</tr>
<tr>
<td>8. Pepe &amp; Talbot, Inc. (U.S.A.)</td>
<td>Canada</td>
<td>Softwood lumber export quota allocation</td>
<td>1998-ongoing</td>
<td>Interim (Phase I) ruling dismissing several aspects of claim made June 26, 2000; final (Phase II) award finding for claimant only under the Verification Review Episode of Art. 1105 rendered April 10, 2001; quantification of damages pending</td>
</tr>
<tr>
<td>9. Sun Belt (U.S.A.)</td>
<td>Canada</td>
<td>Ban on bulk water exports from province</td>
<td>1998-ongoing</td>
<td>Claim in progress</td>
</tr>
<tr>
<td>11. The Loewen Group, Inc., and Raymond L. Loewen (Canada)</td>
<td>United States</td>
<td>Allegation that state trial process involving suit against claimant over a funeral home transaction violated Art. 1102, barring discrimination against foreigners; Art. 1105, imposing minimum standard for treating foreigners; and Art. 1110, prohibiting uncompensated expropriation</td>
<td>1998-ongoing</td>
<td>Claim in progress</td>
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### Claims Under NAFTA Chapter 11 (Cont.)

<table>
<thead>
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<th>Claimant Description</th>
<th>Country</th>
<th>Allegation</th>
<th>Status</th>
<th>Conclusion</th>
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<tbody>
<tr>
<td>13. Mondev International Ltd. (Canada)</td>
<td>United States</td>
<td>Allegation that Massachusetts Torts Claims Act and errors made by state trial court in civil litigation over a real estate development</td>
<td>1999-ongoing</td>
<td>Claim in progress</td>
</tr>
<tr>
<td>14. ADF Group Inc. (Canada)</td>
<td>United States</td>
<td>Challenge to “Buy American” government procurement policy by Canadian steel fabricator</td>
<td>2000-ongoing</td>
<td>Claim in progress</td>
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<tr>
<td>15. United Parcel Service, Inc. (U.S.A.)</td>
<td>Canada</td>
<td>Crown Corporation alleged to be unfairly competing with claimant in parcel delivery</td>
<td>2000-ongoing</td>
<td>Claim in progress</td>
</tr>
<tr>
<td>16. Waste Management Inc. (No. 2) (U.S.A.)</td>
<td>Mexico</td>
<td>Same grounds as Waste Management No. 1</td>
<td>Refiled in 2000-ongoing</td>
<td>Claim in progress</td>
</tr>
<tr>
<td>17. Ketchum Investments and Tysa Investments (U.S.A.)</td>
<td>Canada</td>
<td>Similar to Pope and Talbot; challenge to softwood lumber export allocation</td>
<td>2000-2001</td>
<td>Withdrawn</td>
</tr>
<tr>
<td>18. Trammel Crow Company (U.S.A.)</td>
<td>Canada</td>
<td>Similar to UPS claim; challenge to state monopoly over first class postal services</td>
<td>2001-ongoing</td>
<td>Notice of intent filed; in progress</td>
</tr>
<tr>
<td>Submitter/ Registry number/ Case &quot;Name&quot;</td>
<td>Party</td>
<td>Subject Matter</td>
<td>Date of Filing</td>
<td>Status/ Outcome</td>
</tr>
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</tr>
<tr>
<td>1. Biodiversity Legal Foundation SEM-95-001 (Spotted Owl)</td>
<td>United States</td>
<td>Non-enforcement of Endangered Species Act with respect to spotted owl protection due to a military readiness rider</td>
<td>June 30 1995</td>
<td>Terminated under Art.14(2) on Dec. 11, 1995</td>
</tr>
<tr>
<td>3. Comite para la Proteccion de los Recursos Naturales, A.C. et al SEM-96-001 (Cuzumel Pier)</td>
<td>Mexico</td>
<td>Failure to comply with environmental assessment requirements in authorizing pier construction at Cuzumel</td>
<td>Jan. 18 1996</td>
<td>Final Factual Record released on October 24, 1997</td>
</tr>
<tr>
<td>5. The Friends of the Oldman River SEM-96-003 (Oldman River I)</td>
<td>Canada</td>
<td>Failure to apply, comply with and enforce habitat protection sections of fisheries and environmental assessment Acts</td>
<td>Sept. 9 1996</td>
<td>Terminated under Art.15(1) on April 2, 1997</td>
</tr>
<tr>
<td>7. Comite pro Limpieza del Río Magdalena SEM-97-002 (Río Magdelana)</td>
<td>Mexico</td>
<td>Discharge of wastewater into Magdalena River in violation of environmental legislation</td>
<td>Mar. 15 1997</td>
<td>Secretariat awaiting, under Art.21(1)(b), additional information from Party</td>
</tr>
<tr>
<td>8. B.C. Aboriginal Fisheries Commission et al. SEM-97-001 (B.C. Hydro)</td>
<td>Canada</td>
<td>Non-enforcement of Fisheries Act against B.C. Hydro</td>
<td>April 02 1997</td>
<td>Factual Record released on June 11, 2000</td>
</tr>
<tr>
<td>9. Centre quebecois du droit de l’environnement SEM-97-003 (Quebec Hog farms)</td>
<td>Canada</td>
<td>Non-enforcement of several environmental standards relating to hog production</td>
<td>April 09 1997</td>
<td>Council turned down Secretariat’s recommendation to prepare factual record on May 16, 2000</td>
</tr>
<tr>
<td>12. The Friends of the Oldman River SEM-97-006 (Oldman River II)</td>
<td>Canada</td>
<td>Failure to apply, comply with and enforce habitat protection provisions in federal fisheries and environmental assessment legislation</td>
<td>Oct. 4 1997</td>
<td>Factual record ordered by Council (November 16, 2001) on more limited basis than recommended by Secretariat.</td>
</tr>
<tr>
<td>Submission</td>
<td>Country</td>
<td>Description</td>
<td>Date</td>
<td>Termination Details</td>
</tr>
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</tr>
<tr>
<td>15. Hector Gregorio Ortiz Martinez</td>
<td>Mexico</td>
<td>Improper administrative processing and persistent failure to enforce environment law in connection with a citizen complaint</td>
<td>Oct. 14 1997</td>
<td>Terminated under Art. 14(1) on March 18, 1999</td>
</tr>
<tr>
<td>17. Sierra Club of B.C. et al</td>
<td>Canada</td>
<td>Systematic failure to enforce Fisheries Act provision against mining industry</td>
<td>June 29 1998</td>
<td>Factual record ordered by Council (November 16, 2001) on more limited basis than recommended by Secretariat.</td>
</tr>
<tr>
<td>22. Alliance for the Wild Rockies, et al</td>
<td>United States</td>
<td>Non-enforcement of Migratory Bird Treaty Act prohibition against killing birds without a permit</td>
<td>Nov. 19 1999</td>
<td>Factual record ordered by Council (November 16, 2001) on more limited basis than recommended by Secretariat.</td>
</tr>
<tr>
<td>23. Neste Canada</td>
<td>United States</td>
<td>Failure to enforce California laws related to underground storage tanks resulting in contamination of soil, water and air</td>
<td>Jan. 21 2000</td>
<td>Terminated under Art. 14(3) on June 30, 2000 (see Methanex)</td>
</tr>
<tr>
<td>26. David Suzuki Foundation et al.</td>
<td>Canada</td>
<td>Breach of commitments under NAAEC to effectively enforce laws necessary to protect fish habitats</td>
<td>Mar. 15 2000</td>
<td>Factual record ordered by Council (November 16, 2001) on more limited basis than recommended by Secretariat.</td>
</tr>
<tr>
<td>No.</td>
<td>Case Description</td>
<td>Country</td>
<td>Issue</td>
<td>Date of Decision</td>
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<td>27.</td>
<td>Academia Sonorense de Derechos Humanos and Domingo Gutierrez Mendivil SEM-00-005 (Molymex II)</td>
<td>Mexico</td>
<td>Non-enforcement of General Law of Ecological Equilibrium and Environmental Protection against Molymex Co.</td>
<td>April 05 2000</td>
</tr>
<tr>
<td>28.</td>
<td>Comision de Solidaridad y Defensa de los Derechos Humanos A. C. SEM-00-006 (Tarahumara)</td>
<td>Mexico</td>
<td>Denying access to environmental justice to Indigenous communities in the Sierra Tarahumara in the State of Chihuahua</td>
<td>June 09 2000</td>
</tr>
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<td>30.</td>
<td>Names withheld by Secretariat under Art. 11(8) SEM-01-002 (AAA Packaging)</td>
<td>Canada</td>
<td>Failing to enforce NAAEC obligations by failure to prevent company (AAA Packaging) from exporting banned pesticide</td>
<td>April 12 2001</td>
</tr>
<tr>
<td>31.</td>
<td>Mercerizados y Tenidos de Guadalajara, S.A. SEM-01-003 (Dermet)</td>
<td>Mexico</td>
<td>Mexican company alleges that Mexican courts failed to take proper account of evidence of groundwater pollution caused by another company (Dermet) in the context of a civil action</td>
<td>June 14 2001</td>
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