Watching the pendulum swing: investigating changes in the scope and impact of provisions in investment treaties for securing environmental protection

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CONTENTS

SUMMARY

With the turn of the century, investment treaties began to address the potential for conflict between the introduction by governments of protective environmental measures and investors' claims of intereference with their rights to fully exploit their investments, prompting claims for compensation over reduction in the profitability of their investments. This conflict reflects a tension between the public's right to a safe environment, on the one hand, and investors' rights on the other. Since the 1990s, this tug-of-war between those supporting investment protection and those advocating for a safe environment has been played out in the case law of courts and arbitral tribunals, as well as in the drafting of investment treaties and free trade agreements. While environmental provisions in recent agreements, such as NAFTA and Trans Pacific Partnership (TPP), have suggested the pendulum is swinging with greater force in the direction of the environment, nevertheless the potential for positive impact on the environment has continued to be hampered by both legal and linguistic expedients that prioritize economic growth over environmental concerns. The Investor-State Dispute Settlement (ISDS) provisions carried over into TPP from NAFTA allow foreign investors to challenge government measures related to environmental, health, and safety regulations which investors claim to violate treaty obligations into which the State willingly entered for investors' protection. Moreover, with recent calls for the renegotiation of NAFTA and the US decision to withdraw from TPP, it may be the pendulum is swinging back in favour of economic over environmental concerns.

STATEMENT OF ORIGINALITY

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

(Signed)  Date: 30.09.2018

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LIST OF ABBREVIATIONS

ATCA	Alien Tort Claim Act
BITs	bilateral investment treaties
CEC	Commission for Environmental Conservation
CITES	*Convention on International Trade in Endangered Species of Wild Fauna and Flora*
ECtHR	European Court of Human Rights
EFILA	European Federation for Investment Law and Arbitration
EU	European Union
FET	fair and equitable treatment
FTAs	free trade agreements
ICJ	International Court of Justice
IEL	international environmental law
IIAs	international investment agreements
IIC	International Investment Court
ISDS	Investor–State Dispute Settlement
ITLOS	International Tribunal for the Law of the Sea
IUU	illegal, unreported and unregulated
MARPOL	*Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships*
MBTA	*Migratory Bird Treaty Act*
MNCs	multinational corporations
MTBE	methyl tertiary-butyl ether
NAAEC	*North American Agreement on Environmental Cooperation*
NAFTA	*North American Free Trade Agreement*
NGO	non-government organisations
OECD	Organisation Economic Co-operation and Development
PCA	Permanent Court of Arbitration
SPS	sanitary and phytosanitary
TPAs	trade promotion agreements
TPP	*Trans-Pacific Partnership*
TPSEP	*Trans-Pacific Strategic Economic Partnership Agreement*
UN	United Nations

UNCTAD	UN Conference on Trade and Development
US	United States
WTO	World Trade Organization

Chapter 1:

BALANCING PUBLIC AND PRIVATE INTERESTS

1.1 Introduction

Environmental concerns in relation to trade and investment-related agreements, especially with reference to the potential for conflict between protecting foreign investments and preventing environmental abuse, have been the subject of ongoing discussion and debate.[1] This discussion has intensified in light of the increasing number of complaints filed in the United States (US) against multinational corporations (MNCs) that have caused, yet benefited financially, from environmental damage.[2] Environmental measures affecting investment have been raised as a human rights issue. While parties have argued that investments have adversely affected their right to live in a safe and clean environment, others have maintained their right to property.[3] The *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, endorsed by the United Nations Human Rights Council (16 June 2011) acknowledges that 'States have to make difficult balancing decisions to reconcile different societal needs'.[4] These needs do not just include the protection of the natural environment; securing an investor-friendly environment in which investors are protected against commercially damaging governmental measures is also a recognised societal need.

Conflict has arisen with the introduction, since the 1990's, of protective environmental measures in investment treaties, both regulatory and administrative. From investors' perspective, such environmental protection measures may undermine their right to fully exploit their investment, thus necessitating compensation claims for reduced profitability of investments.[5] This conflict between those claiming compensation over reduction in the profitability of their investments and those advocating for a safe environment has been playing out in the case law of courts and arbitral tribunals, as well as in the drafting of investment treaties and free trade agreements. In order to help resolve this

[1] Paolo Vargiu, 'Environmental Expropriation in Internationals Investment Law' in Tullio Treves, Francesco Seatzu and Seline Trvisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge, 2014) 221.
[2] Elisa Morgera, *Corporate Accountability in International Environmental Law* (Oxford University Press, 2013) 119.
[3] Cesare Pitea, 'Right to Property, Investments and Environmental Protection: The Perspectives of the European and Inter-American Courts of Human Rights' in Tullio Treves, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge, 2014) 265-279.
[4] United Nations, 'Guiding Principles on Business and Human Rights' (Report No HR/PUB/11/04, United Nations Human Rights, 2011) 10.
vn[5] Vargiu, above n 1, 267.

conflict, De Brabandere (2011) argues for employing international arbitration as 'a guarantee for the investor to have access to an effective international remedy'.[6]

Vargiu (2014) asserts that even when the measures are genuinely aimed at environmental protection, such actions cannot be undertaken without considering investors' rights under previously enacted trade agreements.[7] This would potentially result in demand for fair compensation for losses incurred because of those measures. For example, the *Santa Elena* tribunal pointed out that expropriatory environmental measures—no matter how laudable and beneficial to society—are, in this respect, similar to any other expropriatory measures that a State may take to implement its policies.[8] When property is expropriated, even for environmental purposes, whether domestic or international, the State's obligation to pay compensation remains.[9]

These tensions have been manifest in case law of different international tribunals. The Inter-American Court of Human Rights in *Sawhoyamaxa Community v Paraguay*[10] went so far as to prioritise international human rights law over other branches of international law, including the enforcement of investment agreements. It stated that the enforcement of investment agreements 'should always be compatible with the American Convention [on Human Rights], which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States'.[11] Conversely, in *Suez v Argentina*,[12] the International Centre for Settlement of Investment Disputes arbitral tribunal case insisted that the court should view human rights and other treaty obligations equally. Advocating a similarly even-handed approach between human rights and treaty obligations, the European Court of Human Rights (ECtHR) in *Hamer v Belgium* stated that 'financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection'.[13]

[6] E. De Brabandere, 'Non-State Actors in International Dispute Settlement: Pragmatism in International Law' in Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011) 346.
[7] Vargiu, above n 1, 223.
[8] Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1
[9] Ibid.
[10] Case of the Sawhoyamaxa Indigenous Community v Paraguay, Sawhoyamaxa Indigenous Community of the Enxet-Lengua people v Paraguay, Merits, reparations and costs, IACHR Series C No 146, IHRL 1530 (IACHR 2006), 29th March 2006, Inter-American Court of Human Rights [IACtHR]
[11] Pitea, above n 3, 269.
[12] Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19
[13] Ibid.

Balancing concerns for preserving the environment with protecting the right of property, including investment, for individuals, the ECtHR, in *Consorts Richet and Le Ber v France*,[14] considered 'the allocation of the costs for environmental protection policies, in order to determine whether a violation of the right of property has occurred'.[15] In this case, the court ruled in favour of the applicants against the State, determining that applicants' rights were violated and therefore, they were due compensation from the State.

Pitea (2014) argues for an approach that requires the States to act in good faith on their sovereign decisions when enacting environmental measures, to pursue a balance between competing interests that considers good faith and provides flexible determination of compensation, guided by the principle of proportionality. Pitea summarises, 'Domestic authorities, within their margin of appreciation, must strike a fair balance between the competing public and private interest, without impinging on the very essence of the right of the individual concerned'.[16]

This thesis discusses how this tension between those supporting investment protection and those advocating for a safe environment has played out like a swinging pendulum in the case law of courts and arbitral tribunals, as well as in the drafting of investment treaties and free trade agreements, such as NAFTA and Trans Pacific Partnership (TPP). Despite increased attention given to environmental protection in recent trade agreements and treaties, the potential for positive environmental impact has been hampered by both legal and linguistic expediency, which prioritises economic growth over environmental concerns. Not wanting to risk losing investment opportunities, governments have retained Investor-State Dispute Settlement (ISDS) provisions in NAFTA and TPP. These ISDS provisions allow foreign investors to challenge government measures which they claim to have violated treaty obligations. Concerns that the pendulum might be swinging back in favour of economic over environmental considerations have further increased with the Trump administration's decision to renegotiate NAFTA and withdraw from TPP.

*1.2 **International Environmental Law and the Courts***

Morgera notes the increasing number of complaints filed in the US against MNCs that have caused and benefited from environmental damage.[17] As Morgera points out, 'These claims have been filed under the Alien Tort Claim Act (ATCA), which allows US district courts to have "original jurisdiction

[14] Nos. 18990/07 and 23905/07, Judgment, 18 November 2010 (Merits and Just Satisfaction).
[15] Pitea, above n 3, 274.
[16] Ibid 267.
[17] Elisa Morgera, above n 2, 119.

of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"'.[18]

Morgera notes that since 'the US is not party to any international treaty channelling liability to private actors responsible for environmental damage and has ratified only a restricted number of international environmental treaties in general, most environmental cases have alleged violations of the *law of nations*'.[19] US courts have been reluctant to apply international environmental law (IEL) in transboundary litigation against MNCs, as illustrated by the *Amlon Metals* case,[20] in which plaintiffs argued on the basis of the prohibition against transboundary pollution as formulated in Principle 21 of the Stockholm Declaration—'a well-established customary norm'.[21]

In *Beanal v Freeport-McMoran*,[22] Beanal, the leader of the Amungme indigenous tribe, alleged the violation of the precautionary, polluter-pays and proximity principles by a US multinational mining company,[23] for repeated dumping of massive quantities of toxic mine tailings into a local river in Indonesia.[24] The court held that Freeport's alleged policies were 'corporate policies only, and however destructive, did not constitute torts in violation of the law of nations'.[25] On appeal, the court expanded on its decision:

> The principles merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernible standards and regulations to identify practices that constitute international environmental abuses or torts … federal courts should exercise extreme caution when adjudicating environmental claims under international law to ensure that environmental policies of the United States do not displace environmental policies of other governments. Furthermore, the argument to abstain from interfering in a sovereign's environmental practices carries persuasive force especially when the alleged environmental torts and abuses occur with the sovereign's borders and do not affect neighboring countries.[26]

In 1984, the case brought against US multinational Union Carbide Corporation, for the tragic accidental leak of lethal gas in Bhopal India from a chemical storage facility owned by an Indian

[18] Ibid 120, quoting S. Zia-Zarifi, 'Suing Multinational Corporations in the US for Violating International Law' (1999) 4 *UCLA Journal of International Law and Foreign Affairs,* 81, 88–93.
[19] Ibid 125 (emphasis in original [?]).
[20] *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991)
[21] Ibid.
[22] 969 F. Supp 362 (ED La, 1997) 96–1474.
[23] Morgera, above n 2, 129.
[24] Ibid 128–9.
[25] *Beanal v Freeport-McMoran*, 969 F. Supp 362 (ED La, 1997) 383–4.
[26] Ibid 167.

subsidiary, was dismissed on the ground of *forum non conveniens*, paving the way for the case to be finally decided by the Supreme Court of India in 1989.[27]

In 1999, in a new case filed in the US related to the Bhopal disaster, *Bano v Union Carbide Corp*,[28] plaintiffs sought compensation not only for health consequences, but also for the ongoing pollution and contamination at the plant site.[29] Referring to the Ksenti Report, a United Nations (UN) report on human rights and the environment, and the Restatement of Foreign Relations Law of the US,[30] the plaintiffs alleged the international law violation of a 'customary obligation to avoid causing long-term, widespread and severe environmental damage that prejudices the health or survival of a population, or that deprives a people of its means of subsistence'. The *Bano* case was dismissed in August 2000.

Similarly, in 2002, in *Flores v Southern Peru Copper Corp*,[31] in which plaintiffs alleged violations of 'customary rights to life, health and of the right to sustainable development'[32] against a US multinational's smelter in Peru, the court, relying on previous jurisprudence, namely the *Beanal* case,[33] rejected their arguments:

> These principles are boundless and indeterminate. They express virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how to actually achieve theme.[34]

There are cases in which reference to international environmental instruments has featured in judgments of national courts, such as the *Montedison* case (the so-called '*Affaire des bouses rouges*').[35] This decision, while 'expressly based on a national law applicable to the high seas where Italian citizens were involved, also made reference to international environmental instruments such as the 1972 London Convention on Marine Pollution by Dumping and to the 1972 Stockholm Declaration on the Human Environment'.[36]

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[27] Morgera, above n 2, 123; *Union Carbide Corporation v Union of India*, (Supreme Court of India, Civil Appeal Number 3187–8 of 1988), order dated 14 February 1989.
[28] *Bano v. Union Carbide Corp.* 273 F.3d 120 (2nd Cir. (2001)
[29] Ibid 127.
[30] Ibid 128.
[31] U.S. Dist. (S.D.N.Y. 2002)
[32] Morgera, above n 2, 129.
[33] Ibid 132.
[34] *Flores v Southern Peru Copper Corp*, U.S. Dist. (S.D.N.Y. 2002) 30.
[35] A. Kiss, 'Un cas de pollution internationale: l'affaire des boues rouges' (1975) 102 Journal du Droit International 207 cited in Morgera, above n 2, 124.
[36] Ibid.

The decisions of US courts on cases alleging MNC culpability for environmental harm have prompted some to suggest that arguing based on IEL may be counterproductive.[37] In *Doe v Unocal*,[38] although the plaintiffs alleged both human rights abuses and environmental harm to marine and forest resources related to the construction of a natural gas pipeline in Burma, the judgment ignored the environmental consequences and focused exclusively on the human rights aspects.[39]

Morgera concludes by stating that, national courts, particularly in the US, seem reluctant to apply IEL directly to non-State actors such as MNCs. In most cases, US judges denied jurisdiction, concluding that the invoked international norms were not customary. Even when recognising that certain environmental norms are part of the law of nations, national decisions did not consider the merits of the question of their applicability to MNCs or denied such a possibility. Therefore, there is presently no support at the national case law level for an evolutionary interpretation of customary international law and international environmental principles that would allow their direct applicability to MNCs.[40]

Notwithstanding the negative response from national courts, plaintiffs and amici curiae have continued to refer to IEL in their numerous attempts to hold MNCs accountable for their irresponsible environmental conduct. International civil society and eminent legal scholars support the direct applicability to MNCs of a standard based on the international prohibition of transboundary environmental harm.

As an alternative to the domestic legal system of the host State, Morgera argues that human rights bodies have a role to play 'in ensuring procedural rights in the host State, stressing key standards such as participation in decision-making, and access to information and justice, which may help to prevent environmental abuses by MNCs'.[41] Moreover, human rights bodies should do more to identify 'international standards for corporate accountability'.[42]

Reflecting on the current progress in applying human rights to prevent environmental abuses by MNCs, particularly within the European Union (EU), Augenstein notes that IEL 'require[s] states to

[37] Morgera, above n 2, 132. Morgera cites the examples of *Amlon Metals v FMC Corp.* and *Beanal v Freeport-McMoRan* to argue that 'the alleged violation of IEL by a MNC actually constituted an obstacle to the resolution of the case.'
[38] 963 F. Supat 880 (C.D. Cal. 1997).
[39] Morgera, above n 2, 133.
[40] Ibid 141.
[41] Ibid 142.
[42] Ibid.

regulate and control activities on their territory to prevent environmental harm in other states'.[43] Principle 2 of the *1992 Rio Declaration on Environment and Development*, for example, requires States to ensure that 'activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.[44]

Similarly, the Tribunal of the *Trail Smelter* arbitration considered that 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence'.[45]

There are negative and positive obligations imposed on States belonging to the EU by the ECHR. Negative obligations 'protect Convention rights against violations by private actors as state agents',[46] while positive obligations 'protect Convention rights against violations by private actors as third parties'.[47] According to Augenstein, EU external environmental policies and regulations are positive obligations, which, as he illustrates with reference to *Fadeyeva v Russia*, 'constitute obligations of conduct rather than obligations for result'.[48]

Augenstein identifies 'two challenges to extending positive obligations to protect human rights in the environmental sphere to EU external environmental policies and regulations'.[49] First:

> the ECtHR does not appear to recognize a general obligation on Convention States to act within their territories in a way that is respectful of the human rights of individuals residing in other states. Second the existing case law seems to centre on negative state obligations not to violate Convention rights, rather than on positive obligations to protect human rights in relation to private actors.[50]

The application of IEL based on human rights focuses primarily on member States rather than the harm perpetrated by MNCs. Ways to enforce corporate accountability under IEL on a global scale are required. The bottom-up approach, as per Morgera's discussion of the US national courts, has failed to protect the rights of individuals from environmental harm. US courts appear reluctant to confront

[43] Daniel Augenstein, 'The Human Rights Dimension of Environmental Protection in EU External Relations After Lisbon' in Elisa Morgera (ed), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge University Press, 2012) 271
[44] Ibid 271; See also Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (1992), vol 1, Annex I.
[45] Trail Smelter case (United States v Canada), Reports of International Arbitral Awards, 16 April 1938 and 11 March 1941, Vol. III, 1905.
[46] Augenstein, above n 44, 273.
[47] Ibid.
[48] Ibid 274; See *Fadeyeva v Russia*, 45 EHRR 50, [89], [92].
[49] Ibid 278.
[50] Ibid.

MNCs over direct acts that have resulted in environment harm, especially if the illegal acts were committed outside US jurisdiction.

1.3 ***Arbitration***

Arbitration has been suggested as an alternative to resolving environmental disputes involving MNCs' violation of the rights of individuals. Arbitration is described by Romano as 'undisputedly not only the oldest adjudicative means of dispute settlement; it is also one of the third-party procedures most frequently provided for in international agreements and eventually resorted to'.[51] Regarding, international environmental arbitration, there are three notable arbitral cases related to environmental claims: *Pacific Fur Seals Arbitration* (1893),[52] *Trail Smelter Arbitration (1939)*[53] and *Lac Lanoux Arbitration (1957).*[54] All three cases have had a positive impact on efforts to strengthen protection from further environmental harms.

Acknowledging the fact that 'most environmental problems are caused by private conduct rather than state activities',[55] I take a broader view of what constitutes an international environmental dispute to include not only that between States, but also involving other actors. Referring to it as the 'changing fabric of international society',[56] Romano notes how sovereign States are 'increasingly giving way to a multiplicity of other actors, such as international organizations, transnational and multinational corporations, individuals (alone or grouped in non-governmental organizations, peoples, etc.)', resulting in 'disputes arising out of environmental problems straddling international borders [which] are much more likely to be addressed by transnational adjudication than through canonical inter-State or, better, international adjudication'.[57] Under these circumstances, arbitration that is open to non-State entities offers distinct advantages over judicial organs, such as the International Court of Justice (ICJ), which can only hear cases between States.

In 2001, the Permanent Court of Arbitration (PCA), which offers its services to both State and non-State entities,[58] proposed 'Optional Rules for Arbitration of Disputes Relating to Natural Resources

[51] Cesare P. R. Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (Kluwer Law International: The Hague, 2000) 102–103.
[52] "Fur seal arbitration. Proceedings of the Tribunal of arbitration, convened at Paris, under the treaty between the United States ... and Great Britain, concluded at Washington, February 29, 1892, for the determination of questions between the two governments concerning the jurisdictional rights of the United States in the waters of Bering sea" Washington, D. C: Government Printing Office (1892)
[53] 33 AJIL.
[54] 24 ILR 101.
[55] Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press, 2009).
[56] Ibid 334.
[57] Ibid 334.
[58] Ibid 337.

and/or the Environment (Optional Rules)', which were 'based upon the highly regarded and widely used UNCITRAL Arbitration Rules'.[59] The Optional Rules are intended to 'reflect the particular characteristics of disputes having a natural resources, conservation, or environmental protection component [and] reflect the public international law element which pertains to disputes which may involve States and utilization of natural resources and environmental protection issues, and international practice appropriate to such disputes'.[60] Further, the Optional Rules also state that 'agreement by a party to arbitration under these Rules constitutes a waiver of any right of sovereign immunity from jurisdiction'.[61]

However, what Romano describes as the 'the scant case record'[62] with respect to arbitration over environmental disputes between states and non-State entities, is likely due to the fact that 'NGOs [non-government organisations] do not have the same leverage as multimillion-dollar corporations do on governments'[63] in obtaining their consent to enter into arbitral proceedings.

According to Stephens, a disadvantage of arbitration is that it is:

> 'more closely controlled by the parties, and for this reason is not necessarily able to deal appropriately with concerns of a public order. Being more "dependent", arbitral panels are susceptible to pressure to reach a conclusion acceptable to the parties, not a result which is optimal from the perspective of environmental governance'.[64]

Alternatively, Stephens cites the UN Law of the Sea Convention and the International Tribunal for the Law of the Sea (ITLOS) to illustrate how adjudication by arbitration or judicial settlement can play 'a pivotal role' in ensuring compliance with provisions on marine environmental protection. He explains:

> …ITLOS has residual jurisdiction in relation to matters that can involve important marine environmental issues, namely prompt release cases and applications for provisional measures pending determination of a hearing of a dispute on the merits'.[65]

[59] Ibid 509.
[60] Permanent Court of Arbitration, 'Introduction (i) & (ii), Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment'.
[61] Ibid art 1(2).
[62] Romano, above n 53, 338.
[63] Ibid 338.
[64] Ibid 110.
[65] Ibid 111.

Among the advantages of arbitration cited by Romano[66] is that it is not confined to international law; arbitration may also consider national law. In the context of international environmental disputes, noting 'the lacunae of international environmental law, Trail Smelter arbitration *docet'*,[67] Romano suggests 'resorting to domestic law'.[68] Stephens also notes 'new efforts to involve national legal institutions in the task of day-to-day compliance management such as through environmental regimes that confer jurisdiction on domestic courts to hear complaints by or against foreign nationals and companies for causing environmental damage'.[69] Stephens comments that 'a range of civil liability regimes have been developed, most notably in Europe, which give domestic courts a specific role in deciding transboundary pollution cases'.[70] Among the benefits of such civil liability regimes is 'the directness of the claim by individuals harmed against those natural or legal persons responsible for environmental damage'.[71] While no case involving a foreign government in an environmental dispute has ever been determined by a domestic court, there has been 'much more success in actions against private enterprises'.[72]

*1.4 **Investment Treaties***

To secure foreign investment against fierce competition, developing States have entered into Bilateral Investment Treaties (BITs) designed to ensure favourable conditions for investments without reference to upholding environmental concerns. 'An integral part of the bargain', writes Dumberry and Labelle-Eastaugh, 'is the inclusion of an arbitration clause giving investors a direct right of action against the host state before an international tribunal'.[73]

Given that investment treaties have been primarily oriented to the promotion and protection of investments, it is to be expected that the main clauses in investment treaties 'cover such things as national and most-favoured-nation treatment, the prohibition of performance requirements, the

[66] Romano attributes the success of arbitration to 'Its 'great flexibility' to combine 'the fundamental features of judicial settlement (i.e., binding settlement according to a previously agreed-upon procedure) with the fact that it leaves a fairly large degree of influence to the States involved on key issues, such as the composition of the tribunal, choice of the applicable law, rules of procedure, seat of the tribunal, litigation calendar and, in general, the limits of its powers'. 103.
[67] Ibid 103.
[68] Ibid.
[69] Stephens, above n 57, 78.
[70] Ibid 80.
[71] Ibid 80.
[72] Ibid 80.
[73] P. Dumberry and E. Labelle-Eastaugh, 'Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor–State Arbitration' in Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011) 367.

protection against direct and indirect expropriation, free transfer, subrogation and dispute settlement'.[74] However, as Asteriti points out:

> Most of the first generation treaties (1959–1970 roughly) contain applicable law clauses making specific reference to international or domestic law which remains applicable either to fill in the lacunae of the investment treaty or in addition to it. Also, these treaties often refer to "sovereignty" as the governing principle of the investment relationship'.[75]

The Netherlands–Morocco bilateral investment treaty of 1971 was the first to include a clause in its preamble referring to environmental law:

> Agreeing that these objectives [investment promotion and protection] can be achieved without compromising the application of general measures on the protection of health, safety and the environment.[76]

Invoking jurisdiction to settle claims arising out of disputes over investment protection, *Asian Agricultural Products Ltd (AAPL) v Sri Lanka* in 1990 marked the beginning of an explosion in treaty-based investment arbitration.[77] *AAPL v Sri Lanka* was unique because the interpretation of the dispute settlement clause in the investment treaty supported a unilateral recourse to arbitration by the foreign investor.[78] Between the time of the investment treaty between Indonesia and the Netherlands and the first mention of investor–State arbitration in 1968 until *AAPL v Sri Lanka* in 1990, 'no writer or arbitral award had suggested that such a course of securing jurisdiction purely on the basis of the treaty statement was a possibility'.[79] Since then, however, the number of investment treaties has risen from 500 in 1990 to 2,700 by 2000,[80] and 3,236 in 2014.[81]

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[74] A. Asteriti, 'Waiting for the Environmentalists: Environmental Language in Investment Treaties' (March 24, 2012). In R. Hofmann, C.J. Tams (eds.) *International Investment Law and Its Others.* Nomos, 2012. https://ssrn.com/abstract=2028405. 11.
[75] Ibid 11.
[76] Asteriti, above n 76 12. Also noted: 'This kind of preambular language is repeated in several much more recent Netherlands treaties, namely the Netherlands–Mozambique BIT (2001); Netherlands–Namibia BIT (2002); Netherlands–Suriname BIT (2005); Netherlands–Dominican Republic BIT (2006); and Netherlands–Burundi BIT (2007). An identical clause is also present in most treaties concluded by Finland, starting with the Finland–Bosnia Herzegovina BIT (2000). The Netherlands–Costa Rica BIT (1999) preamble refers instead to sustainable development in the following terms: 'Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and sustainable economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable'.
[77] M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP, 2015) 2.
[78] *AAPL v Sri Lanka* (1990) 4 ICSID Rep. 245 cited in Sornarajah, above n 79, 3.
[79] Sornarajah, above n 79, 3.
[80] Ibid 3.
[81] UNCTAD, World Investment Report (Geneva, 2014) 124 cited in Sornarajah, above n 79, 3.

1.5 ***The 'Roaring Nineties'***

The 'roaring nineties'[82] saw 'expansive rule making through arbitration to serve the ideological preference for inflexible protection of foreign investment'.[83] The dominant hegemonic power of this period, the US, advocated neoliberal principles that 'stress trade without barriers, the flow of investment without hindrance, the protection of investment assets through secure recognition of private property, and dispute resolution mechanisms to ensure compliance with standards of governance'.[84]

During this period, the rise of the US as the single hegemonic power and the collapse of communism in the Soviet Union set the stage for a new world order in which it became necessary for developing countries, including those in Eastern Europe and South America, to look to wealthy corporations as a source of financial aid. Treaties offering investment protection were perceived as necessary to attract corporate capital.

Thus, the drive to secure greater foreign investment led to the increase in investment treaties. Sornarajah notes how the preambles in these treaties not only 'affirmed the relevance of the treaties to greater flows of foreign investment with consequential benefit for economic development', but also articulated an emphasis on investment protection that reinforced the expansionary views of arbitrators when it came to interpreting investment treaties.[85]

During the 1990s, there was expansion of the substantive law related to investment protection. *Fedax v Venezuela*[86] expanded the scope of investments protected under treaties to include financial instruments transferred by the original owners.[87] The most favoured nation (MFN) clause removed certain limitations in the original treaty that the claimant could rely on.[88] The law on expropriation was broadened to cover depreciation in the value of the property resulting from the action of an agent of a State. In addition, the fair and equitable standard of treatment became an alternative ground of

[82] Joseph Stiglitz, *The Roaring Nineties: Why We are Paying for the Greediest Decade in History* (Penguin, 2003) cited in Sornarajah, above n 79, 5.
[83] Sornarajah, above n 79, 9.
[84] Ibid 11.
[85] Ibid 13.
[86] Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3
[87] Sornarajah, above n 79, 397.
[88] Ibid 397

claims should there be a violation of the standard such that the legitimate expectations of the foreign investor were not met.[89] Sornarajah explains:

> The fair and equitable standard was interpreted as requiring that legitimate expectations, created at the time of the investment, are not thwarted. Mere depreciation of the value of investments caused by government measures came to be regarded as tantamount to expropriation.[90]

Sornarajah (2015) notes further efforts by arbitrators, who he describes as 'jumping on the bandwagon of neoliberalism as if to outdo each other in their zealousness by creating new notions of investment protection':[91]

> One was through the discovery of the umbrella clause, a throwaway provision whose significance had not been fully grasped when it was included in investment treaties. But it was made the focus of efforts to ensure that the contract came to be protected by the investment treaty as the clause endeavored to protect all commitments made by the host state. Another was to focus on the stabilization clause, the crucial clause in ensuring the legal changes do not affect the contract, and argue that it gave rise to legitimate expectations so that when these expectations were violated, liability for breach of the fair and equitable treatment [FET] standard would follow. The vitality of the stabilization clause can be seen in the efforts to keep it viable despite the formulation of a rule on regulatory expropriation.

Sornarajah describes the creation of 'an ideological climate in which a small arbitral community acted in the conviction that it was interpreting and applying a law in order to advance the tenets of an ideology that advocated that promotion of the flows of foreign investment through creative interpretations of the investment treaties'.[92] Substantive changes were made to the law based on the interpretation rendered by arbitral tribunals, which Sornarajah points out, exceeded the power of even the ICJ:

> On the theory that standards are evolutionary or that they had been entrusted to administer a vague standard such as the fair and equitable standard, arbitrators assumed the power to interpret the provisions in accordance with what they saw as the object of the treaties, which was investment protection. It was thought that standards such as the international minimum standard, which could evolve, and vague standards such the fair and equitable standard were entrusted to arbitrators to create a course of precedents through interpretation of the terms of the treaties. It has been suggested that the continuous pronouncements of arbitral tribunals create custom. In this way, the law on the subject could be created, vesting arbitration

[89] Ibid 397.
[90] Ibid 45.
[91] Ibid 397.
[92] Ibid 27; Sornarajah cites an OECD study that suggested that 12 arbitrators were involved in 60 per cent of 263 ICSID tribunals. OECD, 'Investor–State Dispute Settlement', Public Consultation Paper, 16 May 2012–9 July 2012 (OECD, 2012) [120]. He also notes the Corporate Europe Observatory's finding that '18 arbitrators are "at the core of the social structure of investor–state arbitrators" '. ('How Law Firms, Arbitrators, and Financiers are Fuelling an Investment Arbitration Boom' Corporate Europe Observatory, 2012).

> tribunals with legislative authority to create international law, a power that was not given even to the International Court of Justice.[93]

Asteriti similarly notes how the pronouncements of tribunals have contributed to the substantive content of the law.[94] Tribunal awards, rather than 'the vague language of treaties', decide how conflicts between investment and non-investment obligations are met.[95] As Asteriti remarks, 'tribunals routinely cite each other's previous awards, and so do the parties to the disputes, engendering a reciprocal expectation of consistency and respect of precedent'.[96]

1.6 ***Balanced Treaties***

Overreach on the part of those pushing neoliberal inflexibility for investment protection eventually met with resistance from other arbitrators, 'who believed that going beyond the rules to which parties had agreed to would undermine the fundamental tenet of arbitration that consent provided the basis of arbitration'.[97]

Two forces eventually emerged in an ideological stand-off between those supporting a neoliberal view and those opposing it. On the side of neoliberalism, 'pull[ing] the law towards inflexible investment protection on the ground that it catered to the interests of all concerned, including the developing host states, as foreign investment generally promoted economic development'[98] were 'large multinational corporations, the law firms that advise them, their home states, large financial institutions providing investment funds, third-party funders of investment arbitration whose new business depends on investment arbitration and arbitrators inclined towards a policy of investment protection'.[99]

On the other side, advocating 'recognition of competing regulatory interests of protection of the environment, human rights and other public interests such as health and welfare', were 'states affected by expansionary interpretation of arbitral awards, NGOs, arbitrators not inclined towards interpretations based solely on the policy of investment protection, and international lawyers opposing fragmentation of their discipline'.[100]

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[93] Sornarajah, above n 79, 53.
[94] Asteriti, above n 76, 9
[95] Ibid 9.
[96] Ibid 10.
[97] Sornarajah, above n 79, 28.
[98] Ibid 7.
[99] Ibid 7.
[100] Ibid 7.

'The rise in resistance to norms of inflexible investment protection' argues Sornarajah, 'is largely based on the decline of neoliberalism, which supported the legal base on which the regime of expansionary investment protection was built'.[101] The 'roaring nineties' were clearly coming to an end. First, prompted by concerns related to environmental and human rights, NGOs successfully fought the passage of the multilateral agreement on investment organised by the developed countries of the Organisation Economic Co-operation and Development (OECD) to develop a stronger system of rules on international investment. Second, insistence on the part of China and India, and other developing countries, to include a provision on corporate responsibility stalled efforts to create a discipline in investment within the World Trade Organization (WTO).[102]

The demise of neoliberalism coincided with the weakening of the US's hegemonic power due to its overextension of military power in the Middle East and Afghanistan, and 'the global economic crisis of 2008, brought by a lack of regulatory control over lending practices of financial institutions'.[103] Once the tables were turned and the US found itself on the other side of foreign investment arbitrations in the context of *North American Free Trade Agreement* (NAFTA)[104], '[n]ew types of treaties with broad defenses against state liability began to be made'.[105]

The first use of such language can be found in NAFTA, which was signed in 1992 and entered into force in 1994.[106] *Metaclad v Mexico*[107] is considered one of the leading cases dealing with expropriation allegedly motivated by environmental reasons. The parties in this case referred to NAFTA's preambular language involving environmental concerns. However, the arbitral tribunal later omitted the reference and only addressed other purposes of the treaty.[108]

Despite the argument that 'protection of the environment is indisputably an issue that should be in the agenda of every country',[109] environmental measures may constitute an indirect expropriation that contradicts the central aim of investment treaties: the protection of foreign investors. Vargiu (2014)

[101] Ibid 23.
[102] Ibid 398.
[103] Ibid 15.
[104] North American Free Trade Agreement. https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement
[105] Ibid 16.
[106] Ibid 195.
[107] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1. https://www.italaw.com/cases/671
[108] M. Potesta, 'Mapping Environmental Concerns in International Investment Agreements: How Far Have We Gone?', in Tullio Treves, Francesco Seatzu and Seline Trvisanut (eds.), Foreign Investment, Interational Law and Common Concerns (Routledge, Oxon, 2014) 195-199. Potesta suggests this 'may be indicative of the tribunal's view on the importance [or lack thereof] to be attached to environmental concerns' 198.
[109] Vargiu, above n 1, Paolo, see note 2, 228.

predicts 'a number of cases in which investors will try and prove that a measure that affected their investment was not designed to protect the environment and therefore, being the measure tantamount to expropriation, they are due compensation from the host state'.[110]

While the *US Model Treaty* (1987) included inflexible investment protection, the revised model treaties of the US and Canada (2004) reflected changing attitudes towards investment protection. A statement on exceptions to compensable expropriation contained in letters between those negotiating the *Singapore–US Free Trade Agreement* found its way into a firm statement in the *US Model Treaty 2004*.[111] It occurred in the context of the 2005 NAFTA case, *Methanex Corporation v United States,*[112] 'where the US made the argument that regulations prohibiting a carcinogenic substance used as an additive in petroleum were regulatory measures and therefore could not amount to a compensable expropriation'.[113] The tribunal held in favour of the US, stating that 'California's measure to ban methyl tertiary-butyl ether (MTBE) did not "relate to" the business investments'[114] of Methanex because no evidence of a direct relationship could be found. This case proved a positive step in protecting individual rights from environmental harm. Gaines (2006) argues that the 'Methanex case should help relieve anxiety in the environmental community that NAFTA Chapter 11 will become a widely used platform for challenges by investors to national or subnational environmental regulation'.[115]

The *Methanex* arbitration was also noteworthy in that it was the first time a NAFTA tribunal accepted *amicus curiae* briefs submitted by several NGOs.[116] Since then, *amicus* submissions have become 'a constant feature of NAFTA arbitration'.[117]

1.7 ***Conclusion***

The following chapters discuss the normative value of environmental provisions as evident from the case law and awards passed down by tribunals. Depending on the wording, reference to bilateral or multilateral environmental agreements in BITs may serve little purpose. Potesta cites as an example

[110] Ibid 229.
[111] Sornarajah, above n 79, 399.
[112] In the Matter of An Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Final Award of the Tribunal, August 7, 2005 http://www.state.gov/documents/ organization/51052.pdf accessed 27 July 2012.
[113] Sornarajah, above n 79, 399.
[114] Sanford E Gaines, 'Environmental Policy Implications of Investor–State Arbitration Under NAFTA Chapter 11' (Paper presented at Third North American Symposium on Assessing the Environmental Effects of Trade, February 2006) 35.
[115] Ibid 35.
[116] P. Dumberry and E. Labelle-Eastaugh, above n 75, 366–7.
[117] Ibid 366.

certain BITs negotiated by the Belgian–Luxemburg EU, which incorporated statements into the main text of the agreement, which '[did] not go beyond declaratory ("reaffirm") and hortatory ("shall strive") wording'.[118]

Beyond the discussion of BITS in Chapter 2, subsequent chapters will focus on NAFTA (Chapter 3) and the Trans-Pacific Partnership (Chapter 4), examining their respective contributions to balancing private and public interests with environmental protection. Chapter 5 focuses on the ongoing debate concerning investor–State dispute settlement (ISDS) and its impact on attempts to provide measures for protecting the environment.

[118] Potesta, above n 110, 199. The exact quotation in the BITS read as follows: 'Hence according to which "The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognized and implemented by their domestic legislation" '.

Chapter 2:

SPEAKING OF 'ENVIRONMENTAL' IN INVESTMENT TREATIES AND TRADE AGREEMENTS

2.1 Introduction

This chapter discusses the use of the word 'environmental' in the context of BITs, free trade agreements (FTAs) (other than NAFTA), and trade promotion agreements (TPAs). An early example of trade–environment policy linkage occurred in the 1992 *Rio Declaration on Environment and Development*.[1] In Principle 12, while '[r]ecognizing the integral and interdependent nature of the Earth, our home',[2] it warns States against adopting environment-related trade policy measures that might 'constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'.[3]

This chapter surveys the use of the word 'environmental' in BITs, FTAs (other than NAFTA) and TPAs. It examines how and where mentions occur in the treaty/agreement text and identifies disputes in which tribunal deliberation specifically considered references to environmental concerns in a particular treaty/agreement, thereby providing some basis for assessing the impact treaty/agreement references to environmental concerns may have had on tribunal decision-making.

The first part of this chapter examines references to 'environmental' in BITs, followed by a similar discussion of FTAs and TPAs. Sequencing in each part is chronological, illustrating the evolution of treaty/agreement provisions. Since the use of 'environmental' in the preambles of BIT dating back to the early 1990s, references to environmental concerns have increasingly been incorporated into the articles of the treaties and agreements. The inclusion of information about relevant disputes, tribunal deliberations and awards is highly relevant to the realistic assessment of the impact of the inclusion of treaty/agreement language concerning environmental issues. There are indications that the pendulum is swinging away from tribunal rulings favouring investments at the expense of

[1] *Rio Declaration on Environment and Development*, Report of the UN Conference on Environment and Development (UN Doc A/CONF.151/26/Rev.1 [Vol. I], 14 June 1992), Annex 1.
http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm
[2] Ibid
[3] Ibid

environmental protection to more balanced rulings that pay closer attention to environmental concerns in treaties and agreements.[4]

2.2 Environmental Language in Bilateral Investment Treaties[5]

Developing States have entered into BITs designed to ensure favourable conditions for investments, often without any reference to environmental concerns. Asteriti traces the increased use of language in investment treaties to specifically address environmental concerns, including language used in preambles and the body of the treaty.[6] Of the more than 1,800 agreements listed by the UN Conference on Trade and Development (UNCTAD), less than 10 per cent contain language explicitly referencing the environment.[7]

The US and Canada model treaties of 2004 were balanced treaties that considered environmental and human rights concerns. Asteriti traces the increased use of language in investment treaties to specifically address environmental concerns, including language used in preambles and the body of the treaty. Asteriti reports:

> A review of more than 1,800 instruments listed in the UNCTAD catalog of IIAs,[8] reveals that 170, or about 9.4% of them, contain language that *explicitly* makes reference to the environment.[9] It is certainly a minority of instruments; however, the frequency by which this language is included increases with more recent instruments and for certain countries' model treaties (for example Canada and Belgium, which include express provisions in almost all their more recent treaties). *Indirect references* to non-investment obligations (such as compliance with international and/or domestic law) are almost universally present in the IIAs. There seems to be nonetheless an inverse relationship between the explicitness of the language and the normative strength of the obligation; in other words, explicit environmental language is usually contained in 'soft law' provisions (including the preamble), while general reference to non-investment obligations is in binding provisions, such as the 'Applicable Law' clauses.[10]

4 This investigation has been undertaken using the Investor–State Law Guide database. <http://www.investorstatelawguide.com/>.

5 Appendix 1 shows how environmental concerns are included in the BITs.

6 A. Asteriti, 'Waiting for the Environmentalists: Environmental Language in Investment Treaties' (March 24, 2012). In R. Hofmann, C.J. Tams (eds.) *International Investment Law and Its Others.* Nomos, 2012. https://ssrn.com/abstract=2028405.

7 'The following terms were considered as referring to the environment: environment, environmental, sustainable development, conservation or preservation of natural resources, animal and plant health, prevention of diseases and pests in animal or plants.' (Asteriti, above n 6, 10).

8 http://www.unctadxi.org/templates/DocSearch____779.aspx cited in Asteriti above n 76, 10.

9 'The following terms were considered as referring to the environment: environment, environmental, sustainable development, conservation or preservation of natural resources, animal and plant health, prevention of diseases and pests in animal or plants.' Asteriti, above n 76,10.

10 Asteriti, above n 76, 10.

As noted above, the Netherlands–Morocco BIT of 1971 was the first to include a clause in its preamble referring to environmental law, which has since been repeated in several recent treaties. While not legally binding, preambular clauses serve as an 'aid to interpretation according to the general applicable rule of interpretation as per Article 31(2) of the *Vienna Convention on the Law of Treaties* and as clarified, for example, in the Letter of Submittal to Congress of the US–Georgia BIT'.[11] Nevertheless, while arbitral tribunals acknowledged such environmentally aware preambular clauses, their interpretation of those clauses continued to be influenced by what they perceived to be their role to protect investments and preserve open trade.

Besides non-binding preambular clauses, environmental language outside the legally binding provisions in the body of the treaty occasionally appears in 'the definitions agreed by the contracting parties on the terms used in the treaty'.[12] Asteriti identifies three ways in which environmental language can be used in the definition:

> most commonly, in a reference to the 'conservation of natural resources' in relation to the definition of territory; in one example, as a qualifier for the definition of investment; and finally, in the *Belgium Model BIT*, in the definition of 'environmental legislation' as mentioned in the body of the treaty. The reference to conservation of natural resources, both in the definition of territory and in that of investment covers those activities elsewhere defined as 'green investment'.[13]

Regarding environmental language within the body of the treaty, Asteriti focuses on ' "preservation of rights" clauses, through the medium of exceptions, balancing and carve-outs from the investment duties'.[14] In addition, Asteriti notes the presence of environmental provisions in conflict and procedural clauses. Such environmental provisions 'act as a counterbalance to the openness of the investment protections guaranteed by the treaty'.[15]

Despite the argument that 'protection of the environment is indisputably an issue that should be in the agenda of every country',[16] environmental measures may constitute an indirect expropriation that contradicts the central aim of the investment treaties, which is to protect foreign investors. Vargiu (2014) predicts:

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[11] 'While the Preamble does not impose binding obligations, its statement of goals may assist in interpreting the Treaty and in defining the scope of Party-to-Party consultation procedures pursuant to Article VIII' http://www.unctadxi.org/templates/DocSearch.aspx?id=779, accessed 9 September 2011, cited in Asteriti, above n 76, 13.
[12] Ibid 14.
[13] Ibid 14.
[14] Ibid 15.
[15] Asteriti, above n 76, 35.
[16] Vargiu, above n 1, Paolo, see note 2, 228.

> a number of cases in which investors will try and prove that a measure that affected their investment was not designed to protect the environment and therefore, being the measure tantamount to expropriation, they are due compensation from the host state, and states that will try to prove the existence of legitimate objectives of environmental protection.[17]

2.3 Referencing the Environment in the Preamble

The Netherlands–Morocco BIT of 1971 was the first to include a clause in its preamble referring to environmental law. Citing an OECD report, Sweify (2015) indicates '[t]here are around 66 IIAs and 2 model BITs that contain preamble clauses on environmental concerns'.[18] Although not strictly identified as the preamble, nevertheless preambular in nature, the BIT between the United States and Bolivia (1998) begins with a series of gerunds ('-ing' clauses) indicating the intentions of the two parties to the treaty. The penultimate clause repeats the trinity of concerns that one finds at the close of other BIT preambles to which the United States is a party: 'health, safety, and environmental measures'. However, here, environmental measures are further qualified as 'environmental measures of general application'.[19]

Compared with the enforceability of environmental clauses in a treaty's provisions or accompanying annexes, preambular language is largely dismissed as not being legally binding. However, this is not to say that environmental clauses in the preamble are legally inconsequential. In his discussion of *Preambles in Treaty Interpretation,*[20] Hulme notes how the decision of the WTO Appellate Body in the *US Shrimp-Turtle Dispute* (1990s) 'uses the preamble to justify an expansive reading of a subsequent treaty term, conferring on the preamble a positive legal power'.[21] Ruling on the question of whether member State policies restraining trade for environmental reasons were 'reasonable' in terms of the rights and obligations of members under the foundational WTO Agreement, the Appellate Body in the *US Shrimp-Turtle Dispute* (1990s) [22] concluded that the agreement's preambular language—'optimal use of the world's resources in accordance with the objective of sustainable development'—'reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement,

[17] Ibid 229.
18 OECD, *Harnessing Freedom of Investment for Green Growth* (20 March 2016) 37 <http://www.oecd.org/investment/internationalinvestmentagreements/46905672.pdf>. Cited in M. E. Sweify, 'Investment-Environment Disputes: Challenges and Proposals' (2015) 14 *DePaul Business & Commercial Law Journal* 172.
[19] Similar wording can be seen in the Latvia–Kyrgyz Republic BIT (2008).
[20] M.H. Hulme 'Preambles in Treaty Interpretation' *University of Pennsylvania Law Review* 164 (2016). 1281–343.
[21] Ibid 1307.
[22] *US Shrimp-Turtle Case (2017)* World Trade Organisation <https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds58sum_e.pdf>

in this case, the GATT 1994'.[23] Commenting on what he regards as 'the broad reach' of the WTO Appellate Body's decision, Hulme states that 'the decision effectively amplified the positive power it found within the preamble at issue'.[24]

2.4 Referencing the Environment in the Annex

In 1996, the Annex to Canada's BIT with Venezuela stipulates in II.A, Group of Three Treaty and Exceptions, item 10:

> (a) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
>
> (b) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:
> (i) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
> (ii) necessary to protect human, animal or plant life or health; or
> (iii) relating to the conservation of living or non-living exhaustible natural resources.

Similar language is found in Canada's BIT with Ecuador (1996) in Article XVII Application and General Exceptions. Citing Moloo and Jacinto (2011), Sweify labels this as an example of a 'non-precluded measures clause' (NPM clause), which is included '[to] protect certain types of state conduct from liability under the substantive standards of protection'.[25]

However, subsequent BITs between Canada and Croatia (1997) and Canada and Costa Rica (1998) added a condition to the last item, 2(c), ensuring that restrictions relating to conservation concerns are applied domestically:

> 2 (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

2.5 Referencing the Environment in the Articles

[23] United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia - AB-2001-4 - Report of the Appellate Body WT/DS58/AB/R 58
[24] Ibid 1307.
[25] Rahim Moloo and Justin Jacinto, 'Environmental and Health Regulation: Assessing Liability Under Investment Treaties' (2011) 29 *Berkeley Journal of International Law* 1, 8–9 cited in Sweify, above n 8, 173.

With the turn of the century, BITs began to give far greater attention to environmental concerns. This is well illustrated in the Belgium–Luxembourg–Madagascar BIT (2005) [in English translation], which begins by defining what constitutes environmental legislation:

> Article 1. Definitions
>
> 5. The term 'environmental legislation' shall mean the laws and regulations in force in the Contracting Parties, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:
>
> (a) The prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
>
> (b) The control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto;
>
> (c) The protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Contracting Party's territory.

Article 3, Protection of Investments, stipulates the safeguarding of investments, without prejudice, to 'protection of the environment', among other things:

> 1. All investments made by investors of one Contracting Party shall be accorded fair and equitable treatment in the territory of the other Contracting Party.
>
> 2. Without prejudice to any necessary measures relating to public order, moral standards, public health and protection of the environment, such investments shall be safeguarded and protected at all times and shall not be subjected to any undue or discriminatory measure that might, de jure or de facto, impede their management, maintenance, use, enjoyment or liquidation.

Noteworthy, however, is Article 5, which is devoted to environmental concerns. While perhaps laudable for the attention it gives to the environment, its language is more exhortatory than actionable, diplomatically recognising each party's right to address domestic environmental protection in a manner of their choosing:

> 1. Recognising the right of each Contracting Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental legislation, each Contracting Party shall strive to ensure that its legislation provides for high levels of environmental protection and shall strive to continue to improve this legislation.

2. The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic environmental legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive Volume 2555, I–45578 28 or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment.

3. The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognized and implemented by their domestic legislation.

4. The Parties recognize that cooperation between them provides enhanced opportunities to improve environmental protection standards. Upon request by either Contracting Party, the other Contracting Party shall accept to hold expert consultations on any matter falling under the purpose of this Article.

Sweify, citing Vadi (2011), criticises such hortatory but unenforceable language as 'poor drafting' that 'undermines the power of the host State to adopt and implement environmental and sustainable development policies'.[26] Sweify compares such language with 'sonorous speeches that people only listen to but they are not convinced nor obliged by'.[27]

The BIT between the US and Uruguay (2005) incorporates wording similar to the content of previous BITS, such as the preambular-like initial series of gerunds ('-ing' clauses) indicating the intentions of the two parties to the treaty. However, unlike the US–Bolivia BIT (1998), which referred to 'environmental measures of general application', the penultimate clause in this series of intentions refers to the parties 'Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labor rights'.[28]

Under Article 8: Performance Requirements, the US–Uruguay BIT further incorporates similar language as found in the previous BITS between Canada and Venezuela (1996), Canada and Ecuador (1996), Canada and Croatia (1997), Canada and Costa Rica (1998):

[26] Valentina S. Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage' (2011) 42 *Columbia Human Rights Law Review* 797, 816–17 cited in Sweify, above n 8, 173.
[27] Sweify, above n 8, 174.
[28] US-Bolivia BIT. Signed April 17, 1998; Entered into Force June 6, 2001. https://2001-2009.state.gov/documents/organization/43541.pdf

Article 8: Performance Requirements

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty; (ii) necessary to protect human, animal, or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources.

The new aspect of the wording of this particular BIT, compared with its predecessors, is Article 12, which links investment with environment, most noticeably mentioning measures to ensure investment activity 'is undertaken in a manner sensitive to environmental concerns':

Article 12: Investment and Environment

1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws.[13] Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

2. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Article 32 deals with the appointment of experts 'to report to it in writing on any factual issue concerning environmental, health, safety or other'.

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

The India–UAE BIT (2005), under Article 4, Protection of Investments, stipulates:

Once established, Investments shall not be subjected in the host Contracting Party to additional performance requirements which may hinder or restrict the management, maintenance, use, enjoyment or disposal of Investments unless such requirements are

deemed vital for reasons of public order, public health or environmental concerns and are enforced by law for general application.

The Canada–Czech BIT (2009) and Canada–Slovak Republic BIT (2009) use wording similar to that found in the US–Uruguay BIT (2005) relating to investment and environment (see Article II Promotion of Investment), and what constitutes indirect expropriation (Annex A).

ARTICLE II Promotion of Investment

4. The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Contracting Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Contracting Party considers that the other Contracting Party has offered such an encouragement, it may request consultations with the other Contracting Party and the two Contracting Parties shall consult with a view to avoiding any such encouragement.

Annex A

(c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

2.5.1 Case Study: Crystallex v Venezuela

While references to the environment in BITs indicate an increased sensitivity to environmental concerns, the decision of the Tribunal in *Crystallex v Venezuela* came down to reservations over the Venezuelan government's motivation in pursuing claims based on environmental concerns.

In 2002, Crystallex, a Canadian mining company contracted with a Venezuelan State corporation to mine gold within Venezuela's Imataca National Forest Reserve. After conducting an environmental impact evaluation, Crystallex was required by Venezuela's Ministry of Environment and Natural Resources to post a bond to guarantee implementation of the study's recommended measures. Though Crystallex posted the bond and paid the required environmental taxes, the Ministry nevertheless denied the environmental permit to Crystallex in a letter dated 14 April 2008, around the same time as then-President Hugo Chávez publicly stated Venezuela's intention to nationalise gold deposits in

the same region, prompting some to regard Venezuela's denial of the permits as 'a high-level political agenda to nationalize a gold mine without compensation'.[29]

The tribunal held that 'There is no question that Venezuela had the right (and the responsibility) to raise concerns relating to global warming, environmental issues in respect of the Imataca Reserve, biodiversity, and other related issues'. However, the tribunal was troubled that such concerns 'had not been raised a single time in the innumerable occasions of exchanges occurring between the Claimant and the Venezuelan authorities throughout the 4-year review process'.[30] The Tribunal in *Crystallex v Venezuela* finally concluded that Venezuela had breached the Treaty by failing to accord the claimant's investments in Venezuela FET, and by expropriating the claimant's investments in Venezuela without having offered or provided compensation. The Tribunal's decision against Venezuela's for its breach of the Treaty was clearly warranted given the absence of credible evidence for a genuine concern on the part of the Venezuela government for protecting the environment.

2.6 Free Trade Agreements

Not until NAFTA (1994) did the US begin to include environmental provisions in FTAs. NAFTA led the way by reproducing GATT's environmental exemptions, including a list of multilateral environmental agreements (MEAs) that superseded those of the agreement, and including an environmental side agreement to ensure enforcement of existing environmental laws. Subsequent FTAs have continued to evolve new mechanisms for achieving the desired outcome of a preserving a safe and secure environment and building a robust economy.

The OECD secretariat offers the following reasons for including environmental provisions in trade agreements:[31]

> Promoting sustainable development
>
> Many countries are committed to pursuing sustainable development and attaining high levels of environmental protection. For reasons of policy coherence, they aim to achieve these goals in all policies, including trade policies. Linking environmental (and other) issues to

[29]Martin Dietrich Brauch, *Venezuela Ordered to Pay US$1.202 Billion Plus Interest to Canadian Mining Company Crystallex for FET Breach and Expropriation* (10 August 2016) Investment Treaty News <https://www.iisd.org/itn/2016/08/10/crystallex-international-corporation-v-bolivarian-republic-of-venezuela-icsid-case-no-arb-af-11-2/>.

[30] *Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2,* Award, (2016) 156.

[31] OECD, 'Regional Trade Agreements and Environment' (Report No COM/ENV/TD 47, 12 March 2007). http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=com/env/td(2006)47/final

trade negotiations contributes to putting trade in a broader perspective and to better integrating it in sustainable development approaches.

Levelling the playing field and improving environmental cooperation

Another motivation to deal with environment in trade agreements converges around two key considerations that supplement each other: to ensure fair competition and to provide environmental cooperation.

Pursuing an international environmental agenda

Some countries consider that including environmental issues in trade agreements provides an opportunity to pursue environmental objectives in a more efficient and rapid way than, for example, through Multilateral Environmental Agreements (MEAs). The context of a trade negotiation and the perspectives of obtaining a trade deal often provide an opportunity to obtain concessions in other, related fields, that would otherwise be difficult to obtain.

In their study of 26 FTAs ranging between 1993 (NAFTA) and 2006 (US–Oman and US–Peru), Bourgeois et al. (2007) noted that the preambles of the following FTAs do not mention environmental objectives:[32]

- Australia–Singapore (2003)
- Australia–Thailand (2004)
- Singapore–New Zealand (2000)
- Singapore–Korea (2005)
- Japan–Singapore (2002)
- Japan–Mexico (2004)
- Japan–Malaysia (2005)
- Japan–Philippines (2006)

Included in the eight were FTAs involving Japan and Australia. In the case of Japan, the OECD report suggests environmental issues may have been excluded to avoid missing an 'ambitious target of signing a certain number of RTAs [regional trade agreements] within a given period of time'.[33]

However, others have noted that 'while the Japanese FTAs do not contain any statements relating to the environment in their preamble, these agreements do contain related provisions worth some

[32] J. Bourgeois, K. Dawar, S.J. Evenett. 'A Comparative Analysis of Selected Provisions in Free Trade Agreements' Report commissioned by DG Trade. 2007. 60.
[33] OECD, above n 21, 27.

consideration'.[34] Article 102 in the Japan–Philippines FTA, for example, 'states that the parties should not encourage investments by investors of the other party by relaxing its environmental measures'.[35]

The FTAs between Japan and Mexico, and Japan and Malaysia, while indicating nothing with respect to the enforcement of domestic environmental standards or commitment to MEAs, do suggest environmentally related activities such as 'information and know-how exchange, and capacity building related to the Clean Development Mechanism developed under the Kyoto Protocol to the UN Framework on Climate Change'.[36]

As for Australia, the OECD report notes that 'while sustainable development and environmental protection is high on its agenda, it takes the view that environmental co-operation should generally be dealt with independently of trade negotiations'.[37] Comparing the FTA between the US and Australia with its model, the US–Singapore FTA, Bourgeois et al. describe the Australia–US FTA as 'clearer on the sovereign role of the state'[38] insofar as it 'does not allow for either party to challenge the domestic environmental laws of the other. Indeed, the agreement is silent on the nature of environment law, except for an aspirational clause that encourages high levels of environmental protection with regard to continuous improvement'.[39]

2.6.1 The Four Phases

Discussing both labour and environmental issues in FTAs, Gresser (2010) identifies four distinct phases, the first phase beginning in 1985 with the US's first FTA, the US–Israel FTA,[40] which contains no environmental provisions.

NAFTA kicked off the second phase in 1994, followed by a third phase beginning with the US–Jordan FTA in 2000,[41] the first agreement to include labour and environmental chapters in its core text.[42] Article 5 of the US–Jordan agreement states that 'each Party shall strive to ensure that its laws provide for high levels of environmental protection and shall strive to continue to improve those laws'.[43]

[34] Bourgeois, above n 22, 62.
[35] Ibid 62.
[36] Ibid 62–3.
[37] OECD, above n 21, 27.
[38] Bourgeois, above n 22, 70.
[39] Ibid 70–1.
[40] *Agreement on the Establishment of a Free Trade Area*, United States–Israel, 24 ILM 653 (22 April 1985).
[41] *Agreement on the Establishment of a Free Trade Area*, United States–Jordan, 41 ILM 63 (24 October 2000).
[42] E. Gresser. 'Labor and Environment in Trade Since NAFTA: Activitists have achieved less, and more, than they realize' *Wake Forest Law Review*. Vol. 45.2010, 495.
[43] United States–Jordan, above n 28, art 5.

However '[t]here is no mention of activities that might be described as "striving"'.[44] According to the US Congressional Research Service, the US–Jordan FTA made 'potentially precedent-setting' environmental provisions subject to dispute settlement.[45] The US–Jordan agreement subsequently came to serve as a formula to be applied in connection with seven other FTAs between 2001 and 2007 (US with Chile, Singapore, Australia, Morocco, Bahrain, five Central American countries under CAFTA-DR, and Oman).

These FTAs, unlike the US–Jordan FTA, devote a separate chapter to the environment. Commenting on these chapters, Bourgeois et al. write:[46]

> These chapters contain textually similar provisions for recognising the right for each party to the agreement to set their own domestic laws and standards of environmental protection. The parties make a commitment that these are 'high' standards of protection, which are to be continually improved upon. Nevertheless, the reference to a 'high standard' is not made with any benchmark. The parties instead make a commitment not to fail to enforce its domestic environmental laws effectively and agree that all enforcement activities relating to the environment must be confined to a party's own country. These agreements all define environmental law to mean any domestic statute, regulation or provision primarily designed to protect the environment, or prevent a danger to human, animal, or plant life or health, through:
>
> - the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
> - the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or
> - the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas.

For example, Chapter 17 of the US–Oman FTA is completely devoted to the environment, covering levels of protection, application and enforcement of environmental laws, procedural matters, voluntary mechanisms to enhance environmental performance, institutional arrangements, opportunities for public participation, environmental cooperation, environmental consultations, relationship to environmental agreements, and definitions. The US Trade Commission report on the US–Oman FTA agreement concluded that 'the US–Oman FTA provides adequate safeguards that US environmental negotiating objectives will be met'.[47]

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[44] Bourgeois, above n 22, 63.
[45] Tiemann, M. *United States–Jordan Free Trade Agreement: Analysis of Environmental Provisions.* United States Congressional Research Service. RS20999. (2001). https://file.wikileaks.org/file/crs/RS20999.pdf
[46] Bourgeois, above n 22, 63–4.
[47] US International Trade Commission, 'United States–Oman Free Trade Agreement: Potential Economy-Wide and Selected Sectoral Effects' (Publication No 3837, Investigation No TA–2104–19A, February 2006) 5, 17.

The significance of devoting a whole chapter to environmental concerns was not lost on the tribunal determining *Adel A Hamadi Al Tamimi v Sultanate of Oman* (2015).[48] In this case, the claimant, Mr Al Tamimi, claimed that Oman breached the US–Oman FTA, arguing liability with respect to expropriation, denial of FET, and denial of national treatment. The Respondent, the Sultanate of Oman, argued that the claimant sought 'to transform a conventional breach-of-contract case against OMCO (whose acts are not attributable to Oman) into a treaty claim based on actions allegedly taken by Oman'.[49] The claims against Oman dealt primarily with Chapter 10 (Investment) of the US–Oman FTA. Nevertheless, the tribunal noted that 'the US–Oman FTA places a high premium on environmental protection'[50], citing the Respondent's submitted post-hearing answer:

> In entering into the FTA Oman emphasized the importance of environmental protection, providing in Chapter 17 (Environment) that each State Party should 'encourage high levels of environmental protection' within their respective territories. In so doing, the US and Oman are among the very few countries that have declared in a very concrete way their intention to balance the protections afforded to investors with the rights of States (here Oman and the US) to enact regulations protecting the environment.[51]

The tribunal noted that claims regarding indirect expropriation, for example, 'would also have to confront the express stipulation in Annex 10-B.4(b) of the US–Oman FTA that non-discriminatory regulatory actions by a State designed and applied to protect legitimate public welfare objectives, including protection of the environment—and the Tribunal infers, the enforcement of Omani private property laws—do not constitute indirect expropriations'.[52]

Further, the tribunal stated 'The wording of Article 10.10 provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is "undertaken in a manner sensitive to environmental concerns", provided it is not otherwise inconsistent with the express provisions of Chapter 10'.[53]

[48] Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33
[49] Ibid 41.
[50] Ibid 135.
[51] Ibid 135. nn 775.
[52] Ibid 128.
[53] Ibid 'Again, although these pre-2009 citations are not directly at issue under Art 10.5, it is worth bearing in mind the controlling injunction under Art 10.10 of the US–Oman FTA that "[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns" ', 152. nn 852.

While acknowledging that Chapter 17 (Environment) 'does not fall directly within the Tribunal's jurisdiction', it nevertheless 'provides further relevant context in which the provisions of Chapter 10 must be interpreted'.[54] Elaborating on this point, the tribunal added a footnote:[55]

> Both parties agreed that Chapter 17 provided relevant interpretive context for the Tribunal in considering and applying the provisions of Chapter 10: see Claimant's Post-Hearing Answers at 67, Respondent's Post-Hearing Answers at 54–55. Their view is consistent with Art 10.21, 'Governing Law', which states in relevant part that: 'the Tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'. Thus, while the Tribunal's jurisdiction is limited to determining an alleged breach of those obligations specified in Art 10.15, 'Submission of a Claim to Arbitration', and no other provisions of the Agreement, the Tribunal must, in interpreting and applying the provisions of Chapter 10, read them in the context and purpose of the Agreement as a whole (cf CLA-001, Art 31).

The Award further elaborates on how Chapter 17 impinged on the tribunal's decision-making:[56]

> Article 17.2.1, for instance, records the Parties' understanding that:
>
> > (a) Neither Party shall fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.
> >
> > (b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priority. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.
>
> 389. **The very existence of Chapter 17 exemplifies the importance attached by the US and Oman to the enforcement of their respective environmental laws.** It is clear that the State Parties intended to reserve a significant margin of discretion to themselves in the application and enforcement of their respective environmental laws—indeed, Article 17.2.1 compels each State to ensure the effective enforcement of environmental laws.[777] Article 17.2.1(b), moreover, acknowledges that environmental law enforcement is not inherently consistent in its application.[778] The Tribunal in SD Myers v Canada acknowledged that tribunals 'do not have an open-ended mandate to second-guess government decision-making',[779] and this must particularly be the case in light of the express terms of the present Treaty relating to environmental enforcement. **When it comes to determining any breach of the minimum standard of treatment under Article 10.5, the tribunal must be guided**

[54] Ibid 136.
[55] Ibid 136 nn 776.
[56] Ibid 136-7.

by the forceful defence of environmental regulation and protection provided in the express language of the Treaty.

390. In the Tribunal's view, therefore, to establish a breach of the minimum standard of treatment under Article 10.5, the Claimant must show that Oman has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in Oman's regulation of its internal affairs: a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations. It will certainly not be the case that every minor misapplication of a State's laws or regulations will meet that high standard. **That is particularly so, in a context such as the US–Oman FTA, where the impugned conduct concerns the good-faith application or enforcement of a State's laws or regulations relating to the protection of its environment.**

Besides Chapter 17, the tribunal further noted the US–Oman FTA's preamble:[57]

which includes as one of the Treaty's objectives the desire to 'strengthen the development and enforcement of environmental laws and policies, promote sustainable development, and implement this Agreement in a manner consistent with the objectives of environmental protection and conservation': a further clear indication by the State parties that the Treaty is to be interpreted to give effect to the objectives of environmental protection and conservation.

The tribunal in *Adel A Hamadi Al Tamimi v Sultanate of Oman* ordered the claimant to pay to the Respondent a 75 per cent share of their total costs. The tribunal's decision-making was clearly guided by the prominence given to environmental concerns, both in the preamble and by the inclusion of the chapter devoted to the environment.

Also included among several FTAs from this third phase (including US with Singapore, Oman, Jordan, Morocco, Bahrain and Australia) is the establishment of a supranational joint committee whose members were to be government officials but without specification that they should have environment-related expertise.[58] The remaining two FTAs, US–CAFTA-DR and US–Chile, formed an Environment Affairs Council, constituted by cabinet level or equivalent representatives of the parties, 'to discuss the implementation and progress of the environmental provisions included in the agreement'. [59] Conversely, the Canada–Chile FTA establishes a more elaborate supranational

[57] Ibid 136 nn 777
[58] Ibid 65.
[59] Ibid 66.

institution known as the Commission for Environmental Cooperation, which consists of a council, a secretariat, and a joint public advisory committee comprising members of the public and NGOs.[60]

The dispute settlement mechanism (DSM) in the US–Australia and US–Jordan FTAs only allows parties recourse to dispute settlement 'if the other party fails to enforce its domestic environmental laws effectively and in a manner affecting trade between the parties'.[61] Other FTAs from this phase (including those between the US and Singapore, Oman, Morocco, Chile and Bahrain) permit 'any "interested person" [to] request investigations into alleged violations of domestic environmental law'.[62]

Whereas the US–Australia and US–Jordan FTAs fail to provide compliance mechanisms, these other FTAs 'also commit the parties to ensuring that judicial, quasi-judicial, or administrative proceedings are available, alongside effective remedies or sanctions for violations of its environmental laws. These remedies may include compliance agreements, penalties, fines, imprisonment, injunctions, the closure of facilities and the cost of containing or cleaning up pollution'.[63] While the environmental chapter in the *Korea–China Free Trade Agreement (2015)* established commitments to environmental protection, including a committee to oversee the chapter's implementation, it did not address penalties for violation, nor subject obligations to dispute settlement.[64]

2.6.2 The Fourth Phase

The fourth phase identified by Gresser was initiated by the 'May 10th Agreement', concluded by representatives Charles Rangel (New York) and Sander Levin (Michigan).[65] The 'May 10th Agreement' is realised in the ratified *US–Peru Trade Promotion Agreement*.[66]

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[60] Ibid 66.
[61] Ibid 66–7.
[62] Ibid 67.
[63] Ibid 67.
[64] Jeffrey J. Schott, Euijin Jung and Cathleen Cimino-Isaacs, *An Assessment of the Korea–China Free Trade Agreement* (Peterson Institute for International Economics, December 2015) 14.
[65] Gresser, above n 32, 497. This refers readers to a letter from Charles B. Rangel, Chairman, House Comm. on Ways & Means, and Sander M. Levin, Chairman, Subcomm. on Trade, House Comm. on Ways & Means, to Susan C. Schwab, US Trade Representative (10 May 2007) <http://waysandmeans.house.gov/Media/pdf/110/05%2014%2007/05%2014%2007.pdf>.
[66] HR REP No 110–421, at 1 (2007) cited in Gresser, above n 32, 497. This new trade deal template with stronger provisions for labor and environmental protection was put forward by House Ways and Means Committee Chairman Charles Rangel (D-N.Y.) and Rep. Sandy Levin (D-Mich.) as a compromise solution to obtain support from members of the Democratic caucus for the trade deal with Peru which had been negotiated by the Bush administration (http://thehill.com/business-a-lobbying/3257-rangel-levin-walk-fine-line-on-peru-trade-deal).

According to Jinnah and Morgera (2013), compared with trade agreements from the previous 15 years, the US–Peru TPA offered 'far more prescriptive environmental provisions'.[67] In particular, they point to the linkages with a lengthy list of MEAs, including 'the Convention on International Trade in Endangered Species (CITES), the Montreal Protocol on the Ozone Layer, the Ramsar Convention on Wetlands of International Importance, the 1978 Protocol to the International Convention for the Prevention of Pollution from Ships, the International Convention for the Regulation of Whaling, the Convention on the Conservation of Antarctic Marine Living Resources and the Inter-American Tropical Tuna Commission Convention'.[68] The US–Peru TPA saw the restoration of the covered agreements clause that had been absent from trade agreements since NAFTA.[69] Moreover, not only was the covered agreements clause restored, it was also strengthened to protect and mandate their implementation.[70] On this markedly improved level of support for environmental concerns, Jinnah and Morgera state:

> This expansion of MEAs that are protected from challenge in the event of trade conflict represents a fairly significant movement in terms of the mainstreaming of environmental norms and values into trade policy and, accordingly, the importance given to such norms and values in the United States (and possibly Peru).[71]

Another significant development involves the linkage between the environment chapter of the US–Peru FTA and the FTA's dispute settlement chapter. While previous US TPAs may explicitly de-link environmental-related disputes from the same TPA's DSMs,[72] the US–Peru TPA environment chapter does not impose limits on the outcome of having pursued remedy under the TPA's formal dispute settlement system, subject to both parties having previously exhausted consultations.

While Jinnah and Morgera note that recourse to the TPA's sanction-based DSMs is unlikely to ever occur given the need to have previously exhausted consultations, what they describe as a more

[67] S. Jinnah, E. Morgera. 'Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda.' *Review of European Community & International Environmental Law* 22 (3) (2013), 329.
[68] Ibid 330.
[69] Ibid. Art 103 of the Canada–Peru Free Trade Agreement (2008) had also raised the issues of the relation to multilateral environmental agreements and corporate social responsibility, including environment.
[70] Ibid.
[71] Ibid.
[72] Jinnah and Morgera, above n 57 331 cite as examples 'the US–Morocco FTA excludes the Environment Chapter from the FTA's dispute settlement and enforcement procedures'. CAFTA and the US–Bahrain FTA only permits such access as related to a party's failure to enforce its environmental laws, curtail available remedy to US$15 million, and require that such monies be used in specific ways, such as to improve environmental law enforcement. [CAFTA, Articles 17.7, 20.17; US-Bahrain FTA, n. 57 above, Articles 16.8 and 19.1.2.]

confrontational approach 'is likely to encourage parties to take FTA environmental provisions more seriously'.[73]

Pointing to what they believe to be another significant outcome of this linkage between the chapters on environment and dispute settlement, Jinnah and Morgera note that the agreement links the dispute settlement and corresponding enforcement capability of the TPA, not just to the environment chapter but also to that lengthy list of MEAs to which the environment chapter is itself linked. This effectively transfers the TPA's strong sanction-based regulatory authority to the provisions of these MEAs.[74]

Comparing the wording of the two chapters on environment (see Figure 1 below), from the US–Oman FTA (Chapter 17) and the US–Peru TPA (Chapter 18), we observe the more forceful wording in the latter. For example, while the wording from the US–Oman FTA—'Accordingly each Party shall strive to ensure that it does not waive …'—seems to suggest the need to exert great effort *not* to do something, the wording of the US–Peru TPA comes across as not only simpler, but more direct and forceful—'Accordingly, a Party shall not waive …'. Simple action supersedes good intentions.

Figure 1: Comparison of wording in the US-Oman FTA and US Peru TPA

Article 17.2: Application and Enforcement of Environmental Laws	**Article 18.3: Enforcement of Environmental Laws**
2. Each Party recognizes that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.	2. The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment between the parties.

A further example is the use of the modal auxiliary 'may' in Article 17.6 of the US–Oman FTA. It qualifies the future activity of convening an advisory committee, implying only possibility, whereas the corresponding statement in the US–Peru TPA employs the more forceful modal auxiliary 'shall', suggesting more definitive intention (see Figure 2).

[73] Ibid 335.
[74] Ibid 331.

Figure 2: Comparison of usage of the auxiliary 'may' in the US-Oman FTA and US Peru TPA

Article 17.6: Opportunities for Public Participation	Article 18.7: Opportunities for Public Participation
2. Each Party **may** convene, or consult with an existing, national advisory committee comprising representatives of both its environmental and business organizations and other members of its public, to advise it on the implementation of this Chapter, as appropriate.	4. Each Party **shall** convene a new, or consult an existing, national consultative or advisory committee, comprising persons of the Party with relevant experience, including experience in business and environmental matters. Each Party shall solicit the committee's views on matters related to the implementation of this Chapter including, as appropriate, on issues raised in submissions the Party receives pursuant to this Article.

The third example is the addition of the phrase 'as it deems' before 'appropriate' in Article 17.6 of the US–Oman FTA, which allows each party to interpret by itself what is appropriate (see Figure 3). However, the US–Peru TPA omits this wording, allowing an interpretation which could mean either shared or independent views on appropriateness.

Figure 3: Comparison of the addition of the phrase 'as it deems' in the US-Oman FTA and US Peru TPA

Article 17.7: Environmental Cooperation	Article 18.10: Environmental Cooperation
4. Each Party **shall, as it deems appropriate**, share information with the other Party and the public regarding its experience in assessing and taking into account the positive and negative environmental effects of trade agreements and policies.	5. The Parties **shall, as appropriate**, share information on their experiences in assessing and taking into account environmental effects of trade agreements and policies.

2.7 Conclusion

IEL, in comparison with other areas of international law, has been described as 'toothless', attempting to secure compliance 'by leveraging reputational and normative force, and relying heavily on NGOs for monitoring and "naming and shaming"'.[75] However, as noted above, environmental provisions in treaties and agreements have been evolving in the direction of greater force by linking environmental provisions with MEAs and the agreement's full sanction-based regulatory authority.

While environmental provisions in trade agreements have been evolving in the direction of greater force, the positive impact on the environment has been limited by the fact that existing agreements have largely missed major trading partners. In the case of the US, for example, its existing agreements

[75] Ibid 324.

only apply to about one tenth of US trade.[76] Moreover, especially in economically challenged regions, achieving greater economic growth continues to be prioritised over environmental concerns. Until participation in the globalized economy becomes contingent on meeting environmental standards which are established and enforced on a global level, such as through WTO rules, it is unlikely that environmental concerns will ever trump the more immediately satisfying benefits brought by trade and investment.

[76] Gresser, above n 32, 515.

CHAPTER 3:

NAFTA: TREND-SETTER OR SPOILER FOR ENVIRONMENTAL PROTECTION

3.1 Introduction

As noted in the previous chapter, the first US FTA, the US–Israel FTA,[1] contained no environmental provisions. Marking the second of Gresser's four phases leading to the incorporation of environmental protection in trade agreements, NAFTA was one of the first regional trade agreements to directly address environmental concerns, not just in its preamble, but also in five of its 22 chapters.[2] The general exceptions in NAFTA specifically mention 'environmental measures necessary to protect human, animal or plant life or health', 'conservation of exhaustible natural resources' and barring imports made with prison labour.[3] The respective environmental standards of each country may not be relaxed to attract foreign investment and must be applied to all firms operating within their territories.[4] While a major step forward in the evolution of treaty language favouring greater environmental protection, its deficiencies, such as are discussed in this chapter, will hopefully be addressed in the coming renegotiation announced by the Parties to the agreement.

3.2 History

Cross-border environmental cooperation between the US and Mexico has a long history, dating back to the 1889 bilateral treaty that created the International Boundary Commission, subsequently designated by the *1944 Water Treaty* as the International Boundary and Water Commission.[5] The *La Paz Agreement for the Protection and Improvement of the Environment in the Border Area*[6] was signed by the US and Mexico in 1983.[7] While NAFTA negotiations were underway, the US EPA and its Mexican counterpart SEDUE 'developed an integrated environmental plan for the border region calling for the establishment of six working groups on water, air, solid waste, pollution prevention,

[1] *Agreement on the Establishment of a Free Trade Area*, United States–Israel, 24 ILM 653 (22 April 1985).
[2] David A. Gantz et al., 'Labor Rights and Environmental Protection Under NAFTA and Other U.S. Free Trade Agreements' (2011) 42(2) *The University of Miami Inter-American Law Review* 297–366; Gary Hufbauer et al., *NAFTA Revisited: Achievements and Challenges* (Peterson Institute for International Economics, 2005).
[3] Gantz et al., above n 1, 310.
[4] Ibid.
[5] *The 1944 Water Treaty* is available at <https://www.ibwc.gov/Files/1944Treaty.pdf>.
[6] The *La Paz Agreement* is available at <https://www.epa.gov/sites/production/files/2015-09/documents/lapazagreement.pdf>.
[7] Hufbauer, above n 1, 173.

contingency planning and emergency response, and cooperative enforcement and compliance'.[8] Updated and expanded in 1996 into the Border XXI Program, 'the United States and Mexico established work groups to implement specific objectives for border cleanup through infrastructure development and decentralized environmental management'.[9]

Negotiations on NAFTA began while George H. W. Bush was US President, but encountered opposition from environmental groups and some members of Congress over environmental issues, specifically concerns over Mexico's environmental policies.[10] Taking the Bush administration's efforts to address the US–Mexico environmental issues a step further, the next administration (under Bill Clinton) pursued the addition of a side agreement 'requiring each country to enforce its own environmental standards and establishing an "environmental protection commission with substantial powers and resources to prevent and clean up water pollution"'.[11]

The side agreement, known as the *North American Agreement on Environmental Cooperation* (NAAEC) made 'the world's greenest trade accord still greener'.[12] The side agreement enhanced already ground-breaking environmental provisions in NAFTA agreed to by the Bush administration, Canada and Mexico. Reluctant to reopen negotiations on an already concluded trade agreement, the parties favoured the more practical solution of instituting a parallel agreement to further strengthen the environmental provisions. The (SUNY) Levin Institute commented on the practical effect of the side agreement:

> It probably did not sway many votes in favor of NAFTA in U.S. Congress, which was approved by only 18 votes in the U.S. House of Representatives. U.S. Senators were more in favor of the agreement with, 61 votes in favor and 38 opposed. (In a controversial move, NAFTA was approved not as a treaty, which would have required a two-thirds majority of the Senate alone to become law, but as an "executive-congressional agreement," requiring only a majority of each chamber in favor.) The side agreement did, however, provide political cover to some Congressmen and Senators who wanted to vote for NAFTA but also wanted to assure their constituents that they supported environmental protection.[13]

[8] Ibid.
[9] Ibid.
[10] Ibid 153.
[11] Ibid 154.
[12] Ibid 154.
[13] *The Environment and NAFTA* (2016) <http://www.globalization101.org/the-environment-and-nafta/>.

3.3 NAFTA Environmental Provisions

After listing the objectives to be achieved through this agreement, NAFTA's preamble includes statements related to environment and labour concerns:

> UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;
>
> PRESERVE their flexibility to safeguard the public welfare;
>
> PROMOTE sustainable development;
>
> STRENGTHEN the development and enforcement of environmental laws and
>
> regulations; and
>
> PROTECT, enhance and enforce basic workers' rights;
>
> HAVE AGREED as follows: …

Article 104 (Chapter 1) deals with the potential for inconsistencies between NAFTA and three MEAs and prior regional agreements.[14] As Hufbauer points out, while it was agreed that NAFTA should take precedence over GATT provisions, in which there occurs inconsistencies with the obligations set forth in the MEAs:

> such [MEA] obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.[15]

Article 712 (Chapter 7B) allows for the possibility of sanitary and phytosanitary (SPS) measures that are 'more stringent than any international standard, guideline or recommendation'. However, explaining why NAFTA's SPS disciplines can be regarded as 'less restrictive than those of GATT',

[14] The three MEAs are (a) the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, signed at Washington, 3 March 1973, amended 22 June 1979; (b) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, signed at Montreal, 16 September 1987, amended 29 June 1990; and (c) the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, signed at Basel, 22 March 1989, on its entry into force for Canada, Mexico and the US; the regional agreements included (1) The *Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste*, signed at Ottawa, 28 October 1986. (2) The *Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area*, signed at La Paz, Baja California Sur, 14 August 1983.

[15] Hufbauer, above n 1, 155.

Hufbauer points to the clarifications made by US officials during the NAFTA ratification debate: 'First, "necessary" is not to be interpreted as "least trade restrictive". Second, the appropriate "scientific basis" for an SPS measure is a matter for the regulating authority to decide, not the dispute settlement panel'.[16]

Comparing NAFTA and GATT, Hufbauer notes that while under NAFTA, the party challenging a particular law or regulation carries the burden of proof, 'under GATT, a defending party must prove that its laws are consistent with the provisions of Article XX(b) or XX(g) regarding the conservation of exhaustible natural resources'.[17]

3.4 North American Agreement on Environmental Cooperation

NAAEC was a side agreement to NAFTA, which Hufbauer describes as 'more the product of the US legislative battle over NAFTA than the brainchild of collective environmental conscience among the governments of Canada, Mexico, and the United States'.[18] Nevertheless, the NAAEC expressed trilateral commitment to 'foster[ing] the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;' and 'support[ing] the environmental goals and objectives of the NAFTA'.[19]

Part Two of the NAAEC obligates the parties, among other things, to report on the state of their respective environments, assess environmental impacts and support the advancement of 'scientific research and technology development in respect of environmental matters'.[20] Article 3, while recognising 'the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations,' nevertheless commits each party to 'ensur[ing] that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations'. This commitment, however, as Gantz argues, 'is not realistically enforceable, because NAAEC sets no substantive environmental standards … Thus, nothing prevents a Party from weakening its environmental laws, and then enforcing them at the weakened level'.[21]

[16] Ibid 156.
[17] Ibid 156.
[18] Ibid 157.
[19] NAAEC, art 1, <https://ustr.gov/sites/default/files/naaec.pdf>.
[20] Ibid art 2.
[21] Gantz et al., above n 1, 311.

Part Three established the Commission for Environmental Conservation (CEC), whose structure included a council comprising cabinet-level representatives, a secretariat to exclusively serve and report to the council, and a joint public advisory committee. Part Four deals with 'Cooperation and Provision of Information', including, besides accountability to the council and secretariat to provide requested information, responsibility for notifying another party of 'any credible information regarding possible violations of its environmental law, specific and sufficient to allow the other Party to inquire into the matter. The notified Party shall take appropriate steps in accordance with its law to so inquire and to respond to the other Party'.

Part Five addresses issues related to dispute resolution, including instructions for initiating an arbitral panel to deal with a 'persistent pattern of failure' by a party to enforce its environmental law. Hufbauer explains:

> This panel can require implementation of an action plan to remedy nonenforcement of the offending nation's environmental law. Failure to comply with the plan can lead to suspension of NAFTA benefits—except when Canada is the defending party. So far there have been no complaints of 'persistent failure to enforce,' and hence this mechanism remains untested.[22]

No complaint has ever been brought to dispute resolution under Part Five, which prompts Knox to conclude that 'The sanctions offered by Part Five do appear to be illusory'.[23]

Citing the findings of the Ten-Year Review Committee,[24] Wold[25] comments:

> because these provisions have never been invoked in the NAAEC or in an FTA, it is questionable whether a government sanctions process to address environmental matters would encourage cooperation on environmental matters. Indeed, fearing that a sanctions process would be counterproductive, a high-level expert group formally recommended in 2004 that 'the [NAAEC] Parties publicly commit to refrain from invoking [the dispute settlement provisions] for a period of 10 years.' Nevertheless, the United States claims that the 'mere existence of this enforcement tool helps to ensure full implementation of FTA environmental obligations even if no disputes have been brought to date'.

'A primary purpose of the NAAEC' according to Knox, 'was to strengthen protections against pollution havens'.[26] There were concerns that US and Canadian companies would move their

[22] Hufbauer, above n 1, 158.
[23] John Knox, 'The Neglected Lessons of the NAFTA Environmental Regime' (2010) 45 *Wake Forest Law Review* 397.
[24] Ten Year Review and Assessment Committee, *Ten Years of the North American Agreement on Environmental Cooperation* 15 June 2004 <http://www3.cec.org/islandora/en/item/11382-ten-years-north-american-environmental-cooperation-report-ten-year-review-and-assessment-en.pdf>.
[25] Chris Wold, 'Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements' (2008) 28 *Saint Louis University Public Law Review* 201.
[26] Knox, above n 22, 395.

operations to Mexican 'pollution havens', where lower environmental standards existed. Environmentalists also feared that the US and Canadian governments would in turn lower their own standards to discourage companies from moving,[27] otherwise referred to as either 'the threat of a regulatory "race to the bottom" ',[28] or more generally falling under the heading of 'competitive effects'.[29]

NAFTA's Article 1114, or what Knox refers to as NAFTA's 'Pollution Haven Package',[30] addressed these concerns:

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

However, since Mexico's pollution havens resulted less from weak environmental standards than lack of enforcement,[31] the NAAEC 'recast the hortatory language of Article 1114 in legally binding terms',[32] which required the parties to 'effectively enforce its environmental laws'[33] and to 'ensure that its laws and regulations provide for high levels of environmental protection and [to] strive to continue to improve those laws and regulations'.[34] To encourage compliance, the NAAEC introduced a citizen submission procedure and the dispute resolution procedure in Part Five.

The 'Pollution Haven Package' proved largely irrelevant, however, since, as Knox concludes, 'the fear of pollution havens is largely baseless'.[35] The feared 'race to the bottom' has simply not eventuated. Wold cites a US Congressional Office study,[36] which concluded 'there is little evidence that large-scale shifts in industrial investment and relocation to pollution havens have occurred'.[37]

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[27] Ibid 395.
[28] Ibid 394.
[29] Wold, above n 24, 209.
[30] Knox, above n 22, 395.
[31] Ibid 395.
[32] Ibid 395.
[33] NAAEC, above n 18, art 5, para 1.
[34] Ibid art 3; Knox, above n 22, 396.
[35] Knox, above n 22, 398.
[36] *US Congressional Office for Technology Assessment, Trade and Environment: Conflicts and Opportunities* (OTA-BP-ITE-94, 40, 1992) (studying data concerning the manufacturing sector), cited in Wold, above n 24, 223.
[37] Wold, above n 24, 223.

NAFTA's primary focus, as far as addressing environmental concerns, is misplaced, according to Knox:[38]

> This is undoubtedly good news for those concerned about the implications of trade agreements for environmental protection. It means that the NAFTA countries can raise their environmental standards without worrying about driving away private companies. But it is bad news for the utility of the NAFTA environmental regime. To the extent that its elements are designed to prevent companies from fleeing their home countries in search of pollution havens, it addresses a nonexistent problem.

Besides concerns over a regulatory 'race to the bottom', environmentalists anticipated that legal conflicts with domestic and international environmental rules might lead to an outcome similar to the *1991 US Tuna-Dolphin I Panel*'s decision,[39] which, relying on GATT provisions, 'called into question the compatibility of trade agreements with other domestic environmental laws and even multilateral environmental agreements that used trade restrictions to further environmental ends'.[40] Concerns that NAFTA might repeat some of GATT's environmentally unfavourable provisions, which were also being re-adopted during the then-in-progress Uruguay Round of global trade negotiations, motivated environmentalists to campaign for inclusion of a 'Legal Conflicts Package' in NAFTA.

The outcome, however, proved unsuccessful from the perspective of those hoping to protect MEAs and domestic laws. Knox notes:[41]

> In sum, the Legal Conflicts Package of the NAFTA environmental regime has only two elements: Article 104 of NAFTA, which provides minimal protection to specified international agreements, and Article 10(6) of the NAAEC, which requests the NAFTA parties' environmental officials to try to convince their counterparts in the trade ministries to open dispute resolution to environmental concerns. The failure to include clear substantive guidance addressing such conflicts represents a lost opportunity. The failure of the procedural mechanisms designed to produce such guidance indicates that, if not resolved by the text of an agreement itself, such issues will continue to be left to trade tribunals.

A third concern of environmentalists was that increased trade might harm the environment, similar to what happened with the Mexican maquiladora program, 'whose limited experiment with free trade had caused economic growth in northern Mexico that had outstripped capacity for water and wastewater treatment and solid-waste disposal'.[42] 'The danger', in Knox's words, 'may be more of a

[38] Knox, above n 22, 398.
[39] Report of the Panel, *United States – Restrictions on Imports of Tuna* (DS21/R - 39S/155) is available at <https://www.pravo.unizg.hr/images/50005731/US%20-%20tuna-dolphin%20I.pdf>.
[40] Knox, above n 22, 398.
[41] Ibid 403.
[42] Ibid 404.

"race to the trees" than a race to the bottom'.[43] In the immediate aftermath of a trade agreement coming into force, unless safeguards are in place, an unchecked increase in trade 'may outstrip the available physical infrastructure and/or the ability of governments to monitor and regulate or prevent adverse environmental effects'. [44] NAFTA's two-pronged solution included financing 'environmental infrastructure projects' under the auspices of the Border Environment Cooperation Commission (BECC)/NADBank Agreement between the US and Mexico and instructing the CEC Council to assess the environmental impact of NAFTA.

3.5 Commission for Environmental Cooperation

As noted above, NAFTA established CEC, which included a council comprising cabinet-level representatives and a secretariat to exclusively serve and report to the council. Both the council and secretariat play vital roles in managing environment-related complaints.

NAAEC Articles 14 and 15 indicate the process in which a person or an NGO can submit a complaint to NAFTA against a party for 'failing to effectively enforce its environmental laws'.[45] Complaints that satisfy the formal filing requirements set out in Article 14(1) will be reviewed by the secretariat '[to] determine whether the submission merits requesting a response from the Party'.[46] In making its decision, the secretariat considers whether:

> (a) the submission alleges harm to the person or organization making the submission;
>
> (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
>
> (c) private remedies available under the Party's law have been pursued; and
>
> (d) the submission is drawn exclusively from mass media reports.[47]

Depending on the party's response, the secretariat must make a recommendation to the council whether the complaint merits preparation of a factual record. If approved by a two-thirds vote of the

[43] Ibid 405.
[44] Mary E. Kelly and Cyrus Reed, 'The CEC's Trade and Environment Program: Cutting-Edge Analysis but Untapped Potential' in *Greening NAFTA* 101, 109 cited in Knox, above n 22, 404–5.
[45] Commission for Environmental Cooperation (CEC), *North American Agreement on Environmental Cooperation* (2016), NAAEC art 14(1) <http://www.cec.org/content/north-american-agreement-environmental-cooperation>.
[46] Ibid art 14(2).
[47] Ibid art 14(2).

council, the secretariat then prepares a factual record. Once completed, the factual record will only be made public if approved by a two-thirds vote of the council.

While praised in some quarters for its 'extensive activities … to support scientific research and promote public education about environmental issues', [48] its handling of the Submissions on Enforcement Matters (SEM) process has drawn sharp criticism.[49] While the secretariat is authorised to prepare a 'factual record' when warranted,[50] nevertheless, the majority of complaints have been 'closed without the development of a factual record, usually on the grounds that the issues are already being dealt with by the national authorities or that the procedural requirements of the NAAEC have not been met'.[51] Hester reports that of six active matters in the SEM process in 2014, four were dismissed, leaving only two to undergo development of a factual record, though restricted in scope by the Council.[52] Even when a factual record has been developed 'it is difficult to determine the extent to which such records have altered the behavior of the Parties'.[53] One success story was 'a citizen submission alleging the failure to enforce Mexico's environmental impact assessment law in the construction of a pier in Cozumel [which] had several environmental benefits, including the reform of Mexico's environmental law'.[54]

Noting '[t]he rigorous and professional manner in which the Secretariat has reviewed submissions',[55] Wold criticizes the council for 'whittl[ing] away at the independence of the Secretariat by determining the scope of proposed factual records, a role designated to the Secretariat' [56] and in the process 'erod[ing] public confidence in the process'.[57] Wold cites the former director of the CEC's unit on Submissions on Enforcement Matters: 'the submissions process—frequently referred to as the "teeth" of the NAAEC—suffers from "tooth decay" '.[58]

Though the secretariat determined that the complaint alleging failure on the part of the US to enforce the *Migratory Bird Treaty Act* (MBTA) warranted a factual record, '[t]he Council, in an arbitrary and

[48] *The Environment and NAFTA*, above n 12.
[49] T.D. Hester, 'Designed for Distrust: Revitalizing NAFTA's Environmental Submissions Process' *Georgetown International Environmental Law Review* 28 Geo. Envtl. L. Rev. 29 (2015) 32
[50] CEC, above n 44, 14(5).
[51] Gantz et al., above n 1, 12.
[52] Hester, above n 48, 32-33.
[53] Gantz et al., above n 1, 13.
[54] Gustavo Alanís Ortega, 'Public Participation within NAFTA's Environmental Agreement: The Mexican Experienced' in John J. Kirton and Virginia W. MacLaren (eds), *Linking Trade, Environment, And Social Cohesion: NAFTA Experiences, Global Challenges* 183, 184–185 cited in Wold, above n 24, 226.
[55] Wold, above n 24, 228.
[56] Ibid 228.
[57] Ibid 228.
[58] Geoff Garver, *Tooth Decay* (25 ENVTL F. 34, 2008) cited in Wold, above n 24, 228.

unexplained fashion, decided that the Secretariat could only investigate the failure to enforce the MBTA with respect to two minor examples (but not examples provided in which thousands of birds were likely taken) … effectively neuter[ing] the submission'.[59] Gantz cites further examples[60] to show that '[t]he restrictive approach of the CEC, in which it regularly undermines the citizen submission process, has continued into the Obama Administration'.[61]

That the CEC has 'been circumscribed by its limited mandate, poor enforceability, its inability or unwillingness to address the scale effects of increased cross-border trade and investment in polluting energy and mining projects, and a meager budget of $9 million' has prompted some to conclude that the CEC is 'too institutionally weak and poorly funded to play a meaningful difference in post-NAFTA economic and environmental governance'.[62]

According to Article 43 of the NAAEC, responsibility for funding the CEC is to be equally shared by the three NAFTA members. This, of course, means that '[a]ny NAFTA member thus has the ability to curtail the operation of the CEC by reducing or withholding financial support'.[63] Although, until now, no member has ever withheld support, inadequate funding has left the CEC 'financially starved and politically beleaguered'.[64]

3.6 BECC and NADBank

In 1993, NAFTA established what Gantz refers to as 'a pair of little known and under-appreciated institutions, the North American Development Bank [NADBank] and the Border Environment Cooperation Commission [BECC]',[65] whose mandate was 'to develop, certify, and finance environmental infrastructure projects along the US–Mexico border area'.[66,67] Previously, the more

[59] Wold, above n 24, 228.
[60] Gantz reports on the outcome of a complaint made and then withdrawn by the environmental coalition, Ecojustice against Canada: 'The complaint, filed in 2006, alleged that Canada had failed to protect some 197 species at risk under Canadian law. In January 2011, the CEC decided to investigate this complaint, but limited the investigation to only 11 species and otherwise narrowed the issues. An Ecojustice representative protested that the CEC action "tells you that the citizen submissions process, touted by NAFTA promoters as the way to ensure the environment isn't trampled by free trade, is a sham." In short, the citizen complaint process is still being treated "as an adversarial, rather than a cooperative, process" ' (Ecojustice, 'Species-At-Risk Defenders Walk Away From NAFTA Review Process' Media release, 17 Jan 2011 <http://www.ecojustice.ca/media-centre/press-releases/ species-at-risk-defenders-walk-away-from-nafta-review-process>) cited in Gantz, above n 1, 314–5.
[61] Gantz, above n 1, 314.
[62] Quentin Karpilow et al., *NAFTA: 20 Years for Costs to Communities and the Environment* (Sierra Club, 2014) 10.
[63] Hufbauer, above n 1, 159.
[64] Gantz et al., above n 1, 306.
[65] Ibid 316.
[66] The area between 100 kilometres to the north and south of the US–-Mexico boundary; Hufbauer, above n 1, 157.
[67] Hufbauer, above n 1, 173.

'people-friendly' BECC 'act[ed] as a liaison with state and local entities to develop and certify worthy projects' for which the NADBank provided 'seed' funding.[68]

Already in late 2001, the US Treasury Department proposed merging the BECC and NADBank into a single institution. However, only since 2015 have these two institutions begun working towards the goal of becoming fully integrated into one entity, including:

> aligning information and accounting systems, harmonizing policies and taking preliminary steps to begin integrating staff in various departments, which will ensure a seamless transition and allow the merged institution to remain focused on its mission of preserving, protecting and enhancing the environment of the border region and advancing the well-being of its communities.[69]

In 2015, more than US$257 million was approved to finance certification of 14 new projects, half of which were related to water and wastewater improvement. It included an industrial emission control system, and a co-generation facility to generate electricity using the biogas from a wastewater treatment plant, both in Mexico. Also included was a cross-border renewable energy project to export electricity from a plant in Mexico for consumption in the US, and a border-wide financing program for the purchase or lease of low-emission buses in Mexico.[70] The integration of BECC and NADBank into a single entity appears to have been a positive development toward achieving their original aim.

3.7 Improving NAFTA on Environment Protection

Citing Mexican government statistics, Gallagher reports that 'the economic costs of environmental degradation have continued to average 10 percent of GDP since NAFTA'.[71] In fact, 'During the first five years of NAFTA, soil erosion, municipal solid waste, and urban air and water pollution all worsened'.[72] Similarly, Parsons reports that 'environmental damage has grown and continues to grow

[68] Gantz et al., above n 1, 316–7.
[69] BECC-NADB, *Year in Review* (22 June 2016) <http://www.becc.org/capacity-building/publications-reports/2015-year-in-review#.WhKVF0qWbIU>.
[70] Ibid.
[71] *Sistema de cuentas económicas y ecológicas Indicadores de síntesis: PIN ecológico. Gobierno de Mexico: INEGI* cited in K. P. Gallagher, 'The Future of North American Trade Policy, NAFTA and the Environment: Lessons from Mexico and Beyond' **in** Pardee Center Task Force Report (Boston University, November 2009) <http://www.ase.tufts.edu/gdae/Pubs/rp/PardeeNAFTACh6GallagherEnvtNov09.pdf>.
[72] Kevin Gallagher, *Free Trade and the Environment: Mexico, NAFTA, and Beyond* (17 September 2004) Americas Program, Interhemispheric Resource Center <http://ase.tufts.edu/gdae/Pubs/rp/NAFTAEnviroKGAmerProgSep04.pdf>.

along the U.S./Mexican border at the expense of both the economic benefits of liberalized trade and the health of populations on both sides of the frontera'.[73]

In their report, 'NAFTA: 20 Years of Costs to Communities and the Environment', the contributing authors from several social and environmental concern groups[74] list the ways in which 'NAFTA has reduced the ability of governments to respond to environmental issues and it has empowered multinational corporations to challenge important environmental policies'.[75] According to their report, NAFTA:

- Facilitated the expansion of large-scale, export oriented farming that relies heavily on fossil fuels, pesticides, and genetically modified organisms;
- Encouraged a boom in environmentally destructive mining activities in Mexico;
- Undermined Canada's ability to regulate its tar sands industry and locked the country into shipping large quantities of fossil fuels to the United States;
- Catalyzed economic growth in North American industries and manufacturing sectors while simultaneously failing to safeguard against the increase in air and water pollution associated with this growth; and
- Weakened domestic environmental safeguards by providing corporations with new legal avenues to challenge environmental policymaking.

While Gallagher pins the blame for Mexico's poor environment record on 'the Mexican government's lack of commitment to environmental protection in the post-NAFTA period', as evidenced by declines in real spending and inspection levels, he suggests that there are a number of policy changes for repairing NAFTA 'so that it can enhance environmental sustainability throughout North America'.[76]

Gallagher proposes the following as 'overarching principles and goals' for repairing NAFTA:[77]

- Polluter pays principle where those responsible for pollution pay for the external environmental costs of production.
- Precautionary principle that states that policies should account for uncertainty by taking steps to avoid outcomes that could potentially cause irreversible damage in the future.
- Access and benefit sharing where the action of sharing a portion of profits derived from the use of biological and/or genetic resources with its original providers and allowing those original providers the access to the resources in question.

[73] Cameron S. Parsons, 'NAFTA and the Environment in Mexico' in *Modern Latin America* (8th ed Companion Website) <https://library.brown.edu/create/modernlatinamerica/chapters/chapter-12-strategies-for-economic-developmen/nafta-free-trade-and-the-environment-in-mexico/)>.
[74] Quentin Karpilow, Ilana Solomon, Alejandro Villamar Calderón, Manuel PérezRocha, Stuart Trew. 'NAFTA: 20 Years of Costs ot Communities and the Environment' Sierra Club. (2014. https://content.sierraclub.org/creative-archive/sites/content.sierraclub.org.creative-archive/files/pdfs/0642-NAFTA%20Report_05_low.pdf
[75] Quentin Karpilow et al., above n 62.
[76] Gallagher, above n 71, 63.
[77] Ibid.

- Right to know where producers and governments share environmental information with their populations.

With the pending renegotiation of NAFTA, the Parties will hopefully take the opportunity to implement the improvements suggested above in order to strengthen the provisions for environmental protection. Such would be in keeping with the Canadian Foreign Minister's promise of a more progressive agreement with 'enhanced environmental provisions'.[78] However, given the Trump administration's commitment to prioritizing economic prosperity over other concerns, the prospects for 'strengthening the provisions for environmental protection' are doubtful.

3.8 NAFTA's Chapter 11 as spoiler

NAFTA's Chapter 11 on investment has been described as 'notorious' for the ways in which it is 'constraining and undermining environmental policy making in North America'.[79] Among Chapter 11's 'most harmful components' are 'vaguely worded provisions that guarantee investors "a minimum standard of treatment," "fair and equitable treatment," and the right to claim damages simply when the value of an investment has been reduced'.[80]

NAFTA's investor–State dispute resolution process was 'the first one in any multilateral trade or investment agreement to give foreign private investors the capacity to directly challenge host governments on their compliance with the Agreement'.[81] The motivation for implementing 'a virtually unfettered right of foreign investors to initiate direct actions against their host governments'[82] arose out of 'a very bifurcated North-South view of the relationship between a state and a foreign investor'.[83] The US government praised NAFTA's investor–State process as 'an historic investor–State mechanism, so that individual US companies no longer face an unbalanced environment in an investment dispute with the Mexican government but can seek arbitration outside Mexico by an independent body'.[84] What was intended as a defensive mechanism to protect foreign companies

[78] Address by Foreign Affairs Minister on the modernization of the North American Free Trade Agreement (NAFTA), August 14,2017, https://www.canada.ca/en/global-affairs/news/2017/08/address_by_foreignaffairsministeronthemodernizationofthenorthame.html
[79] Quentin Karpilow et al., above n 62, 7.
[80] Ibid.
[81] H. Mann and K. von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor–State Process on the Environment* (International Institute for Sustainable Development,1999) 4.
[82] Ibid 5.
[83] Ibid 12.
[84] Federal Government of the Unites States, 'How the NAFTA Serves the Interest of United States Commerce' (statement) cited in Mann and von Moltke, above n 81, 12, nn 17.

'against arbitrary and unreasonable government actions' subsequently turned into 'a potent offensive strategic tool'[85] for foreign investors to oppose environmental regulations that they consider harmful to their investments.

NAFTA's investor–State process instituted 'a non-transparent, secretive and non-appealable system of arbitration' allowing foreign investors to avoid 'the procedural or public interest safeguards found in the judicial processes of developed, and many developing countries'.[86] As Mann and Moltke (1999) explain:[87]

> In fact, Article 1121(1) requires an investor to renounce its rights of local action in order to access the international arbitration process. The basic theory behind the development of this approach is that domestic courts, especially in developing countries, are likely to be non-transparent and biased against a foreign investor when evaluating governmental acts impacting that investor. As international investment law was developed in the context of developed country to developing country flows, investor security demands generally included an alternative legal process. The problem is that in addressing this aspect of investor's concerns, little attention was paid to how this would impact on transparent and unbiased judicial process in developed countries such as Canada and the United States.

With neither an appeal process nor having the assurance of neutral judges, NAFTA's investor–State process removed 'the safeguards that exist in domestic courts to ensure a proper balance between private rights and the public interest'.[88] Also detrimental to the protection of the public interest was the absence in the original NAFTA investor–State process of 'any provision addressing confidentiality or transparency in the arbitral process'.[89] This resulted in a level of secrecy and lack of transparency that the Toronto newspaper *The Globe and Mail* referred to as the 'NAFTA Cone of Silence'.[90] Without access to information about an ongoing dispute between a government and foreign investors related to environmental protection, the public is excluded from having a voice in the matter. The lack of transparency precludes the level of accountability one expects to find in a normal court system in which the pleadings of parties to the litigation are publicly available.[91]

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[85] Mann and von Moltke, above n 81, 5.
[86] Ibid 6.
[87] Ibid 13-4.
[88] Ibid 14. Moreover, as Mann and von Moltke point out, 'In the investor–state process, each side chooses one arbitrator, and the third member of the panel is then negotiated or chosen by a neutral person from a standing list of arbitrators with international trade and investment law experience. Thus, at a minimum, the investor initiating the challenge chooses one of the judges, doing so on the basis of known views or orientations that would tend to support its position'. However, they are quick to add 'This does not deny the professional qualities of the arbitrators to the assess the applicability of the law to the facts, but rather goes to their view of what the applicable law might be', nn 28.
[89] G. B. Born and E. G. Shenkman, 'Confidentiality and Transparency in International Arbitration' in C. A. Rogers and R. P. Alford (eds), *The Future of Investment Arbitration* (Oxford University Press, 2009) 31.
[90] Editorial, 'NAFTA Cone of Silence', *The Global and Mail*, (Toronto), 26, Canada, editorial, "NAFTA Cone of Silence," August 26, 1998 cited by Mann and von Moltke, above n 81, 17, see also nn 45.
[91] Mann and von Moltke, above n 81, 18.

Concerns about the lack of transparency and accountability prompted the NAFTA parties to issue a joint interpretation in July 2001:[92]

> Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.

Notably, the NAFTA parties agreed:

> to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
>
> i. confidential business information;
> ii. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
> iii. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.[93]

Moreover, to 'enhance the transparency and efficiency of the investment chapter's investor–state dispute settlement process' the NAFTA parties 'recommended procedures regarding submissions from non-disputing parties'.[94] Their *Statement of the Free Trade Commission on Non-Disputing Party Participation* opens with the assertion that 'No provision of the North American Free Trade Agreement ("NAFTA") limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party (a "non-disputing party")'.[95] The Office of the US Trade Representative issued a statement on 7 October 2003 affirming 'that it will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information, including business confidential information'.[96] In 2006, the ICSID also amended its rules to provide for 'publication of awards, amicus participation in arbitrations, and open hearings'.[97]

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[92] *NAFTA Free Trade Commission, NAFTA Notes of Interpretation of Certain Chapter 11 Provisions (31* July 2001) Foreign Trade Information Systems <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp>.
[93] Ibid.
[94] NAFTA Free Trade Commission, *Celebrating NAFTA at Ten* (7 October 2003) Foreign Trade Information Systems <http://www.sice.oas.org/TPD/NAFTA/Commission/Statement2003_e.asp>.
[95] NAFTA Free Trade Commission, *Statement of the Free Trade Commission on Non-Disputing Party Participation* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf>.
[96] Office of the United States Trade Representative. 'NAFTA Commission Announces New Transparency Measures' October 2003. https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2003/october/nafta-commission-announces-new-transparen
[97] M. Kinnear, 'NAFTA at Fifteen—A View from ICSID' in E. Gallard and F. Bachand (eds.) *Fifteen Years of NAFTA Chapter 11 Arbitrations* (JurisNet, LLC and International Arbitration Institute, 2011) 21–34; Referenced Rules of Procedure for Arbitration Proceedings (as amended 10 Apr 2006) [ICSID Convention Rules].

While open hearings may be the expressed intent of the NAFTA parties, other parties to the dispute may disagree. In *Detroit International Bridge Company (DIBC) v The Government of Canada,*[98]in response to an inquiry from the US Department of State into the possibility for representatives to attend the Hearing on Jurisdiction as a non-disputing NAFTA party, the Arbitral Tribunal rejected the request from the US Department of State. The tribunal noted that while NAFTA Article 1128 refers to submissions from a non-disputing party, 'such provision does not mention anything about the physical participation of a non-disputing Party at hearings'.[99] Summarising the request from the US Department of State for reconsideration of their request, the tribunal noted:

> In summary, they alleged that that such decision is (i) inconsistent with the NAFTA; (ii) contrary to the unanimous practice of other NAFTA tribunals; and (iii) prejudicial to the treaty rights of the non-disputing Parties. According to them, depriving non-disputing Parties of the ability to attend oral hearings is to deprive them of an important aspect of their right to make submissions under NAFTA Article 1128.[100]

The reason for the US Department of State's request and the claimant's objection is clear from the tribunal's discussion, which notes that 'Claimant is engaged in litigation against the United States of America in Washington and this litigation is part of the discussion regarding the jurisdiction of the tribunal'.[101] The tribunal concluded that the non-disputing NAFTA parties could request transcripts of the hearings, provided they have a compelling reason to do so.[102]

Mann and von Moltke note how the use of the word 'measure' in the opening sentence of NAFTA Article 1101(1) became an issue in the Ethyl Corp's[103] complaint against Canada's ban on the import and inter-provincial sale of MMT, a gasoline octane enhancer.[104] The tribunal determined that a trade measure could indeed become the subject of a Chapter 11 dispute, 'even if at the same time it could be dealt with in a state-to-state claim under Chapter 2 and 20 of NAFTA'.[105] Thus, this decision opened the door to the possibility of 'a duplication of remedies, one the investor's and one the state's'.[106] The tribunal also accepted Ethyl's argument that 'a practice that did not amount to a legal stricture, could qualify as a measure',[107] but declined to render a decision on whether government

[98] *Detroit International Bridge Company (DIBA) v. Government of Canada,* UNCITRAL, PCA Case No. 2012-25
[99] *DIBA v Canada* (2014) Arbitral Tribunal Procedural Order No. 6, 2.
[100] Ibid 3.
[101] Ibid 4.
[102] Ibid 5.
[103] *Ethyl Corporation v Canada*, Decision on Jurisdiction, (1998) 7 ICSID Rep 12, (1999) 38 ILM 708, IIC 95 (1998), 24th June 1998, Ad Hoc Tribunal (UNCITRAL)
[104] Mann and von Moltke, above n 81, 21.
[105] Award on Jurisdiction in the NAFTA/UNCITRAL Case between Ethyl Corporation and the Government of Canada, (1998) [62] cited by Mann and von Moltke, above n 81, 22.
[106] Mann and von Moltke, above n 81, 22.
[107] Ibid 22.

statements in the course of making regulatory decisions can constitute a measure under Articles 210 or 1101.[108]

In determining who qualifies as an investor to submit to arbitration a claim against a State for breaching its obligations, NAFTA Article 1117 states, 'An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation'.[109] An 'enterprise' is defined as:

> any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.[110]

Given that Article 1139 equates 'investment' with 'enterprise', 'virtually every connection to the ownership or profit of that enterprise can be considered as an investment'.[111]

In *S.D. Myers v Canada*,[112] the claimant, S. D. Myers, brought a claim against the Canadian government for damages resulting from Canada's ban on the export of PCB waste to the US for disposal. The Canadian government argued that although S. D. Myers owned a company incorporated in Canada, it 'lacked standing as an investor because it held no shares in the Canadian company and there was no joint venture agreement between the two companies'.[113] However, the Tribunal 'found jurisdiction on the ground that the same individual effectively controlled the two entities'.[114] As Mann and von Moltke had warned, minimal foreign investments—such as strategically adding a foreign component to an otherwise domestic investment—may provide 'access to the extraordinary rights and remedies found in Chapter 11'.[115]

3.9 Performance Requirements

Article 1106 prohibits performance requirements for investors.[116] The rationale for prohibiting performance requirements is 'to reduce distortions in the efficiencies gained by free market investment

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[108] Ibid 22.
[109] *North America Free Trade Agreement*, signed 17 December 1992 [1994] (entered into force 1 January 1994) 1117.1.
[110] Ibid 201.
[111] Mann and von Moltke, above n 81, 23.
[112] *SD Myers Incorporated v Canada*, Order, 2004 FC 38, (2004) 244 FTR 161, IIC 252 (2004), 13th January 2004, Canada; Federal Court [FC]
[113] L. Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International, 2011) 113.
[114] *S. D. Myers v Canada* (First Partial Award, supra note 123) cited in Reed et.al., above n 113, 113.
[115] Mann and von Moltke, above n 81, 24.
[116] Article 1106 reads as follows:

decision-making'.[117] These prohibitions apply across all three NAFTA parties: foreign or domestic.[118] However, ISDS is only available to foreign investors.[119] However, there are two environmental exceptions to this prohibition against imposing performance requirements. The first exception is stated in paragraph 2:

> 2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure.[120]

Paragraph 6 allows environmental measures '(b) necessary to protecting human, animal or plant life or health; or (c) necessary for the conservation of living or non-living exhaustible natural resources', provided 'such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment'.[121] While it is arguably necessary to protect investors against restrictions imposed in the name of environmental protection, but that serve other nationalistic or political interests, it is potentially problematic to leave it to the arbitral panel to determine what constitutes 'a disguised restriction on international trade'.

3.10 National Treatment and Most-Favoured-Nation Treatment

Two standards which help to address this problem and provide guidance to arbitral panels in dealing with environmental matters are national treatment [122] and most-favoured-nation treatment. [123] Application of these standards 'would require comparisons of how domestic and foreign investors are

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1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
(a) to export a given level or percentage of goods or services;
(b) to achieve a given level or percentage of domestic content;
(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or
(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

[117] Ibid 34.
[118] Ibid 34.
[119] Ibid 34.
[120] *North America Free Trade Agreement*, above n 109, art 1106.2.
[121] Ibid art 1106.6.
[122] Ibid art 1102.
[123] Ibid art 1103.

treated in the design, substance and implementation of an environmental protection law or regulation'.[124] While the spirit of the articles prohibit treating a foreign investor differently simply because it is foreign, as Mann and Moltke point out, the wording 'no less favourable' begs several questions:

> Does it mean that a foreign investor must receive the best treatment of any other company? Does it require average treatment, if this can be measured? Can the comparison be against a domestic company receiving the least favourable treatment of all domestic companies?[125]

Addressing Articles 1202 and 1203 on services, but whose language concerning these standards is the same as Article 11 (substitute 'investors' for 'service providers'), the US 'Statement of Administrative Action' argues for requiring governments to give 'treatment that is "no less favorable" than that they give domestic service firms in similar circumstances'. [126] Clarifying the meaning of 'no less favorable', the statement asserts:

> The 'no less favorable' standard applied in Articles 1202 and 1203 does not require that service providers from other NAFTA countries receive the same or even 'equal' treatment as that provided to local companies or other foreign firms. Foreign service providers can be treated differently if circumstances warrant. For example, a state may impose special requirements on Canadian and Mexican service providers if necessary to protect consumers to the same degree as they are protected in respect of local firms. NAFTA's non-discrimination provisions prohibit the imposition of laws and regulations designed to skew the terms of competition in favor of local firms; they do not bar legitimate regulatory distinctions between such firms and foreign service providers.[127]

In the *Pope & Talbot* case against Canada[128], the investor argued that the allocation of export quotas and levies for excess exports of softwood lumber failed to meet the national treatment and MFN standards of 'providing "the best treatment that it accords to other softwood lumber producers in Canada" '.[129] Pope & Talbot made its case on the grounds that since the quotas apply only in four provinces (British Columbia, Alberta, Ontario and Quebec), producers in other provinces have no quotas, which equates to more favourable treatment. The tribunal ruled in favour of the investor,

[124] Mann and von Moltke, above n 81, 25. Mann and Moltke note further that the national treatment obligation in NAFTA 'has been excluded from application to several sectors by all three parties (for example fisheries)'.
[125] Mann and von Moltke, above n 81, 25.
[126] Federal Government of the United States, 'Statement of Administrative Action' submitted to Congress (4 November 1993).
[127] Ibid 153.
[128] *Pope & Talbot Incorporated v Canada*, Award on damages, IIC 195 (2002), 31st May 2002, Ad Hoc Tribunal (UNCITRAL)
[129] Mann and von Moltke, above n 81, 26.

awarding compensation 'for out of pocket expenses borne by the Investor and its Investment as a result of Canada's wrongful conduct'.[130]

In the *Ethyl* case,[131] the investor argued that a ban on the import of the gasoline additive MMT, while still permitting the domestic production of MMT, amounted to non-compliance with the national treatment standard. Domestic companies that manufactured MMT had an advantage over investors needing to import MMT. In fact, the comparison was totally hypothetical as there were no domestic producers of MMT in Canada.[132]

Arguing more from a trade law approach than from an investment law basis, comparisons to show 'in like circumstances'[133] were made between Ethyl's manganese-based gasoline enhancer with other competing enhancers made from other products on the grounds that 'all these products were commercially substitutable for the same purpose'.[134] As to the "like circumstances" argument, the Canadian government in its Statement of Defense[135] noted the differences between MMT and other octane enhancers 'in methods of production, supply/demand characteristics, and properties.'[136] Since Ethyl was the only producer of MMT, there could be no claim of less-favourable treatment.

Voicing concern over whether the ambiguity of 'in like circumstances' might be overtaken by 'a market substitution type approach' to comparability and neglect 'long-term and complex environmental impacts of investments',[137] Mann and von Moltke argue the need for '[c]larification of the nature of "in like circumstances" from an environmental regulation perspective'.[138]

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[130] Case summary prepared during research for S. Ripinsky with K. Williams, 'Damages in International Investment Law' (BIICL, 2008) <https://www.biicl.org/files/3922_2002_pope_&_talbot_v_canada.pdf>.
[131] *Ethyl Corporation v Canada*, above n 103.
[132] Mann and von Moltke, above n 81, 26.
[133] The words 'in like circumstances' are found in both paragraphs under NAFTA Article 1103: Most-Favoured-Nation Treatment' (emphasis added):
1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, *in like circumstances*, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, *in like circumstances*, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
[134] Mann and von Moltke, above n 81, 29
[135] Statement of Defence, supra note 37, at paras. 75-101 cited in Timothy R. Wilson, *Trade Rules: Ethyl Corporation v. Canada (NAFTA Chapter 11) - Part 1: Claim and Award on Jurisdiction*, 6 Law & Bus. Rev. Am. 52 (2000) 63. Available at: http://scholar.smu.edu/lbra/vol6/iss1/5.
[136] Wilson, above n 126, 63.
[137] Mann and von Moltke, above n 81, 30.
[138] Ibid 32.

3.11 Expropriations

NAFTA Article 1110(1) is the first legal text to distinguish the following three terms as different tests: expropriation, nationalisation, and measures tantamount to an expropriation.[139]

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

Given the broad definition of the word 'measure', 'there can be little doubt as to the potential for regulations, legislation and administrative acts implementing them to fall within the possible scope of application of Article 1110(1)'.[140] The uncertainty of the agreement's terminology only serves to 'strengthen legal arguments that environmental measures taken for a public purpose can form a basis of a claim for compensation'.[141] The kind of investments resulting from NAFTA are more likely long term and thus, possibly affected by new environmental regulations introduced in response to increased scientific knowledge about and corresponding heightened social awareness of risks to environmental safety. Therefore, there is genuine cause for concern over the potential for compensatory claims from investors with long-term investments to derail the introduction of necessary environmental regulations. Along these lines, Mann and von Moltke pose the following questions:

- If new laws to ensure environmental protection and sustainable resource management are subject to investor claims for compensation under the expropriation provisions of NAFTA, how is it possible for the objective of promoting rising environmental standards to be achieved?
- How is upwards harmonization to be achieved?
- How is the right of the three NAFTA parties to set their own levels of environmental protection, set out in Article 3 of the North American Agreement on Environmental Cooperation, to be respected?[142]

[139] Ibid 44.
[140] Ibid 45.
[141] Ibid 45.
[142] Ibid 46.

Citing the three cases—*Metalclad Corporation v Mexico*; *Ethyl Corporation v Canada*; and *Methanex v California*—Vincent (2004) argues that NAFTA drafters' failure to 'expressly define' "expropriation" in Article 1110(1) has 'seriously affected governments' ability to protect the environment'.[143]

Metalclad v Mexico (1997) has the distinction of being the first case to interpret Article 1110.[144] However, it is also the first case to consider an environmental measure as an expropriatory measure.[145] With assurances from the Mexican federal government that it would receive the necessary permits to construct and operate a hazardous waste landfill, Metalclad, a US waste disposal company, proceeded with its purchase of a landfill site in the Mexican State of San Lui Potosi.[146] However, actions taken by the local and State authorities, culminating in a State-level decree declaring the site of the landfill to be protected national property prevented the constructed landfill from continuing operation. The tribunal hearing Metalclad's claim under NAFTA Articles 1105 and 1110 awarded Metalclad over US$16 million in damages. In its decision, the tribunal noted that:

> [e]propriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[147]

Interpreting Article 1110 to cover 'incidental interference with the use of property' leading to loss of economic benefit to the investor 'could apply to many scenarios where the government attempts to improve environmental protection laws'.[148] Moreover, though denying Metalclad's claim against loss of expected profits, the Tribunal did so because of lack of evidence, allowing for the possibility 'that lost profits should be considered in the valuation of expropriated property'.[149] This possibility that investors might be allowed to claim for loss of expected profits threatened to slow if not stop States' efforts at securing a safe and healthy environment. The necessity of instituting measures to protect

[143] D. P. Vincent, 'The Trans-Pacific Partnership: Environmental Savior or Regulatory Carte Blanche?' (2014) 23(1) *Minnesota Journal of International Law* 4.
[144] Ibid 4.
[145] M. F. Sweify, 'Investment-Environment Disputes: Challenges and Proposals' (2015) 14 *DePaul Business & Commercial Law Journal* 189.
[146] Vincent, above n 147, 4.
[147] Metalclad Final Award, 103 cited in Vincent, above n 147, 5.
[148] OECD, ' "Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (Working Paper No 2004/04, 2004) cited by Vincent, above n 147, 5.
[149] Vincent, above n 147, 5.

against the risks posed by environmental damage caused by investors now had to be weighed against the potential cost of damages to be awarded to those same investors for loss of their expected profits.

Criticised as 'an abuse of Chapter 11's of NAFTA in a manner not intended by its parties',[150] this decision initiated a trend towards using Article 11 'as a tool to extract huge settlements from host states under expansive expropriation claims based on environmental measures'.[151] The tribunal's undemocratic process demonstrated 'the significance of enhancing the due process and transparency in investment–environment disputes'.[152]

The Canadian government's settlement with Ethyl Corporation for US$13 million over Canada's ban of the gasoline additive, MMT, which had also been banned in several other countries and California, prompted some to suggest the *Metalclad* case may have given the Canadian government 'enough reason to doubt its chances'.[153]

In the case of Methanex's claim against California for expropriating its investment by ordering the phase-out of MTBE, the tribunal ruled:

> But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[154]

Described as 'a big victory for environmentalists',[155] the tribunal's ruling in the *Methanex* case 'reconciled the Metalclad decision with its interpretation of the expropriation clause, thereby limiting the scope of Article 1110 and providing governments the legal standing to regulate environmental matters without breaking NAFTA rules'.[156] Moreover, environmentalists succeeded in petitioning the UNCITRAL body to allow amicus briefs until the tribunal issued a surprising award that allowed the amicus input.[157]

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[150] Sweify, above n 149, 189 citing Lucien J. Dhooge, 'The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United Mexican States' (2001) 10 *Minnesota Journal of Global Trade* 209, 213.
[151] Sweify, above n 149, 190 citing Lauren E. Godshall, 'In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter Eleven' (2002) 11 *New York University Environmental Law Journal* 264, 314–15.
[152] Sweify, above n 149, 190.
[153] Vincent, above n 147, 5.
[154] Methanex Final Award Part IV, Chapter D, 4
[155] Vincent, above n 147, 6.
[156] Ibid 6.
[157] Sweify, above n 149, 194.

Gallagher[158] proposes several changes to NAFTA's investment rules:

- Negotiate an 'interpretive note' to reinforce recent NAFTA cases that affirm how indirect expropriation and minimum standard of treatment rules cannot trump genuine environmental regulations that internalize externalities. This could be accomplished by formally recognizing the Methanex and Glamis rulings under NAFTA tribunals.
- Require environmental impact statements by foreign investors before locating in a NAFTA country.
- Preserve the ability of governments to conduct pre-establishment screening whereby possible investors are screened for their environmental and other priorities.
- Grant governments GATT Article XX-like exceptions to use selective performance requirements to ensure that foreign firms are transferring environmental technologies and practices.
- Establish right-to-know provisions whereby citizens and governments have access to information regarding an investor's environmental performance.

The *Methanex* Tribunal had also addressed the question of how to interpret the phrase 'relating to' in NAFTA Article 1101.[159] Though earlier tribunals 'either dismissed or downplayed the Parties' arguments as to the requisite degree of connection between the claimant and the measure complained of,[160] the *Methanex* Tribunal considered a number of factors[161] before reaching its decision that 'the phrase "relating to" signifies something more than the mere effect of a measure on an investor or an investment and … it requires a legally significant connection between them, as the USA contends'.[162] Thus, the *Methanex* Tribunal 'concluded that no legally significant connection was pleaded, and could not be established in the circumstances without proof of specific intent to injure (which was only asserted in the claimant's further submissions)'.[163]

The recent trend in ISDS, as evidenced by tribunal decisions in *Tecmed v Mexico* (2005), *Saluka v Czech Republic* (2008), *Chemtura v Canada* (2010) and *El Paso v Argentina* (2011), is to recognise:

> that by concluding an investment treaty States do not waive the right to regulate as part of their sovereign prerogatives. Accordingly, no indirect expropriation or breach of fair and equitable treatment (FET), or of legitimate expectations as a FET component, may be validly claimed, except if specific promises in that regard had been made to the investor or a

[158] Gallagher, above n 71, 64.
[159] *North America Free Trade Agreement*, above n 109, 'Scope and Coverage 1'. This chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.
[160] Patrick G. Foy, 'Effectiveness of NAFTA's Chapter Eleven Investor–State Arbitration Procedures' (2002) *ICSID Review—Foreign Investment Law Journal.*
[161] Including 'an examination of dictionary definitions, the content, object and purpose of Chapter Eleven, the 1958 New York Convention limit on the recognition of written agreements to arbitrate differences "in respect of a defined legal relationship," other NAFTA awards (which were not followed) and prior statements of Canada and the United States (which were also not relied upon)' cited in Foy, above n 164, 63.
[162] Foy, above n 164, 63–4.
[163] Foy, above n 164, 64.

> stabilization clause had been agreed to the latter's benefit or if new rules are enacted in bad faith or in a discriminatory and disproportionate manner to the investor's prejudice.[164]

Besides issues arising from Chapter 11, the investment chapter, another area in which NAFTA needs to be 'reinvigorated', according to Gallagher, concerns intellectual property rules and clean technology transfer and development. Both are 'a relatively new concern not largely debated during NAFTA negotiations'.[165] One key issue, according to Gallagher, is 'the extent to which developing countries like Mexico will have to pay monopoly prices to install already expensive clean energy technologies and/or face insurmountable obstacles if they chose to develop indigenous clean energy technologies to adapt to and combat global climate change'.[166] Another concern relates to 'the right to exclude plants and animals from patentability and to use sui-generis systems of protection for plant varieties'.

Unless NAFTA is reformed to add GATT Article XX-like exceptions[167] for trade in services, warns Gallagher, NAFTA services provisions threaten to run 'head-on into environmental policy' and 'NAFTA's services chapters may also collide with future efforts to deploy renewable energy and mitigate climate change'.[168] Gallagher argues that the environmental concerns now relegated to a side agreement (i.e. the NAAEC) 'should be enshrined as a standalone chapter within NAFTA and be subject to the same enforcement and dispute resolution parts of the agreement'.[169] As will be discussed in Chapter 4, although the *Trans-Pacific Partnership* (TPP) has indeed included a standalone chapter on the environment, this has not prevented it from being considered a step backwards in efforts to promote environmental protection.

3.12 Conclusion

Environmental protection is a human right, but this connection is complicated by the fact that 'environmental rights are not generally seen as running directly to individuals, with international

[164] P. Bernardini, 'Reforming Investor-State Dispute Settlement: The Need to Balance Both Parties' Interests', ICSID Review, (2017), 14.
[165] Gallagher, above n 71, 66.
[166] Ibid.
[167] GATT Article XX: 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(b) necessary to protect human, animal or plant life or health;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption...' <(https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm)>.
[168] Gallagher, above n 71, 66.
[169] Ibid.

environment agreements other than most of the U.S. FTAs providing "little direct recourse to individual victims of environmental harm" '[170] The human right to 'a healthy and productive life in harmony with nature' is stated as the first principle in the Rio Declaration on Environment and Development (1992).[171] The NAAEC reaffirms the Rio Declaration. Its first objective is 'to foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations'.[172] Arguably, the trend in arbitral decision-making is moving away from the principles that prioritised investment protection for MNCs, thus leading to the failures and broken promises of NAFTA to provide high levels of environmental protection.

Unlike US President Trump's withdrawal from the TPP, a renegotiated NAFTA remains likely given Trump's public statements of support.[173] Potential areas for improvement under a renegotiated NAFTA agreement include boosting environmental protections, in particular safeguards for the oceans and bans on illegal logging.[174] However, given Trump's singular focus on jobs and trade, one suspects environmental protection may not be accorded very high priority, if any.

[170] Caroline Dommen, 'How Human Rights Norms Can Contribute to Environmental Protection: Some Practical Possibilities Within the United Nations System' in Romina Picolotti and Jorge Daniel Taillant (eds) *Linking Human Rights and the Environment* (2003) 105 cited in Gantz et al., above n 1, 302.
[171] UN General Assembly, *Rio Declaration on Environment and Development* (12 August 1992) <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.
[172] NAAEC, art 1, <https://ustr.gov/sites/default/files/naaec.pdf>.
[173] Amelia Hadfield and Rupert Potter, 'Trump, Trudeau and NAFTA 2.0: Tweak or Transformation?' (2017) *The Round Table* 106(2), 213–5 <http://dx.doi.org/10.1080/00358533.2017.1305666>.
[174] J. Frankel, 'Can Donald Trump Better Renegotiate NAFTA? Yes, by Bringing Back TPP', The Guardian, 15 April 2017.

Chapter 4: THE TRANS-PACIFIC PARTNERSHIP: A STEP BACKWARDS IN ENVIRONMENTAL PROTECTION

4.1 Introduction: Significant Environmental Agreement or Missed Opportunity?

As noted in Chapter 3, the drafters of NAFTA were criticised for having relegated environmental concerns to a side agreement. Failure to devote a chapter to the environment suggested that environmental concerns had been assigned lower priority than other considerations when it came to drafting the agreement. So, when the drafters of the TPP devoted a chapter to the environment, one might have anticipated their efforts would contribute to better environmental protection. Instead, the TPP is generally considered a step backwards in environmental protection.[1]

The TPP originated in 2005 in negotiations between New Zealand, Singapore, Chile and Brunei—otherwise known as the Pacific Four (P-4)—culminating in the *Trans-Pacific Strategic Economic Partnership Agreement* (TPSEP).[2] The main objective of the P-4 agreement, according to Rajamoorthy (2013), 'was to eliminate all tariffs between the parties by 2015'.[3] There are two obvious points of difference between the earlier TPSEP and its successor TPP Agreement. While the TPSEP is accompanied by a memoranda on environment, there is a chapter devoted to the environment in the TPP. Second, unlike the TPP, there is no provision in the TPSEP for investors to take legal action against States.

According to the Office of the United States Trade Representative (USTR), the TPP 'includes the most robust enforceable environment commitments of any trade agreement in history'.[4] The TPP has been praised by the USTR for its 'pioneering commitments to combat illegal fishing, wildlife trafficking and illegal logging, as well as first-ever commitments to prohibit some of the most harmful fisheries subsidies'.[5] Additionally, among its contributions to preserving the environment, the TPP

[1] Under the Trump administration, talks on the TTIP have also been put on hold. According to the EU Parliament website, 'Talks on TTIP have officially stopped. The EU needs to clarify with its US counterparts if there is sufficient level of shared ambition and common ground to resume negotiations. For this reason, this train carriage has been put momentarily "on hold".' http://www.europarl.europa.eu/legislative-train/theme-reasonable-and-balanced-trade-agreement-with-the-united-states/file-ttip-state-to-state-dispute-settlement

[2] David Vincent, 'The Trans-Pacific Partnership: Environmental Savior or Regulatory Carte Blanche?' (2014) 23 *Minnesota Journal of International Law* 2.

[3] T. Rajamoorthy, *The Origins and Evolution of the Trans-Pacific Partnership (TPP)* (10 November 2013) Global Research <http://www.globalresearch.ca/the-origins-and-evolution-of-the-trans-pacific-partnership-tpp/5357495>.

[4] Office of the United States Trade Representative (USTR), *The Trans-Pacific Partnership: Preserving the Environment* <https://ustr.gov/sites/default/files/TPP-Preserving-the-Environment-Fact-Sheet.pdf>.

[5] Ibid.

'adds teeth to the enforcement of major multilateral environmental agreements such as CITES (the Convention on International Trade in Endangered Species)', [6] and 'eliminates tariffs on environmentally-beneficial products and technologies'.[7] While 'recognis[ing] the sovereign right of each Party to establish its own levels of domestic environmental protection in the furtherance of sustainable development',[8] each party agrees to 'strive to ensure that its environmental laws and policies provide for, and encourage, high levels of environmental protection and to continue to improve its respective levels of environmental protection'.[9]

Describing the TPP as 'President Obama's trade deal',[10] the USTR argues that the TPP 'upgrades NAFTA by putting fully enforceable environment obligations at the core of the agreement' (see Figure 4 for the USTR's list of enforceable obligations).[11]

Figure 4: USTR list of enforceable environmental obligations in TPP v NAFTA

Noting the major differences between NAFTA and the TPP, former US President Barack Obama [12] praised the TPP's success in fixing NAFTA's failure to 'combat illegal wildlife trafficking, protect against overfishing, or combat illegal logging'.[13] He concluded:

[6] Ibid.
[7] Ibid.
[8] *Trans-Pacific Partnership Agreement*, opened for signature 4 February 2016, [2016] ATNIF 2 (not yet in force) art 20.3.1.
[9] Ibid art 20.3.3.
[10] USTR, above n 3.
[11] Ibid.
[12] Barack Obama, *What are the Major Differences Between NAFTA and TPP?* (28 October 2016) Quora <https://www.quora.com/What-are-the-major-differences-between-NAFTA-and-TPP/answer/Barack-Obama-44>.
[13] Ibid.

> TPP represents an opportunity to renegotiate NAFTA. In fact, by raising environmental and labor standards and beefing up enforcement, TPP will fix a lot of what was wrong with NAFTA in the first place.[14]

Howard F. Chang, the Earle Hepburn Professor of Law at the University of Pennsylvania Law School, describes the TPP as 'not only an important trade agreement but also a significant environmental agreement', which continues the 'promising development in international trade law' begun with NAFTA and subsequent FTAs.[15] Chang describes the TPP's environmental chapter as 'significant not only for the environmental obligations it would impose on TPP parties but also as a precedent for the next generation of free trade agreements'. In particular, Chang highlights 'the entirely new substantive environmental obligations', including 'commitments in Article 20.17 to "take measures to combat" and to "cooperate to prevent" trade in wild animals and plants taken illegally, whether or not those species are protected under CITES', and 'another specially important commitment in which the TPP parties agree to prohibit subsidies for fishing that "negatively affect" stocks that are overfished or that subsidize "any fishing vessel" listed as engaged in illegal fishing'.[16]

In his written testimony to the US Senate Subcommittee on International Trade, Customs and Global Competitiveness, Mark Linscott, Assistant US Trade Representative for Environment and Natural Resources, stated that an 'environment chapter in the TPP should strengthen countries' commitments to enforce their environmental laws and regulations, including areas related to ocean and fisheries governance, through the effective enforcement obligation subject to dispute settlement'.[17] Balancing US insistence on strict environmental provisions with the concerns of developing countries over the potential impact of those same environmental provisions on their growing economies made the TPP's environmental chapter 'one of the most challenging areas of the negotiations'.[18]

The outcome of these challenging negotiations is an agreement whose environmental standards have been described as the strongest of any previous US trade deal.[19] Categorised as bronze, silver and gold, by their strength of environmental stance, US trade deals predating stricter environmental standards set by the 10 May *Bipartisan Agreement on Trade Policy* fall into the bronze category; those

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[14] Ibid.
[15] Howard F. Chang, 'The Environment Chapter of the Trans-Pacific Partnership: An Environmental Agreement Within a Trade Agreement' (2016) 47 *Trends* 5 <https://www.americanbar.org/publications/trends/2015-2016/may-june-2016/the_environment_chapter_of_the_trans-pacific_partnership.html>.
[16] Ibid
[17] Mark Linscott, Submission to 111th Congress Subcommittee on International Trade, Customs and Global Competitiveness, July 2010 <http://www.finance.senate.gov/imo/media/doc/071410mltest.pdf> cited in Vincent, above n 1, 8.
[18] Vincent, above n 1, 8.
[19] J. Chittooran, *TPP in Brief: Environmental Standards* (15 April 2016) <http://www.thirdway.org/memo/tpp-in-brief-environmental-standards>.

subsequent into silver; and the TPP, exceptionally, belongs to the gold category. The criteria shown in Table 1[20] distinguish the stringency of the environmental protections provided in each category.

Table 1- Categorisation of US Trade Agreements with other countries by environmental stance

	BRONZE Singapore, 2004 Chile, 2004 Australia, 2005 Morocco, 2006 CAFTA, 2006-09 Bahrain, 2006 Oman, 2009	SILVER Peru, 2009 Colombia, 2009 Korea, 2012 Panama, 2012	GOLD TPP, 2015
Effectively enforce their own environmental laws	No	Yes	Yes
Cannot waive or derogate from environmental laws to encourrage trade/investment	Yes	Yes	Yes
Implement the Convention on International Trade in Endangered Species (CITES)	No	No	Yes
Further commitments on combatting illegal trade in wild fauna and flora, including that in violation of othercountries' laws	No	No	Yes
Includes commitments on: control of marine pollution, control of ozone depleting substances, protections for natural protected areas, & on illegal fishing	No	No	Yes
Prohibits harmful and unfair fish subsidies	No	Yes	Yes
Penalties for violators can include trade sanctions	No	Yes	Yes

However, the positive claims about how effectively the TPP will contribute to efforts to preserve and protect the environment have been challenged by a number of environmental NGOs. One of these is the Sierra Club, which argues that the TPP environment chapter 'excludes environmental commitments that have been included in all U.S. trade agreements since 2007 and fails to meet the minimum degree of environmental protection required under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, also referred to as "fast track"'.[21] While, unlike NAFTA, the TPP devotes a chapter to the environment, nevertheless, its environmental provisions have been

[20] Ibid.
[21] Sierra Club, *TPP Text Analysis: Environment Chapter Fails to Protect the Environment* [Sierra Club TPP Text Analysis] <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/TPPanalysis.pdf>.

criticised as 'weak and unlikely to address the problems of illegal wildlife trade, overfishing, and other environmental concerns'.[22]

4.2 Multilateral Environmental Agreements

The Sierra Club criticises the Environmental Chapter of the TPP for its retreat from the 10 May 2007 bipartisan agreement between congressional Democrats and the George W. Bush administration. This agreement aimed 'to "incorporate a specific list of multilateral environmental agreements" and to subject the implementation of those seven core MEAs to the FTA dispute settlement process'.[23] [24] According to the agreement, each of the US's FTA partners would be required to 'adopt, maintain, and implement laws, regulations, and all other measures to fulfil its obligations under' the seven MEAs.[25] However, the final text of the TPP maintains this commitment for only one of the seven MEAs: the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) (art 20.17.2). Even this is further qualified, by the addition of a 'hortatory'[26] note stating that parties 'shall *endeavour* to implement, *as appropriate*, CITES resolutions that aim to protect and conserve species whose survival is threatened by international trade' (emphasis added).[27] Being a signatory to these seven MEAs is not a prerequisite for joining the TPP.[28] In fact, only the US and Japan are signatories to all seven agreements; six other countries are signatories to all but one, and other countries to only three or four.[29]

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[22] C. Wold, *Empty Promises and Missed Opportunities: An Assessment of the Environmental Chapter of the Trans-Pacific Partnership* (4 January 2016) 2 <https://law.lclark.edu/live/files/20857-assessing-the-tpp-environmental-chapter>.
[23] Sierra Club, above n 21.
[24] 1) *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 27 UST 1087; TIAS 8249; 993 UNTS 243
2) *Montreal Protocol on Substances that Deplete the Ozone Layer* 1522 UNTS 3; 26 ILM 1550 (1987).
3) *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973*, 1340 UNTS 61; 17 ILM 546 (1978)
4) *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* 996 UNTS 245; TIAS 11084; 11 ILM 963 (1972)
5) *Convention on the Conservation of Antarctic Marine Living Resources,* 33 UST 3476; 1329 UNTS 48; 19 ILM 841 (1980)
6) International Convention for the Regulation of Whaling,
62 Stat. 1716; 161 UNTS 72
7) *Convention for the Establishment of an Inter-American Tropical Tuna Commission* 16 U.S.C. 971 et seq. (see TPP Text Analysis, above n 21).
[25] *Bipartisan Agreement on Trade* (10 May 2007) <http://www.bilaterals.org/IMG/pdf/05_14_07.pdf> cited in Sierra Club, above n 21.
[26] J. Schott, 'TPP and the Environment' in C. Cimino-Isaacs and J. Schott (eds), *Trans-Pacific Partnership: An Assessment* (Columbia University Press, 2016).
[27] Sierra Club, above n 21, art 21.17.3c.
[28] Schott, above n 26.
[29] Ibid.

Further, within the text of the TPP, there are specific references to only three MEAs; four are never mentioned.[30] Two MEAs are referred to by name only in footnotes: the *Montreal Protocol on Substances that Deplete the Ozone Layer*,[31] and the *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships* (MARPOL).[32] Instead of being required to 'adopt, maintain and implement', 'TPP countries are simply required to keep domestic policies named by the TPP on the books'.[33]

Playing down the significance of this apparent slight to both the Montreal Protocol and MARPOL, and those not even mentioned, Wold notes:

> MEAs, however, already include legally binding international commitments that Parties to those MEAs must adopt and implement. Thus, affirming a commitment to implement those obligations or even obligating Parties to implement those MEAs adds nothing to the quality or nature of those obligations.[34]

Wold acknowledges that '[p]rovisions that require TPP Parties to adopt and implement their MEA obligations could be meaningful if supported by meaningful dispute settlement when the relevant MEA does not have its own compliance mechanism or that compliance mechanism is weak'.[35] However, the DSMs in the TPP are similar to those in other FTAs, which have never been used.[36]

Wold further argues that the standards for bringing a claim against a TPP party for failure to implement MEA obligations 'are weaker than those found in CITES, the Montreal Protocol, and perhaps in MARPOL'.[37] For example, in the TPP, a violation only occurs when one party can demonstrate that another party has 'failed to adopt, maintain or implement laws, regulations or other measures to fulfil its obligations under CITES in a manner affecting trade or investment between the Parties'.[38] Further,

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[30] These include *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*; *Convention on the Conservation of Antarctic Marine Living Resources*; *International Convention for the Regulation of Whaling*; and *Convention for the Establishment of an Inter-American Tropical Tuna Commission*.
[31] *Trans-Pacific Partnership*, above n 7, art 20.5.1. ('A Party shall be deemed in compliance with this provision if it maintains the measure or measures listed in Annex 20-A implementing its obligations under the Montreal Protocol or any subsequent measure or measures that provide an equivalent or higher level of environmental protection as the measure or measures listed.')
[32] Ibid art 20.6.1. ('A Party shall be deemed in compliance with this provision if it maintains the measure or measures listed in Annex 20-B implementing its obligations under MARPOL, or any subsequent measure or measures that provide an equivalent or higher level of environmental protection as the measure or measures listed.')
[33] Sierra Club, above n 21, 2.
[34] Wold, above n 22, 3.
[35] Ibid 3.
[36] Ibid 3.
[37] Ibid 4.
[38] *Trans-Pacific Partnership*, above n 7, art 20.17.2 [3].

'the TPP limits the dispute settlement procedure to violations of the obligations of CITES, leaving out the failure to comply with resolutions and other recommendations directed to the Parties'.[39]

To illustrate the difference in enforcement provisions in CITES itself compared with provisions for enforcing CITES in the TPP, Wold notes the CITES Standing Committee's recommendation 'that all Parties suspend commercial trade in specimens of CITES-listed species with the Lao People's Democratic Republic until further notice'.[40] This action was recommended against the Lao People's Democratic Republic owing to its failure to develop a national ivory action plan to deal with the poaching of elephants and illegal trade in ivory as instructed by the CITES Standing Committee.[41] The significance of this directive from the Standing Committee is twofold: first, there is no trade impact mentioned; second, it is not based on the CITES text itself, but on a resolution instructing 'the Standing Committee to determine which Parties have not adopted appropriate measures for effective implementation of the Convention and to consider appropriate compliance measures, which may include recommendations to suspend trade, in accordance with Resolution Conf. 14.3'.[42] 'Clearly,' concludes Wold, 'the TPP's provisions to enforce CITES are considerably weaker than those of CITES itself'.[43]

Unlike in the case of CITES, in which parties to the TPP are required to 'adopt, maintain, and implement' laws relating to CITES, mention of the Montreal Protocol is relegated to a footnote under Article 20.5 (Protection of the Ozone Layer):

> 4 A Party shall be deemed in compliance with this provision if it maintains the measure or measures listed in Annex 20-A implementing its obligations under the Montreal Protocol or any subsequent measure or measures that provide an equivalent or higher level of environmental protection as the measure or measures listed.[44]

The use of the word 'maintain':

> suggests that the TPP Parties do not actually need to implement those measures … Since "implement" is used with respect to CITES but not with respect to the Montreal Protocol,

[39] Wold, above n 22, 4.
[40] Convention on International Trade in Endangered Species of Wild Fauna And Flora (CITES), *Notification to the Parties No. 2015/013, Recommendation to Suspend Trade* (19 March 2015) <https://cites.org/sites/default/files/notif/E-Notif-2015-013_0.pdf> cited in Wold, above n 21, 4.
[41] Ibid 4.
[42] CITES, *National Laws for Implementation of the Convention, Resolution Conf. 8.4* (Rev. CoP15) <https://cites.org/eng/res/08/08-04R15.php> cited in Wold, above n 22, 4.
[43] Wold, above n 22, 4.
[44] *Trans-Pacific Partnership*, above n 7, art 20.5 [3].

> one must assume that the drafters did not intend to make failure to implement the obligations of the Montreal Protocol subject to dispute settlement under the TPP.[45]

A further hurdle to enforcing implementation of the Montreal Protocol is introduced in the following footnote:

> 5 If compliance with this provision is not established pursuant to footnote 4, to establish a violation of this provision, a Party must demonstrate that the other Party has failed to take measures to control the production and consumption of, and trade in, certain substances that can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment, in a manner affecting trade or investment between the Parties.[46]

In other words, to demonstrate that a TPP party is in violation of its obligations under the Montreal Protocol, it would be necessary to show not only a likelihood of adverse effects on health and the environment, but also a link to trade and investment between the parties. Parties to the Montreal Protocol are nevertheless already subject to non-compliance measures under the Montreal Protocol that do not mention impact on health, environment or trade.

Again, instead of requiring parties to 'adopt, maintain and implement', TPP provisions for 'prevent[ing] the pollution of the marine environment from ships'[47] only require each party to 'maintain the measure or measures listed in Annex 20-B implementing its obligations under MARPOL, or any subsequent measure or measures that provide an equivalent or higher level of environmental protection as the measure or measures listed'.[48] Also, as with both CITES and the Montreal Protocol:

> to be found in violation of the TPP obligation parties must have failed to take measures on the environmental obligation in a manner affecting trade and investment between the parties, meaning that an eventual dispute under the deal must also concern trade rather than just environmental issues.[49]

[45] Wold, above n 22, 5.
[46] *Trans-Pacific Partnership*, above n 7, art 20.5 [5].
[47] Ibid art 20.6.1.
[48] Ibid art 20.6.1 [7].
[49] Biores, *Trans-Pacific Partnership Trade Pact Text Published, Environment Chapter Scrutinized* (12 November 2015) Bridges News <http://www.ictsd.org/bridges-news/biores/news/trans-pacific-partnership-trade-pact-text-published-environment-chapter>.

Wold criticises the TPP's failure to 'carve out an exception for environmental measures adopted pursuant to MEAs,'[50] similar to that found in trade agreements with Peru,[51] Columbia[52] and Panama.[53] These agreements do not preclude a party from adopting measures to comply with its obligations under an MEA, even though such measures may interfere with its trade obligations, 'provided that the primary purpose of the measure is not to impose a disguised restriction on trade'.[54] Conversely, the TPP allows 'greater leeway to challenge another TPP Party for trade restrictions adopted to implement the provisions of an MEA'.[55] To strengthen TPP's MEA provisions and make it 'worthy of being called historic', Wold advocates binding commitments instead of weakly worded directives to '*endeavor to implement, as appropriate*'.[56] Wold adds, however, that '[a]s weak as this commitment is, it is stronger than for other MEAs; the TPP is silent with respect to implementing decisions of the Montreal Protocol or other MEAs'.[57]

4.3 Fisheries Subsidies

One of the environmental concerns addressed by the TPP concerns fisheries subsidies, which the UN Environment Programme estimated to be substantial and a contributing factor to over-exploitation of fish stocks.[58] Regarding fisheries subsidies, the FAO notes that:

> there is no universally accepted definition of exactly what government actions (or inaction) are to be considered as subsidies. The term subsidies can be broadly applied to a wide range of government interventions, or to the absence of correcting interventions, that reduce costs and/or increase revenues of producing and marketing of fish and fish products in the short-, medium- or long-terms. 'Government interventions' include financial transfers or the provision of goods or services at a cost below market prices. 'The absence of correcting interventions' includes failure by government to impose measures that correct for external costs (externalities) associated with fishing.[59]

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[50] Ibid 6.
[51] *US–Peru Free Trade Agreement* art 18.13, [4] cited in Wold, above n 22, 6.
[52] *US–Columbia Trade Promotion Agreement* (US-Colombia TPA) art 18.13 [4], 22 November 2006 <http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file644_10192.pdf> cited in Wold, above n 22, 6.
[53] See, eg, *US–Panama Trade Promotion Agreement* (US-Panama TPA) art 17.13 [4] 28 June 2007 <http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file314_10400.pdf> cited in Wold, above n 22, 6.
[54] U.S.–Peru FTA, art 18.13 https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf cited in Wold, above n 22, 7.
[55] Wold, above n 22, 7.
[56] *Trans-Pacific Partnership*, above n 7, art 20.17 [3c] (emphasis added).
[57] Ibid 7.
[58] UNEP, 'Turning the Tide on Falling Fish Stocks—UNEP-Led Green Economy Charts Sustainable Investment Path' (Media release, 2, 17 May 2010) cited in Wold, above n 22. (Wold quotes UNEP's estimate of $27 billion in 2010, with 'only around $8 billion … classed as "good" with the rest classed as "bad" and "ugly" as they contribute to over-exploitation of stocks'.)
[59] FAO, 'The State of World Fisheries and Aquaculture' 7 (2014) cited in Wold, above n 22, 6.

Provisions in the TPP environment chapter related to fisheries subsidies address one of the critical environmental concerns[60] raised by a number of US environmental groups[61] in their 29 October letter to the US Congress.[62] These concerns are prompted by the fact that such subsidies 'distort trade by handing an unfair advantage to domestic producers and can also exacerbate the depletion of overexploited fish stocks'.[63] Using stronger language than is used with respect to any of the other five environmental concerns,[64] the TPP emphatically states that 'no Party shall grant or maintain any of the following subsidies':

> (a) subsidies for fishing that negatively affect fish stocks that are in an overfished condition; and (b) subsidies provided to any fishing vessel while listed by the flag State or a relevant Regional Fisheries Management Organisation or Arrangement for IUU fishing in accordance with the rules and procedures of that organisation or arrangement and in conformity with international law.[65]

Schott notes that the rules require "best efforts" to refrain from providing new subsidies or extending existing programs that contribute to overfishing or overcapacity, and TPP members are required to notify all subsidies "to persons engaged in fishing or fishing-related activities" within one year of entry into force of the pact, and to update those notifications every two years thereafter.[66]

4.4 Illegal, Unreported and Unregulated Fishing

Prior to the withdrawal of the US from the TPP, the USTR 'praised the TPP's "pioneering commitments" to combat illegal fishing and prohibit some of the most harmful fisheries subsidies, such as those given to fishermen engaged in illegal, unreported, and unregulated (IUU) fishing'.[67] The TPP has been criticised, however, for 'fail[ing to] *prohibit* the trade, transshipment, or sale of products harvested or traded in violation of laws that protect living marine resources',[68] and instead only

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[60] 'Legally binding rules to prohibit subsidies that contribute to overcapacity and overfishing. Fisheries subsidies that promote overcapacity and overfishing drive fisheries depletion while also creating unfair competition in seafood trade. The TPP should prohibit subsidies for all fishing activities that contribute to overcapacity and overfishing and that negatively affect fish stocks in an overfished condition.'

[61] 350.org; Center for International Environmental Law; Center for Biological Diversity, Earthjustice, Food & Water Watch; Friends of the Earth; Green America; Greenpeace USA; Institute for Agriculture and Trade Policy; Natural Resources Defense Council; Oil Change International; Sierra Club; and SustainUS.

[62] Ibid <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/TPP%20letter%20FINAL%20%282%29.pdf>.

[63] Biores, above n 49.

[64] Sierra Club, above n 21. In its analysis of the TPP text, the Sierra Club comments 'The binding and specific nature of the TPP commitments regarding fisheries subsidies accentuates the comparably hortatory and vague nature of the TPP provisions in the five other identified areas. In addition, the stronger fisheries subsidies provisions would only prove meaningful in diminishing overfishing if they are effectively enforced'.

[65] *Trans-Pacific Partnership*, above n 7, art 20.16.5.

[66] Schott, above n 26, *Trans-Pacific Partnership* art 20.16.9.

[67] Wold, above n 22, 8 citing *Trans-Pacific Partnership*, above n 7, 2; USTR, above n 1.

[68] Ibid 5.

'list[ing] measures that TPP countries shall undertake "to help *deter* trade in products" harvested illegally'.[69]

The environment chapter does not require TPP countries to abide by the trade-related provisions of regional fisheries management organisations, such as the Inter-American Tropical Tuna Convention[70] or the Western and Central Pacific Fisheries Commission,[71] nor are TPP members required to adopt and implement the 2009 *FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing*.[72]

4.5 Shark Finning and Commercial Whaling

TPP Article 20.16.4 addresses concerns related to sharks, marine turtles, seabirds and marine mammals:

> 4. Each Party shall promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals, through their implementation and effective enforcement of conservation and management measures. Such measures should include, as appropriate:
>
> - for sharks: the collection of species specific data, fisheries bycatch mitigation measures, catch limits, and finning prohibitions; and
> - for marine turtles, seabirds, and marine mammals: fisheries bycatch mitigation measures, conservation and relevant management measures, prohibitions, and other measures in accordance with relevant international agreements to which the Party is party.

Criticised for amounting to nothing more than 'a non-binding list of suggested measures that countries "should" take',[73] TPP Article 20.16.4 fails to live up the 'requirement under U.S. law for the U.S. government to "seek to enter into international agreements that require measures for the conservation of sharks, including measures to prohibit removal of any of the fins of a shark …"'[74] As the Sierra Club notes, 'The use of "should," rather than "shall," makes clear that this is a hortatory statement, not a binding obligation. And the "as appropriate" loophole would give TPP countries even further latitude to simply disregard this suggested list of conservation measures'.[75]

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[69] Ibid citing *Trans-Pacific Partnership*, above n 7, art 20.16.14.
[70] <http://www.iattc.org>. Members include Canada, Japan, Mexico, Peru and the US.
[71] <https://www.wcpfc.int>. Members include Australia, Canada, Japan, New Zealand, the US and co-operating non-members Mexico and Vietnam.
[72] Schott, above n 26.
[73] Sierra Club, above n 21, 6.
[74] Ibid 6, citing *USC 1826i: Action to Strengthen International Fishery Management Organizations* <http://uscode.house.gov/view.xhtml?req=(title:16%20section:1826i%20edition:prelim> (emphasis added).
[75] Sierra Club, above n 21.

The watered-down language may be due to the vested interests of certain TPP parties in maintaining trade in shark fins and meat. Wold criticised TPP parties Japan, Malaysia, Singapore and Vietnam for not having 'banned shark finning or banned possession, sale, or trade in shark fins'.[76] Moreover, 'Singapore, Malaysia, and Vietnam are among the six nations consuming the "vast majority" of shark fins'.[77]

Contrary to the USTR's claim that the TPP requires parties to '[p]romote the long-term conservation of whales, dolphins, sharks, sea turtles, and other marine species at risk',[78] the TPP environment chapter fails to 'even mention commercial whaling, much less require any prohibitions on the practice—the vague concept of "prohibitions" is merely included in a suggested list of measures that TPP countries "should" implement with respect to "marine mammals"'.[79] While reference is made to 'relevant international agreements to which the Party is party',[80] no mention is made to the obviously relevant *International Convention for the Regulation of Whaling*. Again, this 'missed opportunity to improve conservation outcomes'[81] may be attributable to resistance from Japan, which has 'spent large amounts of tax money to sustain whaling operations'.[82]

Given the weak wording of the TPP's conservation measures, naming and shaming by other TPP members via the TPP Environment Committee apparently constitutes the most decisive action that can be taken against offenders.[83]

4.6 Trade in Flora and Fauna

Unlike the American Bar Association's praise for the TPP for incorporating 'new substantive environmental obligations … which go beyond those in any existing agreement and break new ground in the protection of wildlife,'[84] the Sierra Club points to language that 'offers TPP governments a broad loophole to avoid combating illegal wildlife trade at their "discretion"'.[85] They note, for example, how Article 20.17.5 states that 'each Party shall take measures to combat, and cooperate to

[76] Wold, above n 22, 15.
[77] Ibid., citing Felix Dent and Shelley Clarke, *State of the Global Market for Shark Products* 3 (FAO Fisheries and Aquaculture Technical Paper No. 590, 2015) <http://www.fao.org/3/a-i4795e.pdf>.
[78] USTR, above n 3.
[79] Sierra Club, above n 21.
[80] *Trans-Pacific Partnership*, above n 7, art 20.16.4 [b].
[81] Wold, above n 22, 16.
[82] 'Japan Plans Unilateral Restart to Antarctic Whaling in 2015, Says Official', *The Guardian* (Australia), 20 June 2015 <http://www.theguardian.com/environment/2015/jun/20/japan-plans-unilateral-restart-to-antarctic-whaling-in-2015-says-official> cited in Wold, above n 21, 16.
[83] Schott, above n 26.
[84] Chang, above n 15.
[85] Sierra Club, above n 21.

prevent, the trade of wild fauna and flora that, based on credible evidence, were taken or traded in violation of that Party's law or another applicable law, the primary purpose of which is to conserve, protect, or manage wild fauna or flora'.[86] However, the next paragraph renders the preceding paragraph practically unenforceable by stating:

> 6. The Parties recognise that each Party retains the right to exercise administrative, investigatory and enforcement discretion in its implementation of paragraph 5, including by taking into account in relation to each situation the strength of the available evidence and the seriousness of the suspected violation. In addition, the Parties recognise that in implementing paragraph 5, each Party retains the right to make decisions regarding the allocation of administrative, investigatory and enforcement resources.[87]

The Sierra Club takes issue with the TPP's weak wording, which commits parties to 'combat' but not 'prohibit' illegal trade in flora and fauna.[88] Additionally, the Sierra Club is concerned about how the text 'requires generally weak measures, such as to "exchange information and experiences," and to "undertake, as appropriate, joint activities on conservation issues of mutual interest," while stronger measures like sanctions are listed as options'.[89] The provisions suggested to combat illegal trade of wildlife—including information exchange, joint conservation activities and so on—'are not the type of provisions likely to change enforcement and prosecution of wildlife crimes'.[90]

Likewise, Wold notes how the commitment to 'maintain or strengthen government capacity and institutional frameworks to promote sustainable forest management and wild fauna and flora conservation' [91] fails to obligate TPP parties to improve, and 'some TPP Parties clearly need to improve their capacity to manage forests sustainably and conserve wildlife'.[92]

Conversely, Schott notes that 'TPP obligations go beyond protecting CITES-listed species by requiring each country to take measures aimed at deterring illegal trade and inhibiting the transshipment of illegal products through its territory, regardless of whether or not the species at issue is endangered'.[93]

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[86] *Trans-Pacific Partnership*, above n 7, art 20.17.5.
[87] Ibid art 20.17.6.
[88] Sierra Club, above n 21, 4.
[89] Ibid 4.
[90] Wold, above n 22, 12.
[91] *Trans-Pacific Partnership*, above n 7, art 20.17.4 [b].
[92] Wold, above n 22, 11.
[93] Schott, above n 26. Though certain species may not yet be considered 'endangered', certain prohibitions have been put in place to promote long-term conservation.

4.7 Climate Change

Despite its presence in earlier drafts of the TPP,[94] the phrase 'climate change' is never mentioned, in spite of the fact that all TPP countries are party to the UN Framework Convention on Climate Change.[95] Instead, under Article 20.15 (Transition to Low Emissions and Resilient Economy), the TPP employs 'some odd language that presumably refers to climate change while avoiding any mention of climate change or even carbon dioxide'.[96] Referring instead to the need for 'collective action' to 'transition to a low emissions economy',[97] parties 'shall cooperate to address matters of joint or common interest' such as:

> energy efficiency; development of cost-effective, low emissions technologies and alternative, clean and renewable energy sources; sustainable transport and sustainable urban infrastructure development; addressing deforestation and forest degradation; emissions monitoring; market and nonmarket mechanisms; low emissions, resilient development and sharing of information and experiences in addressing this issue.[98]

The parties also agreed to 'as appropriate, engage in cooperative and capacity-building activities related to transitioning to a low emissions economy'.[99]

Besides the failure to include a timetable for reducing and eliminating fossil fuel subsidies,[100] environmental groups like the Sierra Club were concerned that the TPP text included:

> no safeguards for green jobs programs that could run afoul of the TPP's procurement rules, fossil fuel export restrictions that could violate TPP rules on trade in goods, energy-saving labels that could be construed under the TPP as 'technical barriers to trade,' border adjustment mechanisms that could conflict with TPP rules despite boosting the efficacy of domestic greenhouse gas mitigation, or an array of climate change policies that could be challenged by foreign fossil fuel corporations as violations of the TPP's special rights for foreign investors.[101]

Criticising the TPP for 'yielding little more than hot air' on greenhouse gas emissions and their contribution to global warming, Schott notes the lack of funding dedicated to carrying out the

[94] Wikileaks released Article SS.15 of 24 November 2013, consolidated negotiating text of the TPP environment chapter <https://wikileaks.org/tpp2/static/pdf/tpp-treaty-environment-chapter.pdf> cited in Sierra Club above n 21.
[95] United Nations, *Parties and Observers*, United Nations Framework Convention on Climate Change <http://unfccc.int/parties_and_observers/items/2704.php> cited in Sierra Club, above n 21.
[96] Wold, above n 22, 16.
[97] *Trans-Pacific Partnership*, above n 7, art TPP 20.15.1.
[98] Ibid art 20.15.2.
[99] Ibid art 20.15.2.
[100] Wold, above n 22, 18.
[101] Sierra Club, above n 21, 7.

recommended 'cooperative and capacity-building activities'.[102][103] Schott concludes that '[w]ithout dedicated funding for such activities, the TPP words are unlikely to translate into effective action'.[104]

4.8 Enforcement Mechanisms

In addition to ISDS, other enforcement mechanisms included in the TPP are a citizen suit provision and State-to-State dispute settlement, both of which, since NAFTA, have typically been included in FTAs involving the US.[105] Such enforcement means are considered to have been underutilised and ineffective in other US FTAs.[106] Wold warns that the TPP's 'enforcement mechanisms are likely be even more ineffectual than those of prior agreements'.[107]

4.8.1 Citizen Suit Provision

TPP Article 20.9 requires parties to 'provide for the receipt and consideration of written submissions from persons of that Party regarding its implementation of this Chapter [Environment]'.[108] Unlike submissions to NAFTA's side agreement, the *NAAEC*, written submissions under the TPP are not limited to 'alleging a failure to enforce environmental law effectively'.[109]

Though the TPP allows public submissions that are broader in scope, their effectiveness is hindered by the fact that public submissions are not sent to an independent commission. In the case of the NAAEC, this is the CEC secretariat. As discussed above, NAAEC public submissions are sent directly to the party named in the submission.[110]

Each party devises its own procedures for receipt and consideration of public submissions, which may include requiring that submissions 'explain how, and to what extent, the issue raised affects trade or investment between the Parties'.[111] As Wold explains, 'assessing whether a particular policy has specific impacts on trade or investment is challenging', which is why 'WTO dispute settlement panels

[102] *Trans-Pacific Partnership*, above n 7, art 20.15.
[103] Schott, above n 26
[104] Ibid.
[105] Wold, above n 22, 18.
[106] Centre for International Environmental Law, *The Trans-Pacific Partnership and the Environment: An Assessment of Commitments and Trade Agreement Enforcement*. Centre for International Environmental Law (November 2015) <http://www.ciel.org/reports/tpp_enforcement_nov2015/>.
[107] Wold, above n 22, 18.
[108] *Trans-Pacific Partnership*, above n 7, art 20.9.1.
[109] Wold, above n 22, 19.
[110] Ibid 19.
[111] *Trans-Pacific Partnership*, above n 7, art 20.9.2d.

have refused to impose such a duty on WTO Members as a condition of showing a violation of the General Agreement on Tariffs and Trade'.[112]

To follow up on submissions 'assert[ing] that a Party is failing to effectively enforce its environmental laws',[113] after that party has given a written response, 'any other Party may request that the Committee on Environment (Committee) discuss that submission and written response with a view to further understanding the matter raised in the submission and, as appropriate, to consider whether the matter could benefit from cooperative activities'.[114] The Committee is tasked with establishing the procedures for dealing with submissions, which 'provide for the use of experts or existing institutional bodies to develop a report for the Committee comprised of information based on facts relevant to the matter'.[115] The whole process is in the hands of the parties. However, '[S]ubmitters have no authority to bring even these types of submissions to an independent third party'.[116]

4.8.2 ***State-to-State Dispute Settlement Provisions***

The TPP State-to-State dispute settlement provisions[117] for enforcing the environment chapter, while similar to those in recent US FTAs,[118] 'compound the problem of vague and weak obligations by establishing a multi-step process that makes resort to actual dispute settlement highly unlikely'.[119] If initial consultation between the relevant parties does not resolve the matter, then representatives from the Environment Committee are called in to help resolve the dispute. If the matter still remains unresolved, then the relevant Ministers of the consulting Parties become involved. The fourth and final step is dispute settlement, which may involve the formation of a dispute panel.[120]

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[112] Wold, above n 22, 19 citing the *Trade Act of 1974*, ss 301–310 (Panel Report, WT/DS/152/R, 7.83–7.85) (adopted 27 January 2000).
[113] *Trans-Pacific Partnership*, above n 7, art 20.9.4.
[114] Ibid.
[115] Ibid art 20.9.5.
[116] Wold, above n 22, 20.
[117] *Trans-Pacific Partnership*, above n 7, arts 20.20–20.23.
[118] Centre for International Environmental Law, above n 106. Comparison is made between *Trans-Pacific Partnership*, above n 7, arts 20.20–20.23 and article 18.12 of the United States–Peru TPA, art 17.10 of the Dominican Republic–Central America–United States FTA (CAFTA-DR), and art 20.9 of the United States –Korea FTA (KORUS FTA) (referencing dispute settlement provisions to which the environmental chapter of the agreement applies). However, the CIEL report notes that 'Not all US FTAs with enforcement provisions in environment chapters allow for dispute settlement for all the provisions in the chapter; for example, the dispute settlement process is only available under the Dominican Republic–Central America–United States Free Trade Agreement (CAFTADR) for a violation of terms in the environment chapter when a Party is failing "to effectively enforce its environmental laws through a sustained or recurring course of action or inaction, in a manner affecting trade between Parties." CAFTA-DR Article 17.2.1(a)'.
[119] Wold, above n 22, 20.
[120] *Trans-Pacific Partnership*, above n 7, arts 20.20–20.23.

Although the dispute settlement process related to environment matters under other FTAs involving the US is 'much less intensive for binding dispute settlement than the TPP',[121] still 'no dispute under an environment chapter of any free trade agreement involving the United States has ever reached binding dispute settlement'.[122]

Illustrating the apparent lack of enforcement of environmental provisions in US trade agreements, 'rampant'[123] illegal logging in Peru persisted despite 'standard language, included in the environment chapters of all U.S. FTAs since 2007', including the Peru FTA, 'stating that Peru "shall not waive or otherwise derogate from" its environmental laws "in a manner affecting trade or investment"'.[124] Even after Peru 'explicitly rolled back an array of environmental protections (e.g. stripping the environmental ministry of enforcement powers) in order to attract foreign investment—a clear violation of the supposedly enforceable terms of the Peru FTA',[125] the USTR still failed to respond to requests to take action 'to reverse this weakening of environmental protections'.[126]

The USTR's failure to enforce compliance with environmental provisions highlights the need for an independent oversight body 'with sufficient autonomy to enforce environmental commitments and evaluate the environmental effects of the TPP'.[127] Hoping for a more effective and enforceable agreement, US environmental groups, in their 29 October 2015 letter to Congress, complained about 'the failure of the current dispute settlement system to monitor and address issues of non-compliance'.[128] Proposing 'a new approach to dispute settlement resolution for environment-related complaints,' they proposed the establishment of 'an independent body to continuously monitor countries' compliance with environment chapter obligations, report on best-practices and compliance,

[121] Wold, above n 22, 20 citing NAAEC (2016) NAAEC <http://www.cec.org/content/north-american-agreement-environmental-cooperation> arts 22–36.
[122] Ibid 20.
[123] Sierra Club, above n 21, 7 citing Bob Abeshouse and Luis Del Valle, 'Peru's Rotten Wood' *Al Jazeera* 12 August 2015 <http://www.aljazeera.com/programmes/peopleandpower/2015/08/peru-rotten-wood-150812105020949.html>.
[124] Ibid 7–8 citing Peru TPA (12 April 2006) art 18.3(2), at 18–2 <https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf>.
[125] Ibid 8 citing Environmental Investigation Agency, 'Environmental Rollbacks in Peru Threaten Obligations under U.S.–Peru Free Trade Agreement', 3 July 2014 <http://eia-global.org/news-media/environmental-rollbacks-in-peru-threaten-obligations-under-us-peru-free-t>.
[126] Sierra Club, above n 21, 8 citing a 2 March 2015 letter from leading US environmental organisations to USTR Michael Froman <http://switchboard.nrdc.org/blogs/amaxwell/Letter%20re-%20Action%20on%20Peruvian%20Law%2030230.pdf>.
[127] *The Trans-Pacific Partnership and the Environment: An Assessment of Commitments and Trade Agreement Enforcement*. Centre for International Environmental Law. November 2015 <http://www.ciel.org/reports/tpp_enforcement_nov2015/> 9.
[128] Sierra Club, above n 21.

and bring cases directly to a dispute settlement body if and when it finds non-compliance with environmental obligations'.[129]

4.8.3 ***Investor–State Dispute Settlement***

Considered by many environmental groups to pose 'a major threat to environmental protection and other policies in the public interest',[130] ISDS provisions in the TPP expose states to investor-initiated claims for breach of minimum standard of treatment, prompting some States to back pedal on laws protecting the environment.[131]

'[R]olling-back on the efforts of NAFTA tribunals to narrow the minimum standard of treatment',[132] TPP Article 9.6 on Minimum Standard of Treatment assures investors that their investments will be accorded 'fair and equitable treatment and full protection and security',[133] thereby opening up a party to lawsuits from investors for breaching a party's 'minimum standard of treatment obligation by taking "an action that may be inconsistent with an investor's expectations," provided that this is not the sole basis for the claim'.[134]

As of 1 January 2017, there have been 791 international arbitration cases initiated by investors against States pursuant to international investment agreements (IIAs), as many as 59 related to NAFTA.[135] Of those 59 NAFTA-related cases, 41 per cent were decided in favour of the State, 15 per cent for the investor, with the rest either settled (14 per cent), discontinued (12 per cent) or pending (19 per cent). Nevertheless, it has been reported that as early as 2012, over US$350 million had already been paid out in compensation to corporations over claims relating to natural resource policies, environmental

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[129] Ibid.

[130] Centre for International Environmental Law, above 106, 9.

[131] Ibid 10 citing Public Citizen, *Case Studies: Investor–State Attacks on Public Interest Policies* <http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf>. Several other ISDS cases that threaten to undermine environmental protection are currently pending, including *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12, Request for Arbitration, 31 May 2012; *Lone Pine Resources Inc. v Canada*, ICSID Case No. UNCT/15/2, Initial Procedural Hearing, 9 January 2015; *Infinito Gold Ltd. v Republic of Costa Rica*, ICSID Case No. ARB/14/5, Request for Arbitration, 4 March 2014; *The Renco Group Inc. v Republic of Peru*, ICSID Case No. UNCT/13/1, Constitution of UNCITRAL Tribunal, 8 April 2013. See also International Centre for Settlement of Disputes, Cases, <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?cs=CD27> (accessed 12 November 2015). As of 12 November 2015, there were 213 pending ISDS cases registered on the ICSID database. Of these registered cases, seven are related to water, sanitation and flood protection; nine are related to agriculture, fishing and forestry; 49 are related to electric power and other energy; and 54 are related to oil, gas and mining.

[132] Centre for International Environmental Law, above n 106, 10 citing Stefan Dudas, *Bilcon of Delaware et al. v Canada: A Story About Legitimate Expectations and Broken Promises*, Wolters Kluwer-Arbitration Blog (11 September 2015) <http://kluwerarbitrationblog.com/2015/09/11/brokenpromises-and-legitimate-expectations-bilcon-of-delaware-inc-et-al-v-canada/. See Bernasconi-Osterwalder>.

[133] *Trans-Pacific Partnership*, above n 7, art 9.6.1.

[134] Centre for International Environmental Law, above n 106.

[135] The UNCTAD Investment Dispute Settlement Navigator <http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia>.

protection and health and safety measures.[136] This is despite the fact that 'NAFTA's investment chapter actually features more environmental health and social welfare "safeguards" than that of the TPP'.[137]

The understandable popularity of ISDS among investors is not shared by those concerned with the threat it poses to State sovereignty by 'shifting power from American courts, whose authority is derived from our Constitution, to unaccountable international tribunals'.[138] US Senator Elisabeth Warren (Maine) argues further that 'ISDS would allow foreign companies to challenge U.S. laws—and potentially to pick up huge payouts from taxpayers—without ever stepping foot in a U.S. court'.[139] Some consider the TPP 'carve-out' of the tobacco industry from the ISDS provision[140] an 'implicit recognition that ISDS is capable of promoting dangerous results'.[141]

4.9 Conclusion

Described by the USTR as 'the most robust enforceable environment commitments of any trade agreement in history',[142] the TPP has won much less praise from environmental NGOs. Criticism of the TPP centres on missed opportunities for improving environmental provisions, including weakly worded provisions and loopholes that allow parties to disregard conservation measures, and retention of ineffectual enforcement mechanisms. The TPP has been described as an agreement that should be opposed for the detrimental effect it will have on the environment.[143]

Despite the 10 May 2007 bipartisan agreement reached during the Bush administration to include seven core MEAs as part of the FTA dispute settlement process, only one—CITES—is actually named in the TPP, and even then is watered down by language that directs parties merely to '*endeavor to implement, as appropriate,* CITES resolutions that aim to protect and conserve species whose survival is threatened by international trade'.[144]

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[136] Public Citizen, *Key Elements of Damaging U.S. Trade Agreement Investment Rules that Must Not be Replicated in the TPP* (February 2012) <https://www.citizen.org/sites/default/files/tpp-investment-fixes.pdf>.
[137] Centre for International Environmental Law, above n 106, nn 88, 12 referencing NAFTA arts 1101.4, 1106.6, 1114.2.
[138] Elizabeth Warren, 'The Trans-Pacific Partnership Clause Everyone Should Oppose', *The Washington Post* (25 February 2015) <https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacificpartnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html>.
[139] Ibid.
[140] *Trans-Pacific Partnership*, above n 7, art 29.5 (Tobacco Control Measures).
[141] Centre for International Environmental Law, above n 106, 12.
[142] USTR, above n 3.
[143] Centre for International Environmental Law, above n 106, 13.
[144] *Trans-Pacific Partnership*, above n 7, art 20.17(3)(c) (emphasis added).

Among the five environment concerns addressed by the TPP, even the more strongly worded control on fisheries subsidies is unlikely to positively affect fisheries management given that parties have up to three years to comply. As for IUU fishing, instead of outright prohibiting IUU fishing practices, the TPP merely lists a series of measures 'to help deter trade in products from species harvested from [IUU fishing] practices'.[145] Similarly, conservation measures for sharks, marine mammals and wildlife are reduced to ineffectual, non-binding suggestions. Most striking is the glaring omission of reference to 'climate change', especially given its inclusion in earlier drafts of the TPP. These environmental issues remain to be governed through the dispute settlement mechanisms that exist in relation to each of the particular agreements, but the trade dimensions in the implementation of these agreements cannot necessarily be addressed in these fora, leaving a possible gap in the availability of jurisdiction.[146]

The enforcement mechanisms, including provisions for citizen submissions and State-to-State dispute settlement, are hampered in their effectiveness by cumbersome procedural layers, and the lack of an independent body, not unlike the NAAEC's CEC secretariat. Conversely, the TPP's ISDS provisions are considered 'a major threat to environmental protection and other policies in the public interest'.[147] The understandable popularity of ISDS among investors is not shared by those concerned by the power it grants to unaccountable international tribunals.

After Trump's withdrawal from the TPP soon after becoming President in 2017, one might have been inclined to agree with the Canadian Foreign Affairs Minister Chrystia Freeland, who said that 'the TPP as a deal cannot happen without the United States being a party to it'.[148] However, at the November 2017 Asia-Pacific Economic Cooperation (APEC) summit in Vietnam, the Ministers of 11 countries[149], excluding the US, agreed on the 'core elements' for the resurrected TPP Agreement. Core elements include strict labour and environment standards.[150] Despite the US's departure from the TPP, the TPP is apparently very much alive. However, it remains to be seen how the TPP will be redrafted

[145] Ibid art 20.16.14.
[146] N.Klein, personal communication.
[147] Centre for International Environmental Law, above n 106, 9.
[148] Amelia Hadfield and Rupert Potter, 'Trump, Trudeau and NAFTA 2.0: Tweak or Transformation?' (2017) *The Round Table* 106(2), 213–5 <http://dx.doi.org/10.1080/00358533.2017.1305666>.
[149] Agreement among the 11 remaining States (following the US withdrawl) only came after the earlier abrupt cancellation of a previously scheduled leaders' meeting. Reports indicate that an earlier meeting between Canada's Prime Minister Justin Trudeau and Japan's Shinzo Abe had left certain matters unresolved, prompting Trudeau's subsequent absence from the leaders' meeting and Abe's announcement calling off the meeting. (J.P. Tasker, 'We weren't ready' to close deal: Trudeau defends Canada's actions on TPP' *CBC News* (11 November 2017) http://www.cbc.ca/news/politics/justin-trudeau-tpp-canada-not-ready-apec-1.4398824.
[150] J. P. Tasker, 'TPP Partners Reach Agreement on "Core Elements" of Pacific Trade Deal, Canada says' *CBC News* (10 November 2017) <http://www.cbc.ca/news/politics/tpp-apec-summit-talks-1.4396984>.

in line with its declared core aim to achieve stricter environmental standards. Clearly, discussion of how the TPP currently addresses environmental concerns will be very much on the minds of drafters and environmentalists looking ahead to a revitalised TPP.[151]

[151] The resurrected TPP, renamed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) was signed on 8 March by 11 nations – Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. One of the signatories, the Canadian government, describes the chapter on the environment as 'Canada's most ambitious environment chapter in a free trade agreement to date' (http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/sectors-secteurs/environment-environnement.aspx?lang=eng). Similarly, New Zealand insists that given the inclusion of a number of exclusions and reservations, the CPTPP will not interfere with New Zealand's right to regulate to protect the environment (https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/explaining-cptpp-2/#labour).

Chapter 5: THE DEBATE OVER INVESTOR–STATE DISPUTE SETTLEMENT: WHO WINS?

5.1 Introduction

ISDS provisions in many BITs and trade agreements, including NAFTA and TPP[1], allow foreign investors to challenge government measures related to environmental, health and safety regulations that investors claim to violate treaty obligations into which the State willingly entered for the protection of investors. Considering its 40-year experience and inclusion in over 3,000 BITs and other multilateral treaties, Bernardini questions why the ISDS system has apparently fallen into disfavour among States.[2] One reason given for this change of attitude is that ISDS has come to be used against not just developing States, 'but progressively [against] exporters of investments and investors of varied nationalities'.[3] As discussed in this chapter, awards favouring investors in their claims against States are considered a threat to efforts at securing a safe and healthy environment.

The nature of the ongoing debate over the advantages and disadvantages of ISDS is evident from two letters written by law professors on different sides of the argument and addressed to congressional leaders and the US Trade Representative.

In the first letter (dated 30 April 2015),[4] signed by more than one 100 law professors and released by the Alliance for Justice (AFJ),[5] ISDS is described as 'a system built on differential access', providing 'a separate legal system available only to certain investors who are authorized to exit the American legal system'.[6] Concerned by the prospect of ISDS's inclusion in the TPP, the drafters of the AFJ letter took particular exception to the way in which ISDS provisions grant foreign investors legal rights 'not offered to nations, foreign investors or civil society groups alleging violations of treaty

[1] Subsequent to the withdrawal from TPP by the US, the re-named TPP11 retained the TPP's ISDS provisions 'except for two narrow improvements which only apply if investors have specific contracts or authorisations with governments.' http://theconversation.com/the-trans-pacific-partnership-is-back-experts-respond-87432

[2] Piero Bernardini, 'Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties' Interests' ICSID Review, Foreign Investment Law Journal 1, 38–57 (February 2017) <https://doi.org/10.1093/icsidreview/siw035> [the copy referred to here is the advance copy published December 24, 2016] 7-8.

[3] Bernardini, above n 1, 8 citing Radicati di Brozolo, 'Where is Investor–State Arbitration Heading? Reflections on the Debate Over EU Investor Protection Agreements' *International Arbitration under Review-Essays in Honor of John Beechey* (ICC Publication No 772E, 2015) 335.

[4] Alliance For Justice (AFJ), *ISDS Letter* <http://bit.ly/1KX6WYB>.

[5] The AFJ includes more than 120 national, regional and local organisations concerned with civil rights, human rights, and consumer rights <https://www.afj.org/about-afj/member-organizations>.

[6] AFJ, above n 3.

obligations'.[7] Under ISDS provisions, only foreign investors may have their claims heard by an ISDS arbitral panel whose decisions not only 'challenge a broad range of policies aimed at protecting the environment, improving public health and safety, and regulating industry', but also cannot be appealed to a court.[8] Concluding their letter, the drafters write 'ISDS weakens the rule of law by removing the procedural protections of the legal system and using a system of adjudication with limited accountability and review. It is antithetical to the fair, public and effective legal system that all Americans expect and deserve'.[9]

Responding to the letter circulated by the AFJ, the signatories (professors and scholars of international law, arbitration and dispute settlement) acknowledged that 'investment treaty arbitration (ITA), which is sometimes referred to as investor–State dispute settlement (ISDS)', like all systems of justice, is capable of improvement. However, they argue:

> Contrary to the assertions contained in the AFJ Letter, investment treaty arbitration does not undermine the rule of law. It ensures that where a right is given, a remedy is also provided. It permits foreign investors to hold host states to the obligations they have undertaken in their treaties by means of a quasi-judicial process, and it also offers a forum for states to vindicate their policy choices. Indeed, it is useful to recall one of the alternatives: gunboat diplomacy, whereby investment disputes were resolved by the use of force, was not unknown even in the twentieth century.[10]

ISDS allows foreign investors to challenge government measures related to environmental, health and safety regulations that violate treaty obligations into which the State willingly entered for investors' protection. The letter's drafters argue that this does not represent 'an abdication of sovereign responsibility' nor does it undermine the rule of law, as 'a state can be penalized for those regulations only if their acts are arbitrary, discriminatory, or otherwise violate the investment guarantees to which states have previously agreed'.[11]

While the drafters note the tribunal's decision in *SD Myers v Canada* in favour of the claimant against Canada, they are quick to add that Canada's ban on the export of PCB waste was not to protect the

[7] Ibid.
[8] The drafters of the AFJ letter acknowledge 'only limited—private—review through a process called annulment that does not permit decisions to be set aside based even on a—manifest error of law' [*Impregilo S.P.A. v Argentine Republic*, ICSID Case No. ARB/07/17 (Annulment Proceeding) 24 January 2014, at 132 <http://www.italaw.com/sites/default/files/case-documents/italaw3044.pdf>.
[9] AFJ, above n 3.
[10] Open letter challenging AFJ letter about ISDS (2015) <http://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf>.
[11] Ibid.

environment 'but to protect Canada's PCB waste disposal industry, as acknowledged by Canada's Minister for the Environment in a speech that she gave to the House of Commons'.[12]

However, not all decisions necessarily favour investors. The drafters cite data from the UNCTAD that shows 'that the proportion of State wins has been larger than the proportion of investor wins'.[13] As a case in point, the US beat the challenge in the *Methanex* case over California's ban on the gasoline additive MTBE 'because the ban addressed a legitimate environmental concern and did not violate the underlying investment treaty (NAFTA) despite the fact that the ban negatively affected the company's profits'.[14]

5.2 Concerns About Arbitrators' Impartiality and Pro-Investor Bias

Most arbitration panels comprise three arbitrators, two of whom are chosen by the respective parties to the dispute and a third, the President, typically selected by the two party-appointed arbitrators, or 'a previously agreed appointing power such as the World Bank or International Chamber of Commerce'.[15] Arbitrators 'shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgement'.[16] The 2010 UNCITRAL Rules similarly stipulate that '[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence'.[17] The *2014 IBA Guidelines on Conflict of Interest in International Arbitration* also serve to identify potential conflicts of interest.[18]

The Corporate Europe Observatory identifies what it refers to as 'an elite 15'. These arbitrators 'have captured the decision making in 55% of the total investment treaty cases known today'.[19] Most are men from 'the rich North' who 'enjoy close links with the corporate world and share business'

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[12] Ibid.
[13] Ibid citing UNCTAD, *World Investment Report 2014: Investing in the SDGs: An Action Plan Towards a New Generation of Investment Policies*, 126, UN Doc UNCTAD/WIR/2014 (observing that of 274 known completed cases, 'approximately 43 per cent were decided in favour of the State and 31 per cent in favour of the investor. Approximately 26 per cent of cases were settled').
[14] Ibid.
[15] Corporate Europe Observatory 'Chapter 4: Who Guards the Guardians? The Conflicting Interests of Investment Arbitrators' <https://corporateeurope.org/trade/2012/11/chapter-4-who-guards-guardians-conflicting-interests-investment-arbitrators>.
2012.
[16] *ICSID Convention* article 14(1) <https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf>.
[17] EFILA 2015, 19 citing art 12(1) of the 2010 UNCITRAL Rules; article 10(1) of the 1976 UNCITRAL Rules.
[18] Ibid 19 citing *2014 IBA Guidelines on Conflict on Interest in International Arbitration* <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx, accessed 16 February 2015>.
[19] Corporate Europe Observatory, above n 14.

viewpoint in relation to the importance of protecting investors' profits'.[20] The Corporate Europe Observatory sees 'a dark irony' in the fact that arbitrators with such close ties to the corporate world are asked to deliberate on 'issues that arise out of governments' implementation of policies to defend the public interest'.[21]

Hufbauer claims such criticisms against arbitrators 'neglect to mention that arbitrators are selected from a large panel of qualified attorneys and that each side has several opportunities to remove candidates with a potential bias'.[22] However, as noted in the *UNCTAD International Investment Arbitration Issues Note*, 'Reform of Investor–State Dispute Settlement: In Search of a Roadmap', '[a]n increasing number of challenges to arbitrators may indicate that disputing parties perceive them as biased or predisposed'.[23]

However, case-based statistics cast doubt on the perception that arbitral panels necessarily operate with a pro-investor bias. According to International Centre for Settlement of Investment Disputes (ICSID) Caseload statistics, as of June 2017, 46 per cent of claims were upheld with awards in part or in full. In 25 per cent of cases, jurisdiction was declined and 28 per cent were dismissed. It has been argued that the system of investment arbitration is viewed as a sword for foreign investors and a shield for host States.[24] Investment tribunals have routinely dismissed counter claims filed by the host State. However, breaking precedent in 2012, the tribunal in *Goetz v Republic of Burundi* (2012) considered Burundi's counterclaim against the claimants for 'their bank's failure to honour the terms of a local operation certificate'.[25] According to this unprecedented step, the presumption that States may issue environmental measures tainted by other illegitimate purposes, would be refuted by this procedural guarantee for the State itself. Tribunals would be able to balance the situation from both equivalent perspectives.[26] Sweify notes that the tribunal members' civil rather than common law background may have contributed to their lenience in accepting the counterclaim.[27]

[20] Ibid.
[21] Ibid.
[22] G. C. Hufbauer, 'Investor–State Dispute Settlement' in C. Cimino-Isaacs and J. Schott (eds) *Pacific Partnership: An Assessment (Policy Analyses in International Economics)* (The Peterson Institute for International Economics, 2016).
[23] UNCTAD, 'Reform of Investor–State Dispute Settlement: In Search of a Roadmap' No. 2, 26 June 2013 <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013dr_en.pdf> 4.
[24] M. F. Sweify, 'Investment-Environment Disputes: Challenges and Proposals' (2015) 14 *DePaul Business & Commercial Law Journal* 205.
[25] Ibid 205 citing *Goetz v Republic of Burundi* (2012) ICSID Case No. ARB/01/2, 127.
[26] Sweify, above n 23, 205.
[27] Ibid 205.

Swiefy argues that the possibility of accepting States as claimants in counterclaims 'would be a great step of balancing the conflicting interests'.[28] Sweify contends that 'the arbitral tribunals still deal with the investment–environment disputes on the basis that protecting the investment is the general rule while protecting the environment is just an exception to this general rule'.[29] Favouring investors' rights over environmental protection concerns was clearly evident in the *Metalclad* tribunal's decision to hold 'an environmental measure, ecological decree, as an expropriatory measure'.[30] This decision established 'a trend of using Chapter 11 as a tool of favoring MNE's potential profits over the existing legitimate exercise of sovereignty by governments and denying the public its uninhibited right to sound environment'.[31]

Beharry and Kuritzky (2015) suggest redrafting the dispute resolution clause in an investment treaty to allow States to put forward counterclaims against investors, thereby 'impos[ing] liability for the externalities associated with investment activity, such as breaches of human rights or harm to the environment'.[32] Although investors would not be among the signatories to an investment treaty, they still might be subject to counterclaims if the treaty clearly indicated that 'disputes' refers to both claims and counterclaims, or 'include consent to the submission of "any disputes" or "all disputes"'.[33] They also suggest States modify their BIT models to include exception clauses, thereby allowing greater flexibility to designate certain subjects as immune from investment claims. These might include such environmentally sensitive subjects as endangered species, biodiversity, toxic chemicals and air pollution.[34]

5.3 Concerns About Inconsistencies in Interpretation

The *UNCTAD International Investment Arbitration Issues Note*, 'Reform of Investor-Sate Dispute Settlement: In Search of a Roadmap'[35] criticises the arbitral decisions that 'have exposed recurring episodes of inconsistent findings'.[36] These decisions include 'divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases

[28] Ibid 136.
[29] Ibid 187.
[30] Ibid 188.
[31] Ibid 189 citing Lucien J. Dhooge, 'The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United Mexican States' (2001) 10 *Minnesota Journal of Global Trade* 209, 213.
[32] C. L. Beharry and M. E. Kuritzky, 'Going Green: Managing the Environment Through International Investment Arbitration' (2015) 30 *American University International Law Review* 383, 407.
[33] Ibid 408.
[34] Ibid 405–6.
[35] UNCTAD, above n 22.
[36] Ibid 3.

involving the same facts'.[37] Such inconsistency has resulted in 'uncertainty about the meaning of key treaty obligations and lack of predictability of how they will be applied in future cases'.[38] While arguing the importance of consistency, Karton acknowledges that an 'overweening emphasis on consistency' not only fails to take into consideration significant contextual factors, but 'might also stifle healthy evolution of the law by inhibiting innovation among ISDS tribunals'.[39]

Ragnwaldh et al. of the European Federation for Investment Law and Arbitration (EFILA), a Brussels-based non-profit think tank, disputes the notion that tribunals' divergent interpretations indicate a failure in the system, but are instead the result of 'divergent realities'.[40] As noted by the tribunal in *Methanex,* interpretation is dependent on a number of factors:

> As to the third general principle, the term is not to be examined in isolation or in abstracto, but in the context of the treaty and in the light of its object and purpose. One result of this third general principle, being relevant to Methanex's first argument on GATT jurisprudence and Article 1102 NAFTA, is that, as noted by the International Tribunal for the Law of the Sea in The MOX Plant case (as also applied in The OSPAR case): 'the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux preparatoires'.[41]

However, at issue is not simply differences in interpretation, which might be explained with reference to the wording of the agreement. Instead, the inconsistencies may be indicative of 'erroneous decisions'.[42] A way to effectively review arbitrators' decisions and annul or correct an award that results from an erroneous decision is lacking. Highlighting the grounds for annulment enumerated in Article 52(1) of the ICSID Convention and applied by the ad hoc committee on the application for annulment of the panel's decision in *CMS Gas Transmission Company v The Republic of Argentina,* the UNCTAD report emphasises the fact that the grounds for annulment do not allow for 'manifest errors of law'.[43] Rather, they allow annulment only on what could be considered procedural grounds.

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[37] Ibid 3.
[38] Ibid 3.
[39] J. Karton, 'Lessons from International Uniform Law' in J. E. Kalicki and A. Joubin-Bret (eds) *Reshaping the Investor–State Dispute Settlement System: Journeys for the 21st Century* (Hotei Publishing, 2015).
[40] EFILA, above n 16, 13.
[41] Ibid citing 37 *Methanex Corporation v United States of America,* Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) para 16 <http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf>. The MOX Plant case (*Ireland v United Kingdom*), Order on Provisional Measures (3 December 2001) para. 51 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf>.
[42] UNCTAD, above n 22, 3.
[43] Ibid 3. The grounds identified included '(a) improper constitution of the arbitral Tribunal; (b) manifest excess of power by the arbitral Tribunal; (c) corruption of a member of the arbitral Tribunal; (d) serious departure from a fundamental rule of procedure; or (e) absence of a statement of reasons in the arbitral award'. *CMS Gas Transmission Company v The*

Karamanian states the following with respect to the need for oversight of the arbitration process:

> Going forward, the key to ensuring that democratic values are not undermined is for courts to appreciate that within the existing legal regime there is room for oversight of the arbitration process. Second, in exercising their oversight authority, courts should send clear signals to the parties and arbitrators regarding issues of potential public concern. The process should be understood as ongoing as opposed to stagnant. With these guides, the public and private could be better harmonized.[44]

Alternatively, Bernardini suggests the lack of consistency in arbitral decisions might be alleviated by making decisions public. It could be further alleviated 'by providing more rigorous definitions of substantive protection standards such as FET, "full protection and security" or "most favoured-nation treatment" to reduce the margin of possible disagreement among decisions on the same or similar issues'.[45]

5.4 Concerns About Lack of Transparency

Transparency of arbitral proceedings has increased with the adoption of the *2014 UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration*[46] and public access to ICSID's 'comprehensive database of pending and past cases that provide information, such as the names of the parties, their representatives and the outcome of concluded proceedings'.[47]

Third-party participation, while always available through various means, whether through publishing documents or petitioning parties to the dispute, became a more significant force in the dispute settlement proceedings with the allowance of amicus curiae written submissions.[48] NAFTA Article 1128 allows submissions by a non-disputing State party. Third-party amici may introduce issues not

Republic of Argentina (25 September 2007) ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the application for annulment, paras. 97, 127, 136, 150, 157–159.

[44] S. L. Karamanian, 'Courts and Arbitration: Reconciling the Public with the Private' (2017) 9 *International Arbitration Law Review* 65, 15.

[45] Bernardini, above n 1, 16. Bernardini notes that this approach has been followed in the following investment and trade agreements: CETA arts 8.6, 8.7; EU–Singapore FTA arts 9.3, 9.4; EU–Vietnam FTA art 14.

[46] *UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration* (effective 1 April 2014). The rules 'cover publication of information and documents relating to the arbitration proceedings, including orders, decisions and awards as well as submissions by a third person and by a non-disputing party to the treaty on issues of treaty interpretation. Hearings under the Rules are public' cited in Bernardini, above n 1, 17.

[47] Bernardini, above n 1, 17.

[48] Beharry and Kuritzky, above n 31, 414. They also cite the discussion of other forms of third-party participation in Eugenia Levine's 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29 *Berkeley Journal of International Law* 200, 201.

raised by the parties to the dispute, effectively 'prevent[ing] disputing parties from acting as gatekeepers of specialised knowledge'.[49]

Sweify describes the *Methanex* Tribunal's decision to allow amicus input as 'a significant win for the environmentalists'.[50] Though third-party amicus-based participation in investment disputes is likely to increase transparency in the proceedings, Sweify argues it could also lead to increased costs[51] and re-politicisation.[52]

5.5 Concerns That ISDS Allows Foreign Investors to Bypass National Judicial Systems

Allowing foreign investors to bypass the State's national judicial system is considered necessary to attract investors who may be reasonably concerned about the impartiality and independence of national courts, particularly in countries with less political stability.[53] ISDS allows foreign investors a non-politicised, neutral forum to resolve their disputes.[54] Moreover, as noted in chapter two, given the failure of national courts to hold MNCs to account for environmental failures, this issue of bypassing national judicial systems may not prove to be as detrimental to efforts at improving environmental protection as some might suppose.

Rejecting 'the perception that dispute settlement rules give disgruntled multinational foreign companies the ability to bypass national courts and bring claims against states before international arbitral tribunals',[55] Ragnwaldh et al. insist that ISDS provisions in EU trade agreements 'should be seen not as a parallel, or independent system of justice, but as a vital complement to the national judicial systems of EU member states'.[56]

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[49] Ibid 416.
[50] Sweify, above n 23, 194.
[51] Ibid 195.
[52] Ibid 195 citing Valentina S. Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law' (2011) 42 *Columbian Human Rights Law Review* 797, 885.
[53] EFILA, above n 16, 31.
[54] Ibid 31.
[55] J. Ragnwaldh, N. Lavranos, B. Blasikiewicz. 'Treaty Troubles' 5 May 2015. https://www.cdr-news.com/categories/arbitration-and-adr/5536-treaty-troubles?newslettercrmid=824214ce-d73e-e211-ad7f-b8ac6f1693a8.
[56] Ibid.; In line with the EU's efforts toward finding multilateral solutions to issues involving trade and investment, including dispute settlement, the initiative for a multilateral investment court 'aim[ed] at setting up a framework for the resolution of international investment disputes that is permanent, independent and legitimate; predictable in delivering consistent case-law; allowing for an appeal of decisions; cost-effective; transparent and efficient proceedings and allowing for third party interventions (including for example interested environmental or labour organisations). (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:493:FIN)

Sweify acknowledges the need for tribunals to act as 'supranational adjudicators charged with reviewing a state's regulatory policy'[57] especially when such measures are 'a pretext to interfere in the operation of the foreign investments through expropriation without any judicial review over such interference except of the judicial system of the state itself which most probably would be biased'.[58] Nevertheless, 'distinguish[ing] between legitimate [environmental] measures and arbitrary, discriminatory or expropriatory measures … is not an easy task due to the absence of clear guidance whether through IIAs [international investment agreements] or customary international law'.[59]

5.6 International Investment Court

Piero Bernardini, Professor of Law (Arbitration) at Luiss-Guido Carli University, Rome, in his article 'Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties' Interests', discusses the proposal for an international investment court (IIC) originally proposed in a concept paper transmitted to the European Parliament and the Council on 7 May 2015,[60] whose move 'from ad hoc arbitration towards an international investment court'[61] subsequently recommended via the Lange Report (2015) and approved by the European Parliament for recommendation to the EC:

> to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives.[62]

Rejecting the current ISDS system, the EC adopted a proposal for the establishment of the International Court System. This has since been included in the *Canada Comprehensive Economic and Trade Agreement* (CETA) and the *EU–Vietnam FTA*,[63] both awaiting approval by the European Council and ratification by the European Parliament.

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[57] Sweify, above n 23, 185 citing Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 *Journal of Transnational Law* 775, 826.
[58] Sweify above n 23, 185.
[59] Ibid 186 citing David A. Gantz, 'Potential Conflicts Between Investor Rights and Environmental Regulation Under Nafta's Chapter 11' (2001) 33 *George Washington International Law Review* 655–6.
[60] Bernardini, above n 1, 2 citing 'Investment in TTIP and Beyond: The Path for Reform: Concept Paper' (2015) <http://trade.ec.europa.eu/doclib/html/>.
[61] Ibid
[62] Ibid 3 [European Parliament Resolution of 8 July 2015 Containing the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership, Doc 2014/2228(INI) (2014), para 2(d)(xv)].
[63] Ibid 4 citing CETA ch 8, s F: Resolution of investment disputes between investors and States, arts 8.18–8.45; EU–Vietnam FTA ch 8, s 3: Resolution of Investment Disputes, arts 1–34, and Annexes I, II, III and IV.

Sweify describes the IIC as possibly 'a step in the right path to harmonize the investment related disputes, including the environment-investment disputes'.[64] Such a body 'would consider the relevant environmental issues on equal footing with the investment issues which precludes the automatic superiority of the investment issues over environmental issues by the tribunals that deals with such disputes from the perspective of investment rules not environmental ones'.[65]

Bernardini explains that the proposed two-tier ICS consists of a first instance tribunal and an appellate tribunal.[66] Once a request has been made by the investor for 'consultations' based on the alleged breach by the EU or a member State of an obligation under the treaty,[67] settlement must be reached within 90 days of the request. If it is not, the stage is set for the case to be heard by three members selected from the 15 members of the full tribunal:

> Five of which are appointed by the EU from nationals of the Member States, five by the State party to the treaty among its nationals and five among nationals of third States, provided that all of them possess the qualifications required in their respective countries for appointment to a judicial office and demonstrate expertise in public international law. In particular, in international investment law, international trade law and the resolution of disputes under international investment or trade agreements.[68]

Appeals against a Tribunal's award are considered by the appellate tribunal whose award is final and binding on the disputing parties.[69]

Bernardini believes that replacing ISDS with the ICS would 'diminish investors'' protection without appreciable advantages with respect to ISDS's safeguarding of States' regulatory powers, better consistency and predictability of decisions and greater transparency of arbitral proceedings.[70] It remains to be seen whether the promises of greater transparency and a 'more coherent and fair system'[71] will be realized with the establishment of the EU's International Investment Court or the newly proposed Multilateral Investment Court.

[64] Sweify, above n 23, 203.
[65] Ibid 204.
[66] Bernardini, above n 1, 4.
[67] Ibid 4.
[68] Ibid 5 citing CETA art 8.27 (1–4).
[69] Ibid 6.
[70] Ibid 19.
[71]

5.7 The Environment as a 'Special Case'

One major concern shared by advocates for environmental protection is that States will back down on implementation and enforcement of environmental regulations for fear that such regulations may incur significant costs at the hands of arbitral panels who may decide to rule in favour of foreign investors. Responding to criticism that ISDS has a chilling effect on environmental legislation, EFILA argues that it is 'impossible to find out which draft legislation has been withheld or whether ISDS-risks, more than e.g. risks to domestic legal procedures by nationals, constituted the determining factor in chilling proposed legislation'.[72] Since concerns related to NAFTA about a race to the bottom never materialized, perhaps fears of a chilling effect on environmental regulations are similarly pure speculation. Nevertheless, it is not unreasonable to suspect that there might be some reluctance on the part of States to implement environmental regulations which could potentially incur significant costs.

However, in relation to environmental protection, should regulation be 'a "special case" militating towards a greater measure of deference'?[73] The doctrines of 'police powers' and 'margin of appreciation' offer a perspective on dealing with 'the gray area between public international law, in which qualified deference to the State exists, and international commercial law, in which public elements of a dispute are not typically addressed'.[74]

International law gives States police powers to adopt and enforce regulations to protect the environment. For example, the tribunal in the *Methanex* case 'recognized the State's police powers and held that the contested MTBE ban was a "lawful regulation and not an expropriation" '.[75] However, Beharry and Kuritzky assert 'it somewhat limited the defense by noting that compensation would be required if "specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation" '.[76]

Margin of appreciation, as put forward by the ECtHR, 'leave[s] to States a margin of appreciation to interpret and apply laws in force so long as they do so reasonably and in good faith'.[77] Beharry and

[72] EFILA, above n 16, 26.
[73] Beharry and Kuritzky, above n 31, 428.
[74] Ibid 428.
[75] Ibid 423 also citing *Methanex Corp v United States* (2005) Final Award of the Tribunal on Jurisdiction and Merits, Part II Ch. D P 15 (UNCITRAL) <http://www.state.gov/documents/organization/51052.pdf>.
[76] Ibid 423 also citing *Methanex Corp v United States* (2005) Final Award of the Tribunal on Jurisdiction and Merits, Part IV Ch. D P 7 (UNCITRAL) <http://www.state.gov/documents/organization/51052.pdf>.
[77] Ibid nn 163, 424.

Kuritzky cite consideration of the doctrine of margin of appreciation in a number of investment cases.[78] The difference between police powers and margin of appreciation is that:

> police powers are based on the State's sovereign right to regulate whereas the margin of appreciation applies a level of review to the policy assessment of state agencies akin to administrative law. Accordingly, police powers implicate state liability under legal rules while the margin of appreciation is applied to factual analysis without directly impacting a State's liability to pay compensation.[79]

Closely associated with margin of appreciation is the general legal principle of proportionality, which 'refers to weighing a State's implementation of its policy goals against the protected rights of an investor'.[80] For example, in the *Tecmed* case, the tribunal assessed 'whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality'.[81]

5.8 The Way Forward

Without ISDS provisions, investments are less likely to be forthcoming from investors concerned whether their cases will get a fair hearing in national courts. Instead of doing away with ISDS provisions, this thesis argues for improving ISDS by providing greater transparency and better consistency (see sec 5.4 above).

Admittedly, there is no simple solution to resolving the tension between investors and those concerned with protecting our environment, whether they are States or other members of the public. As a way forward, Karamanian proposes that tribunals apply the following four basic rules in their decision-making:

> (1) jus cogens norms should trump obligations under an IIA if they are raised defensively while they could be relevant if raised offensively by the investor; (2) a state's obligations

[78] See, e.g., *Frontier Petrol. Services Ltd v Czech Republic* (2010) Final Award, 527 (Perm. Ct. Arb) <http://www.italaw.com/ documents/FrontierPetroleumv.CzechRepublicAward.pdf>. ('States enjoy a certain margin of appreciation in determining what their own conception of international public policy is.'); *Electrabel S.A. v Republic of Hungary* (2012) ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 8.35 (UNCITRAL) <https://icsid.worldbank.org/ICSID/FrontServlet?requestType= CasesRH&actionVal=showDoc&docId=DC2853_En &caseId=C111>. ('Hungary would enjoy a reasonable margin of appreciation in taking such measures before being held to account under the ECT's standards of protection.'); Cont'l Cas Co v Argentine Republic, ICSID Case No. ARB/03/09, Award, P 181 (UNCITRAL Sept. 5, 2008) (Kluwer Law Int'l) (affirming a State's right to apply a 'significant margin of appreciation' for measures taken during emergencies); Beharry and Kuritzky, above n 31, nn 164, 424.

[79] Ibid 425.

[80] Ibid 426.

[81] *Tecnicas Medioambientales Tecmed S.A. v United Mexican States* (29 May 2003) ICSID Case No. ARB(AF)/00/2, Award, 66, 19 ICSID Rev. FILJ 158 (2004) 122, cited in Beharry and Kuritzky, above n 31, 427–8.

> under the United Nations Charter should trump obligations under an IIA, although this rule is tempered when the mandated state conduct in itself constitutes a human rights violation; (3) the treaties should be interpreted using the standard of VCLT, Article 31(1) to give full effect to their purpose as reflected in the preambles and exceptions and also in light of customary international law; and (4) human rights aspects of the investment protection measures in the treaties should be recognized and given effect.[82]

The first rule refers to '*jus cogens* norms', which Karamanian explains is 'one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted"'[83] In other words, investments in support of torture, trafficking of human organs, slavery and so on, that conflict with the most basic rules of human rights, are not protected. The second rule is based on the UN Charter, Article 103, according to which 'a State's obligation to respect a human rights norm reflected in an obligation under the Charter would be superior to a Sate's conflicting obligation under an investment treaty'.[84] The third rule refers to 'VCLT [Vienna Convention on the Law of Treaties], Article 31(1), which instructs a tribunal to interpret the IIA "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"'.[85] Moreover, Karamanian clarifies 'the context of the treaty includes its text, preamble, and annexes'.[86] Along these lines, Beharry and Kuritzky (2015) suggest States modify their BIT models to include 'preambular language that promotes environmentally responsible investment in tandem with foreign direct investment objectives either explicitly or by reference to other international corporate social responsibility or environmental standards, such as the Voluntary Principles, U.N. Global Compact, and Rio Declaration'.[87] The fourth rule 'simply urges the tribunal to address human rights when they are affected by the dispute at issue and give the appropriate weight to them in a reasoned manner'.[88]

Speaking at the Roundtable on *Challenges and Future of Investment Arbitration* in Warsaw in May 2015, Annette Magnusson, Stockholm Chamber of Commerce secretary, commented 'If we can combine treaty terms that truly reflect the role played by private investment for a better environment, and the existing enforcement mechanisms of international arbitration, I believe true progress for the environment could be achieved on a global level'.[89] The impact of political changes in the US and

[82] S. Karamanian, 'The Place of Human Rights in Investor–State Arbitration' (2013) 17.2 *Lewis & Clark Law Review* 435–6 <https://law.lclark.edu/live/files/14084-lcb172art2karamanianpdf>.
[83] Ibid 436 citing VCLT, art 53.
[84] Ibid 438.
[85] Ibid 442 citing VCLT, art 31(1).
[86] Ibid 442.
[87] Beharry and Kuritzky, above n 31, 409.
[88] Karamanian, above n 81, 445.
[89] Ibid

Europe on the development of both treaty terms and the role of international arbitration in settling investor–State disputes is uncertain. Dattu and Pavic (2017) report that in the coming renegotiations of NAFTA, Canada and the US have prioritised reformation of the dispute settlement provisions in Chapter 11.[90] Stating that 'strong dispute settlement systems make good trading partners',[91] Canada's Foreign Affairs Minister, Hon. Chrystia Freeland, presenting Canada's perspective on modernizing NAFTA, argues for a more progressive agreement whose Investor-State Dispute Settlement process works 'to ensure that governments have an unassailable right to regulate in the public interest.'[92] A progressive NAFTA is one with 'enhanced environmental provisions' and 'supports efforts to address climate change'.[93] Reminding Canada's negotiating partners that hockey is Canada's national sport, the Minister was clearly signalling Canada's intended stance in upcoming negotiations with partners whose priorities may be different from Canada's own.

[90] Riyaz Dattu and Sonja Pavic, *Canada Seeks to Reform NAFTA's Investor State Dispute Settlement Chapter* (Osler, Hoskin & Harcourt LLP, 2017) <https://www.osler.com/en/resources/cross-border/2017/canada-seeks-to-reform-nafta-s-investor-state-disp>.

[91] Address by Foreign Affairs Minister on the modernization of the North American Free Trade Agreement (NAFTA), August 14,2017, https://www.canada.ca/en/global-affairs/news/2017/08/address_by_foreignaffairsministeronthemodernizationofthenorthame.html

[92] Ibid

[93] Ibid

Chapter 6: CONCLUSION—IS THE US LEADING THE WORLD ON A RACE TO THE BOTTOM?

The tension between the right of investors to have their investments protected from government expropriation and the right of the public to a safe environment has persisted despite an evolving backdrop of legislative, judicial and arbitral attempts to resolve what has been identified as a human rights issue. On the one side is 'the green lobby', which is raising the alarm against what it considers the irresponsibly detrimental actions of greedy investors which have adversely affected the right of every citizen to live in a safe and clean environment. On the other side are investors, who were most likely persuaded to relocate their investments by the very governments that introduced the environmental measures that adversely affected their right to property. NAFTA and Trans Pacific Partnership (TPP) raised hopes that the pendulum had finally begun to swing in favour of environmental concerns, although their Investor-State Dispute Settlement (ISDS) provisions suggested otherwise.

Looking back, the decisions of US courts in the 1980s–90s reflected their reluctance to hold MNCs accountable for causing environmental harm. The 1984 case filed in the US against Union Carbide Corporation, for the accidental leak of lethal gas in Bhopal (India), was dismissed on the ground of *forum non conveniens*.[1] Even when the incident resurfaced in 1999, as *Bano v Union Carbide Corp*, over health consequences resulting from ongoing pollution and contamination at the plant site, it was dismissed again in 2000.[2] Moreover, as noted in Chapter 1, not only were US courts apparently reluctant to apply IEL, but even IEL-based arguments before a US court could prove counterproductive to a plaintiff's case. The inhospitable response of US courts to the claims of plaintiffs against MNCs accused of causing environmental harm prompted interest in arbitration as an alternative to resolving environmental disputes involving the violation of the rights of individuals by MNCs.

Additionally, during the 1990s, developing countries competed against each other to attract investment from MNCs, hoping such investments would boost their struggling economies. MNCs sought security for their investments in treaties, the provisions of which accomplished that aim,

[1] Elisa Morgera, *Corporate Accountability in International Environmental Law* (Oxford University Press, 2013) 123; *Union Carbide Corporation v Union of India* (1989) Civil Appeal Number 3187–88 of 1988, order dated 14 February 1989.
[2] *Bano v Union Carbide Corp* (SDNY 28 August 2000) No 99 Civ 11329, 2000 WL1225789.

whether through the addition of an umbrella clause endeavouring to protect all commitments made by the host State, or a stabilisation clause securing the terms of a contract against changes to the law.

Arbitral tribunals, by helping secure protection for investments, even at the expense of environmental protection, and through their pro-investment interpretations, expanded the substantive law relating to the protection of investments. However, at the turn of the century, there were indications that the pendulum was swinging away from tribunal rulings that favoured inflexible investment protection at the expense of environmental protection, towards more balanced rulings, which acknowledged environmental concerns in treaties and agreements. It was not only 'the green lobby' that rose up against this evident bias towards inflexible investment protection, but also States that found that their efforts at environmental protection ended up in compensation payments to investors who claimed losses because of those measures. When, rather than only developing countries, developed countries such as the US and Canada, were also falling victim to arbitral rulings favouring investment protection and requiring payment of substantial compensation, the tide began to turn in favour of defending against State liability for the protection of their environment.

While the US Model Treaty of 1987 provided inflexible investment protection, the beginnings of environmental awareness can be observed in the preambular language of the NAFTA (1994) in relation to environmental concerns, and in the addition of a side agreement to ensure enforcement of existing environmental laws. The *US–Jordan FTA* (2000) was the first agreement to include labour and environment chapters in its core text.[3] The significance of devoting a whole chapter to environmental concerns was not lost on the tribunal deciding the case between *Adel A Hamadi Al Tamimi v Sultanate of Oman* (2015).[4] The tribunal's decision was clearly guided by the prominence of environmental concerns, both in the preamble and by the inclusion of a chapter devoted to the environment. Subsequently, the US and Canada model treaties of 2004 took a more balanced approach to investments and the environment.[5] As discussed in Chapter 2, treaty language in BITs and FTAs relating to environmental protection, while tending to be more exhortatory than actionable, has been evolving in the direction of displaying greater concern for the protection of the environment.

The next milestone in this evolution of environmental language in investment treaties and trade agreements was the 10 May Agreement (2007), concluded by US congressional representatives

[3] *Agreement on the Establishment of a Free Trade Area*, US–Jordan (24 October 2000) 41 ILM 63. See also Chapter 2, Section 2.7.1.
[4] *Adel A Hamadi Al Tamimi v Sultanate of Oman* (27 October 2015) ICSID Case No. ARB/11/33, Award.
[5] *US Model Treaty 2004* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2872>. *Canada Model Treaty 2004* <https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

Rangel (New York) and Levin (Michigan).[6] Subsequent to that agreement, environmental provisions have grown stronger by linking environmental protections with MEAs and the agreement's full sanction-based regulatory authority, effectively transferring the TPA's strong sanction-based regulatory authority to the provisions of the MEAs. Nevertheless, the positive impact on the environment has been limited by two significant factors. First, existing agreements have largely missed major trading partners; and second, especially in economically challenged regions, the achievement of greater economic growth continues to be prioritised over environmental concerns.

The side agreement to NAFTA, the NAAEC expressed trilateral commitment to 'foster[ing] the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations' and 'support[ing] the environmental goals and objectives of the NAFTA'.[7] Despite certain limitations, as discussed in Chapter 3, NAFTA still represents a major step forward in the evolution of treaty language in regards to favouring greater environmental protection. However, the level of priority given to environmental protection in a renegotiated NAFTA under a Trump administration, especially given Trump's focus on jobs and trade, is yet to be determined.

Despite the Obama administration's prioritisation of safeguards for preserving a healthy environment and advocacy of US participation in a global economy, the trade deal negotiated during that administration, the TPP, has not lived up to Obama's promise to raise environmental standards and 'beef up enforcement'.[8] Instead, as discussed in Chapter 4, ineffectual enforcement mechanisms, weakly worded provisions and loopholes have prevented the TPP from becoming the significant improvement on NAFTA's environmental provisions promised by Obama.

Despite the May 10, 2007 bipartisan agreement, reached during the Bush administration, to include seven core MEAs as part of the FTA dispute settlement process, only one, CITES, is named in the TPP. Even then, it is watered down by language that directs parties merely to '*endeavor to implement, as appropriate*, CITES resolutions that aim to protect and conserve species whose survival is threatened by international trade'.[9]

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[6] E. Gresser. 'Labor and Environment in Trade Since NAFTA: Activitists have achieved less, and more, than they realize' *Wake Forest Law Review*. Vol. 45.2010, 497 refers to a letter from Charles B. Rangel, Chairman, House Committee on Ways & Means, and Sander M. Levin, Chairman, Subcommittee on Trade, House Committee on Ways & Means, to Susan C. Schwab, US Trade Representative (10 May 2007) <http://waysandmeans.house.gov/Media/pdf/110/05%2014 %2007/05%2014%2007.pdf>.

[7] *North American Agreement on Environmental Cooperation* (1993) <https://ustr.gov/sites/default/files/naaec.pdf> art 1.

[8] Barack Obama, *What are the Major Differences Between NAFTA and TPP?* (28 October 2016) Quora <https://www.quora.com/What-are-the-major-differences-between-NAFTA-and-TPP/answer/Barack-Obama-44>.

[9] *Trans-Pacific Partnership Agreement*, opened for signature 4 February 2016, [2016] ATNIF 2 (not yet in force) art 20.17(3)(c) (emphasis added).

Among the environmental concerns addressed by the TPP, the more strongly worded control on fisheries subsidies is unlikely to positively affect fisheries management in the short term, given that parties have up to three years to comply. As for IUU fishing, instead of outright prohibiting these practices, the TPP leaves its regulations to other instruments and merely lists a series of measures 'to help deter trade in products from species harvested from [IUU fishing] practices'.[10] Conservation measures for sharks, marine mammals and wildlife are reduced to ineffectual, non-binding suggestions. Moreover, there is a glaring omission of any reference to 'climate change', despite its inclusion in earlier drafts of the TPP.

Despite the US's departure from the TPP, and Trudeau's insistence on dropping the TPP's intellectual property provisions,[11] the TPP is apparently still very much alive. However, it remains to be seen how the TPP will be redrafted in line with its declared core aim to achieve stricter environmental standards.

ISDS provisions, carried over into the TPP from NAFTA, allow foreign investors to challenge government measures related to environmental, health and safety regulations that investors claim to violate treaty obligations into which the State willingly entered for the protection of investors. As discussed in Chapter 5, among the arguments put forward against ISDS are claims of pro-investor bias on the part of arbitral panels and concerns that the challenges of investors to environmental regulations will prompt States to waver in the implementation of laws to protect the environment. However, case-based statistics do not substantiate claims of pro-investor bias, nor should challenges by investors necessarily discourage States from initiating new environmental regulations. After all, as the *Methanex*[12] case demonstrated, non-discriminatory environmental regulations are not automatically deemed expropriatory, demonstrating the fact that ISDS might still be worthwhile for environmental protection

Despite the success of EU States in having investors' claims dismissed (44 per cent dismissed, 36 per cent settled and only 20 per cent awarded monetary compensation),[13] the European Commission rejected the current ISDS system in favour of a proposal for the establishment of a multilateral investment court with jurisdiction over BITs.[14] This proposal would replace the EU's previously established Investment Court System, which features in its bilateral agreements with Canada

[10] Ibid art 20.16.14.
[11] R. Owens, 'Trudeau's Mischief With the TPP Isn't Just Bizarre. It's Bad for Canada', *Financial Post* 14 November 2017 <http://business.financialpost.com/opinion/trudeaus-mischief-with-the-tpp-isnt-just-bizarre-its-bad-for-canada>.
[12] https://www.state.gov/s/l/c5818.htm
[13] EU Commission, *Investor-to-State Dispute Settlement (ISDS) Some Facts and Figures* (12 March 2015) 7 <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf>.
[14] *Factsheet on the Multilateral Investment Court* <http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf>.

(CETA)[15] and Vietnam.[16] Although the concept of a multilateral investment court is well intentioned, given current anti-globalisation sentiment, it is unlikely that the US under a Trump administration would agree to submit to the decisions of this proposed legal entity under international law. Even in a period marked by far greater political will to achieve globalised solutions, the ICJ's Chamber for Environmental Matters fell into disuse in 2006, after 13 years of never having been called upon to hear any cases.[17]

Given the reluctance of investors to have their cases heard by national courts, out of concern for probable bias, and an aversion on the part of certain States to submit to the decisions of international courts, this thesis contends that the more reasonable alternative would be to continue with the mechanism of ISDS but to operate with greater transparency and better consistency, in other words, to improve ISDS. Significant progress in the achievement of transparency of arbitral proceedings has already been made with the adoption of the *UNCITRAL Rules on Transparency*.[18] In addition, public access to the ICSID database of pending and past cases will support efforts at achieving greater consistency across panels.

Despite greater voice having been given to environmental provisions in investment treaties and trade agreements since the mid-nineties, their potential for positive environmental impact has been constrained, if not completely undermined, by the capricious political will of those who prioritize short-term economic growth over long-term environmental impact. With the rise of Donald Trump's 'America First' policy, which gives precedence to economic prosperity over environmental protection, and nationalism over globalisation, there are fears that the political will to preserve and protect a safe and healthy environment may be on the downswing. The US withdrawal from the TPP, and a renegotiated NAFTA in line with Trump's stated priorities, could foreshadow the undoing of many of the green-friendly gains achieved over the past two decades of investment treaty development, at least where the US is a major player. There is, of course, the possibility that the EU and China will emerge as key leaders and contributors to the continuation of the green-friendly, pro-globalisation course established after the turn of the century. However, the concern remains, that the US, having struck out on its own and no longer acting in concert with other major economic players,

[15] EU Commission, *EU–Canada: Comprehensive Economic and Trade Agreement* <http://ec.europa.eu/trade/policy/in-focus/ceta/>.
[16] EU Commission, *EU–Vietnam Free Trade Agreement: Agreed text as of January 2016* <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.
[17] C. L. Beharry and M. E. Kuritzky, 'Going Green: Managing the Environment Through International Investment Arbitration' (2015) 30 *American University International Law Review* 411–2.
[18] *UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration* (effective 1 April 2014).

may lead the world in ‘a race to the bottom’, risking the safety of our environment so the rich can get richer.

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Nationals of Peru Victimized by the Stanford Ponzi Scheme v United States of America

Pac Rim Cayman LLC v Republic of El Salvador (ICSID Case No. ARB/09/12)

Peruvian Victims of the Stanford Ponzi Scheme v United States of America

Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v Republic of Costa Rica (ICSID Case No. ARB (AF)/08/1)

Railroad Development Corporation v Republic of Guatemala (ICSID Case No. ARB/07/23)

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Appendix 1: How Environmental Concerns are Included in BITs

Bilateral Investment Treaties	Preamble/ preambular list of '-ing' clauses	(a) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.	(b) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures: (i) necessary to ensure compliance with laws and regulations that are not	Chapter defining 'environmental legislation'	Protection of Investments … Without prejudice to any necessary measures relating to public order, moral standards, public health and protection of the environment, such investments shall be safeguarded and protected …	Chapter on Environment	Expert reports	Expropriation	Promotion of Investment The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.

			inconsistent with the provisions of this Agreement; (ii) necessary to protect human, animal or plant life or health; or (iii) relating to the conservation of living or non-living exhaustible natural resources.
Georgia–US BIT 1994	✓		
Trinidad and Tobago–US BIT 1994	✓		
Canada–Venezuela BIT 1996		✓	✓
Canada–Ecuador BIT 1996		✓	✓
Jordan–US BIT 1997	✓		
Canada–Croatia BIT 1997			✓

Canada–Costa Rica BIT 1998				✓								
Bolivia–US BIT 1998	✓											
Belgium–Luxembourg–Madagascar BIT 2005					✓	✓		✓				
US–Uruguay BIT 2005	✓		✓		✓					✓	✓	
India–UAE BIT 2005						✓						
Latvia–Kyrgyz Republic BIT 2008	✓											
Canada–Czech BIT 2009											✓	✓
Canada–Slovak BIT 2010											✓	✓

Appendix 2: How Environmental Concerns are Included in the FTA or TPA

Free Trade Agreements, Trade Promotion Agreements	**Preamble/ preambular list of '-ing' clauses**	**Performance Requirements**	**Chapter on Environment**	**Expert Reports**	**Expropriation**	**Investment and Environment**	**Relation to Multilateral Environmental Agreements**	**Corporate Social Responsibility**
Chile–US FTA 2003	✓	✓		✓	✓	✓		
CAFTA-DR 2006	✓	✓		✓	✓	✓		
Oman–US FTA 2006	✓	✓	✓	✓	✓	✓		
Colombia–US TPA 2006	✓	✓		✓	✓	✓		
Peru–US TPA 2006	✓	✓		✓	✓	✓		
Panama–US TPA 2007	✓	✓		✓	✓	✓		
Canada–Peru FTA 2008	✓	✓		✓	✓	✓	✓	✓

Appendix 3: Disputes Citing BITs

BITs	Disputes that cite this Treaty	Disputes that cite this Treaty and include mention of the word 'environmental'
Georgia–US BIT 1994	Georgia: *Itera International Energy LLC and Itera Group NV v Georgia* (ICSID Case No. ARB/08/7)	
Trinidad and Tobago–US BIT 1994	Trinidad and Tobago: *F-W Oil Interests, Inc. v Republic of Trinidad & Tobago* (ICSID Case No. ARB/01/14)	
Canada–Venezuela BIT 1996	Venezuela: *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Venezuela: *Gold Reserve Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1)	*Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016 *Gold Reserve Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014 *Gold Reserve Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Memorandum Opinion of US District Court for District of Columbia on Enforcement of the Award, 20 November 2015 *Vannessa Ventures Ltd. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6), Award, 16 January 2013
Canada–Ecuador BIT 1996	Ecuador: *EnCana Corporation v Republic of Ecuador* (LCIA Case No. UN 3481)	*Gold Reserve Inc. v Bolivarian Republic of Venezuela*, (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014
Jordan–US BIT 1997	Jordan: *Trans-Global Petroleum, Inc. v Hashemite Kingdom of Jordan* (ICSID Case No. ARB/07/25)	

Canada–Croatia BIT 1997		
Canada–Costa Rica BIT 1998	Costa Rica: *Alasdair Ross Anderson and others v Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3) Costa Rica: *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Costa Rica: *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v Republic of Costa Rica* (ICSID Case No. ARB (AF)/08/1)	
Bolivia–US BIT 1998	Bolivia - *Guaracachi America, Inc. and Rurelec PLC v Plurinational State of Bolivia* (PCA Case No. 2011-17)	*Guaracachi America, Inc. and Rurelec PLC v Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014
Belgium–Luxembourg-Madagascar BIT 2005		
US–Uruguay BIT 2005	US: *Gregorio Anibal Sanabria Fleitas v United States of America*	*Caratube International Oil Company LLP v Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Award, 5 June 2012
India–UAE BIT 2005	India: *Strategic Infrasol Foodstuff LLC and The Joint Venture of Thakur Family Trust UAE with Ace Hospitality Management DMCC UAE v India*	
Latvia–Kyrgyz Republic BIT 2008	Kyrgyz Republic: *Valeri Belokon v Kyrgyz Republic* (UNCITRAL)	
Canada–Czech BIT 2009		*Mesa Power Group LLC v Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016,

Canada–Slovak BIT 2010	Slovak Republic: *EuroGas Inc. and Belmont Resources Inc. v Slovak Republic* (ICSID Case No. ARB/14/14)	*Mesa Power Group LLC v Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016,

Appendix 4: Disputes Citing FTAs or TPAs

FTAs, TPAs	**Disputes that cite this Agreement**	**Disputes that cite this Agreement and include mention of the word 'environmental'**
Chile–US FTA 2003	US: *Mordehai Moor v United States of America*	*Azurix Corp. v Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006 *El Paso Energy International Company v Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011
CAFTA-DR 2006	Costa Rica: *David R. Aven and others v Republic of Costa Rica* (ICSID Case No. UNCT/15/3) Costa Rica: *Spence International Investments et al. v Republic of Costa Rica* (ICSID Case No. UNCT/13/2) Dominican Republic: *Corona Materials LLC v Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Dominican Republic: *Michael, Lisa and Rachel Ballantine v Dominican Republic* Dominican Republic: *TCW Group, Inc & Dominion Energy Holdings, L.P. v Dominican Republic* (UNCITRAL) Dominican Republic: *TCW Group, Inc & Dominion Energy Holdings, L.P. v Dominican Republic* (UNCITRAL)	*Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016 *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No. ARB/09/12), decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010 *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No. ARB/09/12), decision on Jurisdictional Objections, 1 June 2012 *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v Republic of El Salvador* (ICSID Case No. ARB/09/17), Award, 14 March 2011 *Dominican Republic-Central America-United States Free Trade Agreement* (CAFTA-DR) (excerpts)

	El Salvador: *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v Republic of El Salvador* (ICSID Case No. ARB/09/17) El Salvador: *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No. ARB/09/12) Guatemala: *Railroad Development Corporation v Republic of Guatemala* (ICSID Case No. ARB/07/23) Guatemala: *TECO Guatemala Holdings, LLC v Republic of Guatemala* (ICSID Case No. ARB/10/23) US: *Guatemalan, Costa Rican and Dominican Victims of the Stanford Ponzi Scheme v United States of America*	*TECO Guatemala Holdings, LLC v Republic of Guatemala* (ICSID Case No. ARB/10/23), Award, 19 December 2013
Oman–US FTA 2006	Oman: *Adel A Hamadi Al Tamimi v Sultanate of Oman* (ICSID Case No. ARB/11/33)	*Adel A Hamadi Al Tamimi v Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 27 October 2015 *Mesa Power Group LLC v Government of Canada* (PCA Case No. 2012-17), Award, 24 March 2016
Colombia–US TPA 2006	*Colombia: Cosigo Resources Ltd., Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc. v Republic of Colombia* (UNCITRAL)	
Peru–US TPA 2006	Peru: *Gramercy Funds Management LLC, Gramercy Peru Holdings LLC, Gramercy Investment Advisors LLC and Gramercy Advisors LLC v The Republic of Peru* *Peru: The Renco Group Inc. v Republic of Peru* (ICSID Case No. UNCT/13/1)\ US: *Nationals of Peru Victimized by the Stanford Ponzi Scheme v United States of America*	

	US: *Peruvian Victims of the Stanford Ponzi Scheme v United States of America*	
Panama–US TPA 2007	Panama: *Retire in Chiriqui, S.A., James Falgout, Barbara Falgout and Clarence Johnson v Republic of Panama* Panama: *Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, S.A. v Republic of Panama*	
Canada–Peru FTA 2008	Peru: *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No. ARB/14/21)	*Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No. ARB/14/21), Procedural Order No. 2, 19 April 2015