Dynamically Interpreting Property in International Regulatory Takings Regimes

Hao Zhu*

The North American Free Trade Agreement (NAFTA)'s Article 1110 — which created an expropriations remedy for foreign investors — has expanded into an international regulatory takings regime over the last two decades. Newer international trade agreements, such as the Trans Pacific Partnership Agreement (TPPA), have continued to include expropriations provisions by default, further expanding the reach of these takings regimes.

This Note focuses on the NAFTA in order to explore the tension within international regulatory takings regimes, between investor property interests and sovereign interests to regulate for the public welfare. First, this Note traces the contours of international regulatory takings doctrines, organizing them in a Penn Central *framework. Against other commentators, this Note argues that though the case law has not been a model of clarity, the law has settled into a framework analogous to* Penn Central. *Second, this Note elaborates on and rejects the critique that international regulatory takings regimes erode states' sovereignty to regulate for the public welfare, while acknowledging that the structural problem of private law tribunals deciding the public law values of property needs to be addressed.*

To address this structural problem, this Note proposes that the NAFTA's authoritative bodies interpret property dynamically, in light of the public welfare concerns raised by global climate change. Specifically, this Note proposes that the NAFTA's Free Trade Commission issue authoritative Notes of Interpretation to dynamically interpret Article 1110 to shift the balance toward sovereign regulatory power to address global climate change. Lastly, this Note applies that interpretation of Article 1110 to the facts of the dispute between TransCanada Corp. and the

---

* Managing Editor, Colum. J.L. & Soc. Probs., 2017–2018. J.D. Candidate 2018, Columbia Law School. The author would like to thank Professor Thomas W. Merrill for his insight and the *Journal* editors for their thorough work. The author also thanks his family for their enduring love and support.

United States over the Keystone XL oil pipeline, ultimately concluding that no regulatory takings occurred.

I. INTRODUCTION

On June 24, 2016, TransCanada Corp. filed a request for arbitration under the North American Free Trade Agreement (NAFTA)[1] against the United States, seeking $15 billion in compensation.[2] TransCanada claimed that the Obama Administration's seven-year delay in deciding on and ultimately rejecting a permit for its Keystone XL oil pipeline was politically motivated and not based on technical or environmental reasons, thus breaching U.S. obligations under the NAFTA.[3] Though the Trump Administration's State Department promptly changed course and granted the Keystone XL permit to TransCanada in March 2017,[4] the dispute remains instructive as similar factual scenarios will likely arise in the future.

In its request for arbitration, TransCanada claimed, *inter alia*, that the U.S. breached its obligations under Article 1110 of NAFTA, titled "Expropriation and Compensation,"[5] which provides, in part:

> 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 ("indirect expropriation"), except:
> (a) for a public purpose;
> (b) on a non-discriminatory basis;

1. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (chs. 1–9), 32 I.L.M. 605 (chs. 10–22) [hereinafter NAFTA], http://www.sice.oas.org/Trade/NAFTA/NAFTATCE.ASP [https://perma.cc/KUQ5-ACSP].

2. Jennifer A. Dlouhy, *TransCanada Files $15B Nafta Claim on Keystone XL Rejection*, BLOOMBERG (June 25, 2016, 11:49 AM), https://www.bloomberg.com/news/articles/2016-06-25/transcanada-files-15b-nafta-claim-on-keystone-xl-rejection [https://perma.cc/N7PE-TQ6J].

3. *Id.*; *see also* TransCanada Corp. v. United States of America, ICSID Case No. ARB/16/21, Request for Arbitration, at 39 (June 24, 2016) [hereinafter Keystone XL Request for Arbitration], https://www.keystone-xl.com/wp-content/uploads/2016/06/TransCanada-Request-for-Arbitratio-2n.pdf [https://perma.cc/5KRJ-59ZT].

4. *See* U.S. Dep't of State, Media Note, *Issuance of Presidential Permit to TransCanada for Keystone XL Pipeline* (Mar. 24, 2017), https://www.state.gov/r/pa/prs/ps/2017/03/269074.htm [https://perma.cc/9BB6-22SU].

5. Keystone XL Request for Arbitration, *supra* note 3, at 1.

> (c) in accordance with due process of law and Article 1105(1) [which requires "treatment in accordance with international law, including fair and equitable treatment and full protection and security"]; and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6 [which require compensation at fair market value to be paid without delay and with interest].[6]

This claim sharpens the conflict between foreign investors' property interests and host nations' sovereign interests to regulate for the public welfare. This conflict was first tested in the 2000 case of *Metalclad Corp. v. United Mexican States*, in which a NAFTA arbitral tribunal[7] held that Mexico's land use and environmental laws "indirectly expropriated" Metalclad Corp.'s investment in a Mexican subsidiary operating a hazardous waste facility, and awarded Metalclad $16.7 million in compensation.[8] The decision prompted discussions about the potential expansiveness and legitimacy of Article 1110's international "regulatory takings" regime.[9] Yet, since the NAFTA's enactment in 1993, the United States has faced twelve Article 1110 claims and won

---

6. NAFTA, *supra* note 1, at art. 1110(1) (incorporating references to Article 1105 and Article 1110(2)–(6)) (emphasis added).

7. NAFTA Article 1120 ("Submission of a Claim to Arbitration") requires that investors of a signatory government submit claims against another signatory government under the ICSID Convention, Additional Facility Rules of ICSID, or the UNCITRAL Arbitration Rules. *See* NAFTA, *supra* note 1, at art. 1120. The arbitral tribunals are composed of three members: one chosen by the investor, one by the host state, and a third presiding member selected through agreement. NAFTA, *supra* note 1, at art. 1123. Notably, there is no stare decisis. *See* NAFTA, *supra* note 1, at art. 1136(1) (providing that arbitral awards are binding only on disputing parties and only in respect of particular case).

8. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 112, 131 (Aug. 30, 2000) [hereinafter Metalclad Arbitration Award], http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf [https://perma.cc/5YMX-ZEXU].

9. *See, e.g.* Vicki Been & Joel C. Beauvais, The Global Fifth Amendment? NAFTA's Investment Protection and the Misguided Quest for an International "Regulatory Takings" Doctrine, 78 N.Y.U. L. REV. 30 (2003) [hereinafter Been & Beauvais, The Global Fifth Amendment]; Joel C. Beauvais, Student Article, Regulatory Expropriations under NAFTA: Emerging Principles & Lingering Doubts, 10 N.Y.U. ENVTL. L.J. 245 (2002); Lauren E. Godshall, Student Article, In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter Eleven, 11 N.Y.U. ENVTL. L.J. 264 (2002); Rudolf Dolzer & Felix Bloch, Indirect Expropriation: Conceptual Realignments, 5 INT'L L.F. DU DROIT INT'L 155 (2003); Guillermo Aguilar Alvarez & William W. Park, The New Face of Investment Arbitration: NAFTA Chapter 11, 28 YALE J. INT'L L. 365 (2003).

them all,[10] several on procedural grounds.[11] The recent TransCanada claim over the Keystone XL oil pipeline sought the highest compensation amount in Article 1110's history.[12]

This Note focuses on TransCanada's Keystone XL "indirect expropriations"[13] claim to explore the tension between investor property interests and sovereign interests in regulating for the public welfare. Part II argues that the path-dependency of international regulatory takings law has settled into a framework analogous to the U.S. regulatory takings law, which balances the economic impact of regulations against the character of the governmental action in the context of reasonable investment-backed expectations. Part III elaborates on and rejects Professor Ivan Pupolizio's critique that international regulatory takings regimes give transnational enterprises an expansive "right to an unchanging world" and imbue arbitral tribunals with a proto-constitutional power of judicial review that threatens to upend state sovereignty on a global scale. This Part argues that though

10. Challenges were brought by Loewen Group Inc. and Raymond Loewen (1998), Mondev Int'l Ltd. (1999), Methanex Corp. (1999), Canfor Corp. (2001), James Russell Baird (2002), Doman Inc. (2002), Tembec Inc. (2002), Paget et al. and 800438 Ontario Ltd. (2002), Terminal Forest Products Ltd. (2003), Glamis Gold Ltd. (2003), Grand River Enterprises Six Nations Ltd. (2003), Apotex Inc. (2007 for sertraline), Apotex Inc. (2009 for pravastatin), and Cemex (2009). Canfor Corp., Tembec Inc., and Terminal Forest Products Ld. challenges were consolidated into one case. *See* Scott Sinclair, *NAFTA Chapter 11 Investor-State Disputes (to October 1, 2010)*, TRADE AND INV. RES. PROJECT, CANADIAN CTR. FOR POLICY ALTS., at 11–16 [hereinafter NAFTA Dispute Table], https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2010/11/NAFTA%20Dispute%20Table.pdf [https://perma.cc/9MMD-NYKL]. *See also* Ian Austin, *TransCanada Seeks $15 Billion From U.S. Over Keystone XL Pipeline*, N.Y. TIMES (Jan. 6, 2016), https://www.nytimes.com/2016/01/07/business/international/transcanada-to-sue-us-for-blocking-keystone-xl-pipeline.html [https://perma.cc/Y84X-Z2F5].

11. *See, e.g.*, Mondev Int'l Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 76, 87 (Oct. 11, 2002) [hereinafter Mondev Arbitration Award], http://www.italaw.com/sites/default/files/case-documents/ita1076.pdf [https://perma.cc/6YQK-F5NS] (tribunal dismissing Mondev's claims as time-barred because the underlying dispute pre-dated NAFTA); The Loewen Group Inc. and Raymond Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, ¶ 240 (June 26, 2003) [hereinafter Loewen Arbitration Award], http://www.italaw.com/sites/default/files/case-documents/ita0470.pdf [https://perma.cc/87EB-Q792] (tribunal dismissing the investor's claims after determining that it "lacked jurisdiction").

12. *See* NAFTA Dispute Table, *supra* note 10, at 11 (James Russell Baird, a Canadian investor who claimed $13.58 billion against the United States for measures banning the disposal of radioactive wastes at sea or below the seabed, is the next highest).

13. This Note uses the treaty term "indirect expropriations" and the American parlance "regulatory takings" interchangeably, with a preference for using "indirect expropriations" when referencing the treaty or the claims made in arbitration and a preference for using "regulatory takings" when referencing the concept.

the fears of a "right to an unchanging world" are exaggerated, the structural problem of private law tribunals deciding public law values of property remains unaddressed. Thus, Part IV of this Note proposes that the NAFTA's Free Trade Commission issue authoritative Notes of Interpretation using the customary principles of treaty interpretation, as restated by the Vienna Convention of the Law of Treaties (VCLT), to find values from international public law to balance against the investor's private property rights. In doing so, it argues that the Commission acts in an analogous way to the U.S. Supreme Court in dynamically interpreting property to renegotiate the interdependent nature of property rights and state regulatory practices. Part IV interprets Article 1110 based on current values in international public law. Finally, Part V details TransCanada's claim over the Keystone XL oil pipeline's permit denial, and applies this interpretation to the facts of TransCanada's Keystone XL claim.

II. Comparing Indirect Expropriations with Domestic Takings

Though critics suggest that international takings law is in disarray, the arbitral case law has developed distinct doctrines from the expropriations clauses, similar to domestic takings law. Historical developments of the expropriations clauses show a trend toward favoring investor property rights. To show the developments of distinct doctrines, this Part mirrors the *Penn Central Transportation Co. v. City of New York* framework in analyzing what constitutes a regulatory taking. Per the first, second, and third factors of *Penn Central*, respectively, this Part illustrates the sole effect doctrine, which emphasizes the economic impact of the regulation on the claimant; the police power doctrine, which emphasizes the nature of the governmental act in question; and reasonable investment-backed expectations, which account for global trends, industrial contexts, and special representations made by the host state.

A. The Text of Treaty Provisions

As early as 1952, the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) codified three basic principles in Protocol No. 1:

> [1] Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
>
> [2] No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and the general principles of international law.
>
> [3] *The preceding provisions shall not*, however, *in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest* or to secure the payment of taxes or other contributions or penalties.[14]

This early formulation combined the ideas of a private right to enjoy property and deprivation subject to the public interest. But the formulation emphasized the right of the State to control and limit the use of property by individuals.

In 1967, the Organization for Economic Cooperation and Development (OECD) Draft Convention defined an expropriatory act (a "taking") as one:

> to deprive ultimately the alien of the enjoyment or value of his property, *without any specific act being identifiable as outright deprivation.* As instances may be quoted excessive or arbitrary taxation, prohibitions of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition of dismissal of staff; refusals of access to raw materials of essential export or import licenses.[15]

Before *Penn Central*[16] dealt with compensation for domestic regulatory takings in 1978, the international economic community was already considering these issues. The idea of incomplete deprivation of value in the definition of takings took hold.

By the 1980s, formulations of expropriations clauses shifted their focus away from the right of the state to limit property and toward the rights of property holders harmed by incomplete deprivations. Section 712 of the Restatement (Third) of the Foreign Relations Law of the United States defines expropriation as:

---

14. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20 1952, 213 U.N.T.S. 262, http://www.echr.coe.int/Documents/Convention_ENG.pdf [https://perma.cc/YJ3R-KXQU] (emphasis added).

15. Organisation for Economic Co-operation and Development (OECD), *Draft Convention on the Protection of Foreign Property*, 2 INT'L LAW. 331, 338 (1968) (emphasis added).

16. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

> (1) a taking by the state of the property of a national of another state that is
> (a) not for a public purpose, or
> (b) is discriminatory, or
> (c) is not accompanied by provision for just compensation.[17]

The comment to Section 712 further explains that expropriation extends to acts that have the effect of "taking" property, in whole or in part and outright or in stages ("creeping expropriation").[18] Examples include "subject[ing] alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property."[19] This formulation directly targets the states' regulatory acts and creeping expropriations, while de-emphasizing the state's rights to regulate property use for the public interest.

In 1998, the OECD draft rules for a multilateral investment treaty codified expropriations with the following clause:

> Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect . . . except:
> a) for a purpose which is in the public interest,
> b) on a non-discriminatory basis,
> c) in accordance with due process of law, and
> d) accompanied by payment of prompt, adequate, and effective compensation . . .[20]

Variations of this clause appear in the NAFTA and other bilateral and multilateral trade agreements.[21] The broad language of

17. Restatement (Third) of Foreign Relations Law of the United States § 712(1) (AM. L. INST. 1986).

18. *Id.* § 712 cmt. g.

19. *Id.*

20. OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment Draft Consolidated Text*, OECD (Apr. 22, 1998), http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf [https://perma.cc/QRJ6-666Z].

21. Nearly identical provisions appear in many of the 1500 bilateral investment treaties (BITs) in effect around the world. *See* Daniel M. Price, *NAFTA Chapter 11 - Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. 107, 107–08 (2000).

these clauses forms the foundations of international takings law. The case law begins in 1922 with the *Norwegian Shipowners* case,[22] in which an arbitral tribunal awarded Norway compensation plus interest for a U.S. order requisitioning all Norwegian ships over 2500 tons — built or under construction — in anticipation of World War I against Germany.[23] In addition to finding a physical taking of the ships, the tribunal found a taking of the contract rights of the Norwegian shipowners.[24] The tribunal interpreted the Fifth Amendment of the U.S. Constitution and the American common law to protect broad property rights in contracts, liens, and equities, concluding that a taking occurred as to the requisitioning of Norwegian ships even though other jurisdictions had more restrictive conceptions of property.[25] This tension between restrictive and broad conceptions of property rights is reflected in subsequent arbitration decisions. Overall, the decisions tend to fall into two conflicting groups: the sole effect doctrine, which primarily favors the property rights of the foreign investor, and the police power doctrine, which favors the sovereign rights of the host state to regulate.

B. ECONOMIC IMPACT OF THE REGULATION: SOLE EFFECT DOCTRINE

When determining whether a regulatory taking has occurred, the sole effect doctrine focuses exclusively on the effect to the investor's property rights, without consideration for the purpose of the corresponding governmental action. The doctrine only examines the degree to which the defined property right is impaired by the governmental measure. In 1984, the Iran-United States Claims Tribunal decided *Tippetts v. TAMS-AFFA Consulting Eng'rs of Iran*, in which a U.S. firm — with a 50% ownership interest in an Iran-U.S. firm — claimed that the Iranian government's appointment of a manager to be solely responsible for making financial and personnel decisions on behalf of the joint

22. Norwegian Shipowners' Claims (Nor. v. U.S.), 1 R.I.A.A. 307 (Perm. Ct. Arb. 1922) [hereinafter Norwegian Shipowners' Case], http://legal.un.org/riaa/cases/vol_I/307-346.pdf [https://perma.cc/B9DD-C27X].
23. *Id.* at 325–30.
24. *Id.* at 334.
25. *Id.* at 332–33.

venture was tantamount to expropriation.[26] In awarding the U.S. firm 50% of the liquidation value of the joint venture, the Tribunal held:

> While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. *The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.*[27]

In 1989, an ad hoc United Nations Commission on International Trade Law (UNCITRAL) tribunal decided *Biloune v. Ghana Investment Centre*.[28] Biloune, a Syrian investor in the Ghanaian real-estate corporation MDCL, claimed that the Ghanaian Investment Centre and the Government of Ghana had expropriated his assets.[29] The City of Accra had issued a stop order on a building project of the MDCL, and demolished a hotel also owned by the corporation. Ghanaian authorities arrested and deported Biloune, stating that his presence in Ghana was "not conducive to the public good."[30] In awarding Biloune compensation, the Tribunal held:

> What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr. Biloune without possibility of re-entry *had the effect of causing the irreparable cessation of work on the project*. . . . [S]uch prevention of MDCL's pursuing its ap-

---

26. Tippetts v. TAMS-AFFA Consulting Eng'rs of Iran (U.S. v. Iran), 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1984) [hereinafter Tippetts Case], https://www.trans-lex.org/231000/_/iran-us-claims-tribunal-tippetts-abbett-mccarthy-stratton-v-tams-affa-6-iran-us-ctr-at-219-et-seq/ [https://perma.cc/ENZ5-MTUN].

27. *Id.* at 225–26 (emphasis added).

28. Biloune v. Ghana Inv. Ctr., 95 I.L.R. 183, 209 [hereinafter Biloune Case], https://www.trans-lex.org/260700 [https://perma.cc/DK7G-DY4G].

29. *Id.* at 202–03.

30. *Id.* at 203–04.

> proved project would constitute a constructive expropriation of MDCL's contractual rights in the project, and accordingly, the expropriation of the value of Mr. Biloune's interest in MDCL, unless the [Ghanaian Investment Centre and Government of Ghana] can establish by persuasive evidence sufficient justification for these events.[31]

In both *Tippetts* and *Biloune*, host governments acted unreasonably and impaired the property rights of investors. In determining what constituted a taking, neither decision required considering whether the state's sovereign interest in regulating foreign investments was a legitimate constraint on property, focusing solely on the deprivation's effect on the investor.

The sole effects doctrine still weighs heavily in the takings analysis, even when the character of the governmental measure is reasonable. In 2000, a NAFTA Tribunal decided the *Metalclad* case.[32] Metalclad, an American corporation, acquired COTERIN, a Mexican corporation, to use COTERIN's permits to develop a hazardous waste landfill.[33] After Metalclad began building the waste landfill through COTERIN's permits, the municipal government of Guadalacazar ordered it to stop, citing the lack of a municipal building permit.[34] Faced with local protests against the environmental impact of the waste landfill, Metalclad applied for a municipal building permit.[35] Thirteen months later, after the negotiation over the specific terms of the environmental remediation plan failed, the municipal government denied the permit on the grounds of adverse environmental effects.[36] Later, the Governor of San Luis Potosí issued an Ecological Decree declaring a Natural Area for protection of rare cactus encompassing the landfill, ending Metalclad's project.[37] In awarding Metalclad almost $17 million in compensation, the Tribunal held:

> [E]xpropriation under NAFTA includes not only open, deliberate, and acknowledged takings of property . . . but also *covert and incidental interference with the use of property*

31. *Id.* at 209.
32. Metalclad Arbitration Award, *supra* note 8.
33. Metalclad Arbitration Award, *supra* note 8, ¶¶ 28–39.
34. *Id.* ¶ 40.
35. *Id.* ¶¶ 47–50.
36. *Id.* ¶¶ 50–51.
37. *Id.* ¶ 59.

> *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 not necessarily to the benefit of the host State.*[38]

The Tribunal discarded the municipal and state governments' claimed, albeit suspect, purpose and focused solely on the interference with the owner's use of his property and the resulting deprivation of benefits. Rather than balancing the public interest in environmental regulation against the investor's interest in the unfettered use of his property, the Tribunal interpreted "expropriation" without any reference to the regulation's purpose.[39] In *Tippetts*, *Biloune*, and *Metalclad*, the tribunals focused exclusively on the effect to the investor's property rights.

C. CHARACTER OF THE GOVERNMENTAL ACTION: POLICE POWER DOCTRINE

The police power doctrine contrasts with the sole effect doctrine by focusing on the character of the governmental action rather than the action's effect on the investor's property. In the extreme, the police power doctrine considers the legitimacy of the host state's sovereign right to regulate foreign investors' property for the general welfare and — absent discriminatory purpose — to put limits on property as an exclusive criterion.

In 1934, the Permanent Court of International Justice (PCIJ) decided the *Oscar Chinn* case in favor of the state's police power to regulate.[40] When the prices for colonial goods from Europe collapsed in 1931, the Belgian Government responded by reducing the cargo transport rates on the Congo Rivers charged by shippers to keep trade viable.[41] Consequently, the Belgian Government granted subsidies to Unatra, the Belgian shipper, while refusing to grant the same subsidies to Oscar Chinn's United Kingdom shipper.[42] As a result, Oscar Chinn's business collapsed.[43]

38. *Id.* ¶ 103 (emphasis added).
39. *Id.* ¶ 104.
40. Oscar Chinn (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12) [hereinafter Oscar Chinn Case], http://www.worldcourts.com/pcij/eng/decisions/1934.12.12_oscar_chinn.htm [https://perma.cc/2BT5-BME4].
41. *Id.* at 72.
42. *Id.* at 71–75.
43. *Id.* at 75.

The U.K. brought a claim against Belgium for damages to Oscar Chinn caused by the Belgian Government's rate regulation and unfair treatment in granting subsidies.[44] In rejecting Oscar Chinn's claim, the PCIJ held:

> The Court . . . is unable to see in his original position - which was characterized by the possession of customers and the possibility of making a profit - anything in the nature of a genuine vested right. Favourable business conditions and goodwill are transient circumstances, subject to inevitable changes; *the interests of transport undertakings may well have suffered as a result of the general trade depression and the measures taken to combat it*.[45]

The Court emphasized that the interests of the U.K. investor were subject to the general economic conditions of the depression — as well as to the Belgian Government's regulations to combat it — rendering the impairment of the interest not compensable.

In 1984, two days before *Tippetts*, a different chamber of the Iran-United States Claims Tribunal decided *Sea-Land Service, Inc. v. Iran*.[46] Sea-Land Service, a U.S. cargo corporation, claimed that the Ports and Shipping Organization (PSO), an Iranian governmental agency, deprived it of the priority use of PSO's facilities to unload cargo to its terminal.[47] Consequently, it argued, this deprivation constituted an expropriation of Sea-Land's construction and operation of a container terminal at the port.[48] In dismissing the claim of expropriation, the Tribunal held:

> A finding of expropriation would require, at the very least . . . that there was *deliberate governmental interference with the conduct of Sea-Land's operation*, the effect of which was to deprive Sea-Land of the use and benefit of its investment. Nothing has been demonstrated here which might have amounted to an intentional course of conduct directed against Sea-Land. . . . where the evidence suggests a widespread and indiscriminate management, disrupting the

44. *Id.*
45. *Id.* at 88 (emphasis added).
46. Sea-Land Service, Inc. v. Iran, 6 IRAN-U.S. C.T.R., 149 (1984) [hereinafter Sea-Land Case].
47. *Id.* at 150–52.
48. *Id.* at 150–51.

> functioning of the port of Bandar Abbas, can hardly justify a finding of expropriation.[49]

The *Sea-Land* Tribunal was concerned with the purpose and effect of the governmental measures, rather than the sole effect of the measures on the investor's property. The reasoning seems almost directly contrary to *Tippetts*.[50] The Tribunal also cited the *Oscar Chinn* decision, noting that Sea-Land's priority use of PSO's facilities was characterized by the possibility of profit and as such not "anything in the nature of a genuine vested right."[51] Both *Oscar Chinn* and *Sea-Land* draw on the notion of a genuine vested right in countering the sole effects doctrine. Both argue that since government regulations influence and define an investor's property interest, an investor has no genuine vested right to block governmental measures that incidentally affect the value of the property interest. Under this doctrine, unless governmental measures deliberately interfere to deprive an investor of the value of his property interest, there is no case for expropriation.[52]

In 2000, another NAFTA tribunal decided *S.D. Myers, Inc. v. Government of Canada*.[53] In 1993, the American corporation S.D. Myers — which specialized in the disposal of the highly toxic polychlorinated biphenyl (PCB) — decided to enter the Canadian PCB disposal market.[54] Faced with a decline in the U.S. PCB disposal market, S.D. Myers wanted to treat Canadian PCB at its U.S. facilities.[55] In 1995, S.D. Myers successfully lobbied relevant U.S. agencies to allow the import of Canadian PCB into the U.S.

---

49. *Id.* at 166.

50. *See supra* Part II.B.

51. Sea-Land Case, *supra* note 46, at 163 (quoting Oscar Chinn Case, *supra* note 40, at 88).

52. The vested rights doctrine discussed in *Oscar Chinn* acts as a kind of estoppel. If an investor makes substantial expenditures in good faith reliance upon a valid issuance of a permit or other form of discretionary approval, then a court would allow the owner to proceed with development — despite government changes to regulation precluding such development. But this exception to the police powers doctrine is narrow in that good faith reliance by the investor usually requires governmental acts that induce reliance, which was not present in *Oscar Chinn* or *Sea-Land*. For a survey of these cases, *see* John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U.J. URB. & CONTEMP. L. 27 (1996).

53. S.D. Myers, Inc. v. Gov't of Canada, Partial Award (NAFTA-UNCITRAL) (Nov. 13, 2000) [hereinafter S.D. Myers Partial Award], http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf [https://perma.cc/PT6Y-LNJZ].

54. *Id.* ¶¶ 89, 92–94, 98.

55. *Id.* ¶¶ 92, 93.

for remediation.[56] At the same time, the fledgling Canadian PCB disposal industry lobbied Canadian authorities to prevent the export of Canadian PCB.[57] The Canadian authorities effectively banned the export of Canadian PCB for sixteen months, citing significant dangers to the environment and human health.[58] Consequently, S.D. Myers claimed that Canada's acts were "tantamount to expropriation" in violation of Article 1110.[59] Unlike the Tribunal in *Metalclad*, the Tribunal in *S.D. Myers* found no indirect expropriation, noting that Canada's acts were only a temporary ban, merely postponing S.D. Myers' entry into the Canadian market by eighteen months.[60]

The Tribunal took a broad approach to interpreting Article 1110, stating that "[t]he term 'expropriation' in Article 1110 must be interpreted in light of the whole body of state practice, treaties and judicial interpretations of that term in international law cases."[61] The Tribunal indicated that regulatory takings remained a relatively rare subset of takings:

> The Tribunal accepts that, in legal theory, rights other than property rights may be "expropriated" and that international law makes it appropriate for tribunals to examine the purpose and effect of governmental measures. . . . *The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out that possibility.*[62]

While not ruling out expropriation through regulatory acts, the Tribunal seems to weigh the balance in favor of the state police powers to regulate:

> Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most poten-

56. *Id.* ¶¶ 118, 119.
57. *Id.* ¶ 122.
58. *Id.* ¶¶ 123–27.
59. *Id.* ¶¶ 142, 143.
60. *Id.* ¶ 284.
61. *Id.* ¶ 280
62. *Id.* ¶ 281 (emphasis added).

> tial cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.[63]

Lastly, the Tribunal held that an inquiry into the exercise of state police powers required a "look at the substance of what occurred and not only at form."[64] An inquiry must "look at the real interests involved and purpose and effect of the government measure."[65]

Though decided at nearly the same time, *S.D. Myers* directly conflicts with *Metalclad*. The lack of stare decisis in NAFTA arbitral tribunal decisions allows for such conflicting interpretations.[66] *Metalclad* interprets Article 1110 Expropriation in isolation from background norms of state regulation, international law, and regulatory takings precedents, whereas *S.D. Myers* interprets it in light of these background norms to come to a narrow conception of regulatory takings. *Metalclad* presumptively favors investor property rights, and *S.D. Myers* presumptively favors governmental regulation to manage public affairs. The conflict between *Metalclad* and *S.D. Myers* seems to validate the criticism that the international regulatory takings regime established by Article 1110 lacks a coherent framework and generates inconsistent decisions.

D. REASONABLE INVESTMENT-BACKED EXPECTATIONS DEFINED

One source of inconsistency in regulatory takings is the question of what constitutes a reasonable expectation in the context of investor property rights. As Rudolf Dolzer notes, no one doubts that each state has the right to set its own rules of property

---

63. *Id.* ¶ 282.
64. *Id.* ¶ 285.
65. *Id.*
66. See, e.g., Catherine A. Rogers, Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration, 39 STAN. J. INT'L L. 1, 37 n.198 (2003); Andrea Kupfer Schneider, Getting Along: the Evolution of Dispute Resolution Regimes in International Trade Organizations, 20 MICH. J. INT'L L. 697, 710 n.41 (1999); Clyde C. Pearce & Jack Coe, Arbitration under NAFTA Chapter Eleven: Some Pragmatic Reflections upon the First Case Filed Against Mexico, 23 HASTINGS INT'L AND COMP. L. REV. 311, 340 n.99 (2000); Julia Ferguson, California's MTBE Contaminated Water: an Illustration of the Need for an Environmental Interpretive Note on Article 1110 of NAFTA, 11 COLO. J. INT'L ENVT'L L. AND POL'Y 499, 505 (2000).

through regulation.[67] When an investor acquires property in a host country, he accepts these rules.[68] What an investor accepts in terms of reasonable expectations is framed by global trends, industrial contexts, and the host state's specific representations to him.

1. *Global Trends*

When an investor acquires property in a host state, hoping to profit on risk, he accepts the global economic and political trends affecting that state. In fact, the very idea of investment hinges on exploiting changes in global economic and political trends in specific contexts. For example, in the *Oscar Chinn* decision,[69] the PCIJ emphasized that the "severe commercial depression which prevailed throughout the whole world" seriously affected the business climate in the Belgian Congo.[70] Though Mr. Chinn had started his business in early 1929 before the depression deepened, his continued investments and expectations for profit had to be judged with reference to the acuteness of the depression in 1930 and 1931.[71]

Chemtura Corp. v. Government of Canada provides a modern example of investors exploiting global trends.[72] Chemtura, an American agricultural pesticides manufacturer, alleged that Canada's Pest Management Regulatory Agency (PMRA) expropriated its lindane-based pesticide business by cancelling the registration of lindane for its most common use on rapeseed.[73] Rejecting Chemtura's claim of expropriation, the Tribunal noted that it "cannot ignore the fact that lindane has raised increasingly serious concerns both in other countries and at the interna-

---

67. Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVT'L L.J. 64, 78 (2002).

68. Id.

69. For details of the Oscar Chinn Case, *see supra* Part II.C.

70. Oscar Chinn Case, *supra* note 40, at 71.

71. *Id.* at 71, 75 ("At the beginning of 1929, Mr. Chinn, a British subject, who had worked in the Congo since 1927, came to Leopoldville and established there a river transport and ship-building and repairing business. . . . In the course of 1930 and 1931, the severe commercial depression which prevailed throughout the whole world seriously affected trade in the Congo colony.").

72. Chemtura Corp. v. Gov't of Canada, Award (NAFTA-UNCITRAL) (Aug. 2, 2010) [hereinafter Chemtura Award], http://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf [https://perma.cc/MSF2-R3ZE].

73. *Id.* ¶¶ 7, 9, 93.

tional level since the 1970s."[74] The Tribunal emphasized the global trends in the banning of lindane, from Hungary's ban in 1968 to the Stockholm Convention on Persistent Organic Pollutants (POPS) in May 2009.[75] Though the Tribunal rested its finding of no expropriation on the bases that the deprivation was too insubstantial[76] and that PMRA's banning of lindane was within the limits of Canada's police powers,[77] it was driven at least in part by the global trend toward the banning of lindane undercutting the reasonableness of Chemtura's expectation of continued profit from lindane-based pesticides.

2. *Industrial Contexts*

In addition to global trends, a rational investor also considers the specific context of the industry that he or she is investing in. In heavily regulated industries, investors accept that regulatory changes affect the value of their investments. They often lobby for regulatory changes that are more favorable and against ones that are unfavorable.[78]

S.D. Myers provides one example of investors manipulating changes in a heavily regulated industry. Recall that in 1993, S.D. Myers wanted to take advantage of excess capacity to process toxic PCB waste by importing Canadian PCB waste.[79] In rejecting the claim for expropriation, the Tribunal noted that PCBs have been "the subject of increasingly strict regimes of regulation both in Canada and internationally."[80] Specifically, the PCB Waste Export Regulations of 1990 effectively banned the export of PCB waste from Canada to all other countries other than the United

74. *Id.* ¶ 135.

75. *Id.* ¶¶ 135–136.

76. Lindane-based products only made up of 10% of Chemtura's sales. *Id.* ¶¶ 262–263.

77. *Id.* ¶ 266.

78. *See, e.g.* Oscar Chinn Case, *supra* note 40, at 74 (Socié'té commerciale du Centre africain (Socca) and the Chamber of Commerce of Leopoldville, two local trade organizations, wrote letters to Belgian colonial government to request subsidies received by Unatra); Metalclad Arbitration Award, *supra* note 8, ¶¶ 32, 45, 58 (American corporation lobbied the state government for agreement to support project and held an open house attended by government dignitaries); S.D. Myers Partial Award, *supra* note 53, ¶¶ 113, 114 (American corporation lobbied Canadian government agencies to allow for export of toxic chemicals and U.S. EPA to allow import of the same chemicals); Chemtura Award, *supra* note 72, ¶ 156 (American corporation lobbied U.S. EPA to obtain a registration for lindane-based pesticides).

79. S.D. Myers Partial Award, *supra* note 53, ¶¶ 92–93.

80. *Id.* ¶ 98.

States.[81] The U.S. Environmental Protection Agency could discretionarily approve the import of PCB waste. S.D. Myers planned on using its competitive edge to export PCB from Canada to the United States by obtaining non-enforcement discretion from the EPA.[82] In adopting this strategy, S.D. Myers intensively lobbied both U.S. and Canadian authorities.[83] When the Canadian authorities banned the export of PCB for eighteen months, S.D. Myers effectively claimed expropriation of its competitive edge.[84] In rejecting this claim, the Tribunal implicitly held that the industrial context of changing regulations did not confer a reasonable expectation of a particular advantageous regulatory environment.[85]

Methanex Corp. v. United States[86] provides a more recent example of alleged expropriation in a heavily-regulated industry. In 1999, Methanex — a Canadian marketer and distributor of Methanol — alleged expropriation against the United States resulting from a California ban on using or selling the gasoline additive methyl tertiary-butyl ether (MTBE), which is manufactured chiefly from methanol.[87] In rejecting Methanex's claim, the Tribunal reasoned:

> Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level . . . continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. . . . *Methanex appreciated that the*

81. *Id.* ¶ 100.
82. *Id.* ¶ 118.
83. *Id.* ¶¶ 113–116.
84. *Id.* ¶ 284.
85. *Id.* ¶ 284 ("In this case the closure of the border was temporary. SDMI's venture into the Canadian market was postponed for approximately eighteen months. Mr. Dana Myers testified that this delay had the effect of eliminating SDMI's competitive advantage. This may have significance in assessing the compensation to be awarded in relation to CANADA's violations of Articles 1102 and 110548, but it does not support the proposition on the facts of this case that the measure should be characterized as an expropriation within the terms of Article 1110.").
86. Methanex Corp. v. United States of America, Final Award on the Jurisdiction and Merits (NAFTA-UNCITRAL) (Aug. 3, 2005), 44 I.L.M. 1345 (NAFTA Ch. 11 Arb. Trib. 2005) [hereinafter Methanex Final Award], https://www.state.gov/documents/organization/51052.pdf [https://perma.cc/3N73-3CZM].
87. *Id.* at Part I - Preface - Page 1.

> *process of regulation in the United States involved wide participation of industry groups, nongovernmental organizations, academics and other individuals, many of these actors deploying lobbyists. Methanex itself deployed lobbyists. . . . Methanex entered the United States market aware of and actively participating in this process.* It did not enter the United States market because of special representations made to it.[88]

Again, as a corporation whose central business was a toxic product in a heavily regulated chemical industry, Methanex actively lobbied the regulatory system to create business advantages. In doing so, Methanex's expectations were framed by the speculative nature of the regulatory environment. Thus, the Tribunal reasoned that the industrial context of changing regulations did not confer on Methanex a reasonable expectation that a favorable regulatory environment would continue.[89]

3. *Special Representations*

Against the backdrop of global trends and industrial contexts, some foreign investors engage with host states under the special representations that the host state makes to the foreign investor. As the only case in which a Tribunal sustained an Article 1110 Expropriations claim, the *Metalclad* decision can be understood in terms of a host state's special representations that induce reliance from the foreign investor. As Professor Vicki Been and Joel C. Beauvais note, *Metalclad* might have been decided in the U.S. under the vested rights doctrine.[90]

In that case, the Mexican government officials assured Metalclad that all the permits were issued and they had obtained support from the state government, municipal government, and local community.[91] Relying upon these special representations, Metalclad purchased COTERIN[92] and began construction, openly

88. *Id.* at Part IV - Chapter D - Page 5 (emphasis added).

89. *Id.*

90. Been & Beauvais, *supra* note 9, at 72. Been & Beauvais argue that U.S. Courts would likely have rejected a vested-rights claim because U.S. case law puts the risks of not obtaining a permit upon the investor when the investor fails to specifically allocate that risk to the government by contract. *Id.* at 75. For a discussion of the vested rights doctrine, *see supra* note 56.

91. Metalclad Arbitration Award, *supra* note 8, ¶ 31–34, 80.

92. *Id.* ¶ 35.

continuing its investment activity.[93] The Tribunal found that Metalclad reasonably relied upon the federal government's authority, especially insofar as it contradicted the more limited authority of the municipality.[94] Thus, Mexico was held to have "taken a measure tantamount to expropriation."[95] This case suggests that, where a nation acts to encourage a particular behavior, a finding of expropriation is more likely.

E. A RETURN TO THE *PENN CENTRAL* FRAMEWORK

The sole effects and police powers doctrines converge against the context of reasonable expectations to form the familiar regulatory takings framework of *Penn Central*,[96] which balances the economic impact of the regulation, the nature of the governmental act in question, and the reasonableness of the investment-backed expectations — though the exact balance is unclear. The arbitral cases that interpret Article 1110 have shown inconsistency and path-dependency in the last two decades. But the emergent result is roughly analogous to the regulatory takings framework established in *Penn Central*.

In *Glamis v. United States*, decided in 2009,[97] a Canadian gold mining company claimed indirect expropriation by federal and state mining regulations aimed at addressing the environmental and cultural impacts of Glamis' open pit mining project.[98] Perhaps in response to intense local criticism,[99] California required Glamis to completely backfill the open pit mines.[100] Glamis claimed that the costs of backfilling the mines reduced the profit to a negative.[101] The NAFTA Tribunal was unpersuaded by Glamis' valuation figures and found that even with the cost of completely backfilling, the mining project still had a $20 million

93. *Id.* ¶¶ 86–88, 90.
94. *Id.* ¶ 86.
95. *Id.* ¶¶ 104, 107.
96. Penn. Cent. Transp. Co. v. City of New York, 438 U.S.104 (1978).
97. Glamis Gold Ltd. v. United States of America, Award (NAFTA-UNCITRAL) (June 8, 2009), [hereinafter Glamis Gold Award], https://www.state.gov/documents/organization/125798.pdf [https://perma.cc/N3A2-AG8L].
98. *Id.* ¶ 27–30.
99. *Id.* ¶ 127.
100. *Id.* ¶ 367.
101. *Id.* ¶ 362.

net positive value.[102] On the expropriation question, the Tribunal held:

> In light of this significantly positive valuation, . . . the first factor in any expropriation analysis is not met: the complained of measures did not cause a sufficient economic impact . . . to effect an expropriation of Claimant's investment. The Tribunal thus holds that Claimant's claim under Article 1110 fails.[103]

The Tribunal adopted the *Penn Central* analysis as well-developed law to decide the issue.[104] In ruling on the expropriation claim, the Tribunal did not reach the second factor of interference with reasonable investment-backed expectations and the third factor of the character of the governmental action because the first factor of economic impact was not met.[105]

III. PROPERTY, SOVEREIGNTY, AND INDIRECT EXPROPRIATIONS

The tension between the sole effects and police powers doctrines demonstrates that underlying notions of property and sovereignty go beyond mere protection of investments. Given that state sovereignty is limited by the manner in which arbitral tribunals interpret the term "indirect expropriation,"[106] the development of "indirect expropriation" regimes affects the tension between property and sovereignty, and between private and public actors in the international legal system. This Part wrestles with these tensions. First, it draws out Professor Ivan Pupolizio's

---

102. *Id.* ¶ 17.

103. *Id.* ¶ 536.

104. *Id.* ¶¶ 332, 356 ("[T]ribunals in such instances often assess whether measures of a State constitute a non-compensable regulation or a compensable expropriation by examining, *inter alia*, (1) the extent to which the measures interfered with reasonable and investment-backed expectations of a stable regulatory framework, and (2) the purpose and character of the governmental actions taken. There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken.") (noting that both parties cite to and rely on U.S. law of takings as a well-developed body of law).

105. *Id.* ¶ 536.

106. *See* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 11 (1927) ("Meanwhile, however, the sovereignty of the state is limited by the manner in which the courts interpret the term "property" in the 5th and 14th amendment to the Federal Constitution and in the bills of rights in our state constitutions. This makes it imperative for us to consider the nature of private property with reference to the sovereign power of the state to look after the general welfare.").

critique that "indirect expropriation" regimes confer an expansive "right to an unchanging world" in a way that mirrors developments in U.S. takings law in the early 20th century. Second, it extends and rejects Professor Pupolizio's argument that "indirect expropriations" regimes allow arbitral tribunals to "control the very core of sovereignty" by bringing in the notions of institutional competence.

A. THE RIGHT TO AN UNCHANGING WORLD

Professor Pupolizio argues that the indeterminacy of indirect expropriation leads to a potential expansion of property rights protection that could give transnational corporations a new "right to an unchanging world," a de-physicalized and almost boundless conception of property rejected by the U.S. Supreme Court in the early 20th Century.[107] Pupolizio argues that treaties such as the NAFTA Article 1110 imbue arbitral tribunals with a proto-constitutional power of judicial review over a state's regulatory acts, threatening to upend state sovereignty on a global scale.[108] Pupolizio's argument comes in two parts. First, he argues that expanding takings to include investment values fails to account for the public law limits defining private property. Second, he argues that arbitral tribunals, as private law entities, lack the institutional competency and legitimacy to decide difficult theoretical questions about the limits of legislative power over the scope of private property rights, which are essentially public law questions.

1. *The De-Physicalization of Property*

Pupolizio sees the current transformation of property rights in international law echoed in the changes in U.S. law in the early 20th Century.[109] During that period of rapid commercial growth, the U.S. Supreme Court extended the scope of constitutional protections for takings from the limited conception of physical things

---

107. Ivan Pupolizio, *The Right to an Unchanging World: Indirect Expropriation in International Investment Agreements and State Sovereignty*, 10 VIENNA J. ON INT'L CONST. L. 143, 145 n.15 (2016) (citing Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987)) (this period came to an end with West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)).

108. Pupolizio, *supra* note 107, at 146.

109. *Id.*

to encompass "any of the expected activities implied with regard to the thing owned, comprehended in the activities of acquiring, using and disposing of the thing."[110] In classical political economy terms, the scope of constitutional protection shifted from use-value of things like land to exchange value of goods.[111] Taken to its logical conclusion, this conception of property allowed owners to invoke constitutional protections whenever any legal change negatively affects the market value of their things,[112] because any change in the market value of things affects the owner's "expected activities" in "using and disposing of the thing."[113]

By the 1920s, scholars — such as the institutional economist John R. Commons — criticized this conception of property as circular, because it is difficult to imagine a legal change that does not affect market values.[114] Scholars pointed out that this conception of property overlooks the fact that market values of things ultimately depend on the degree of legal protection afforded to those things.[115] As the legal historian Morton Horwitz argues, the American courts implicitly held that market values preexisted the legal protection of property and threatened to freeze the world by turning the market value expectations into property. Horwitz argues that the American courts at that time "came as close as they had ever had to saying that one had a property right to an unchanging world."[116]

2. *The Public Nature of Private Property*

American courts eventually retreated from this conception of property. In part, the legal realist movement contributed to this retreat by focusing on the public nature of private property and attacking the distinction between public and private law regimes. First, the legal realists dispelled the myth of property as a preex-

---

110. John R. Commons, Legal Foundations of Capitalism 18 (1924).

111. *Id.*

112. Morton J. Horwitz, The Transformation of American Law: 1870–1960: The Crisis of Legal Orthodoxy 150 (Oxford Univ. Press 1992).

113. *Id.* at 163 ("Since any prospective change in the law that reduced future income necessarily also reduced the property's present market value, it seemed to mean nothing less than a constitutional guarantee that the future should remain unchanged.").

114. Gerard C. Henderson, *Railway Valuation and the Courts*, 33 HARV. L. REV. 902, 917 (1920).

115. HORWITZ, *supra* note 112, at 162.

116. *Id.* at 151.

isting natural right by cutting off appeals to natural law.[117] Second, they gave a positive account of property rights as delegations of public power. As Morris Cohen argued:

> From this point of view it can readily be seen that when a court rules that a gas company is entitled to a return of 6% on its investment, it is not merely protecting property already possessed, it is also determining that a portion of the future social produce shall under certain conditions go to that company. Thus not only medieval landlords but the owners of all revenue-producing property are in fact granted by the law certain powers to tax the future social product. When to this power of taxation there is added the power to command the services of large numbers who are not economically independent, we have the essence of what historically has constituted political sovereignty.[118]

In essence, the private property right to a market return functions as a delegation from the sovereign in the form of legal rules that permit such a market return. For example, by allowing companies to contract with labor under favorable terms unmolested by regulations — such as a minimum wage — the state is delegating to the owner the right to receive the returns. Because private property rights are derivative of state power, Cohen argues, the state can justifiably abolish valuable property rights such as slavery and alcohol through regulation.[119]

Throughout the 20th century, the U.S. Supreme Court struggled to provide a theory of property that could draw the line between legitimate regulation and compensable takings. The Court recognized the difficulty of the theoretical question by advocating for an *ad hoc* inquiry into the extent of the "economic impact of the regulation on the claimant," its "interfere[nce] with distinct investment-backed expectations," and "the character of the governmental action."[120]

---

117. Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 541 (1988).
118. Cohen, *supra* note 106, at 13.
119. *Id.* at 24–25.
120. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

B. THE PRIVATIZATION OF SOVEREIGNTY

In recent decades, the NAFTA Chapter 1110 arbitral case law has caught up with domestic regulatory takings law. Further, given that arbitral tribunals have the ability to adopt U.S. takings law,[121] indirect expropriation cases stand to have the same ambiguous standards as U.S. takings law.[122] Along legal realist lines, Pupolizio argues that indirect expropriation suffers from structural indeterminacy, due to arbitral tribunals' position in the global legal landscape.[123] Unlike constitutional courts that have the institutional competence to determine and balance public law values, arbitral tribunals operate in a vacuum outside any constitution's legal hierarchies.[124] Arbitration tribunals do not have any public law values to counterbalance the value that investor agreements assign to property rights.[125]

This subpart extends Pupolizio's argument through notions of institutional competence. Unlike constitutional courts, arbitral tribunals lack the institutional competence and legitimacy to decide difficult theoretical questions about the limits of legislative power over the scope of private property rights. For example, when the U.S. Supreme Court decided *Penn Central*, the Court used categorization, reasonableness, and proportionality to balance the constitutional values of the legislature's regulatory power with individuals' property rights. Then, the Court acted in its constitutionally ordained role to balance the interests involved and carefully fashion new standards using its discretion. On the other hand, when an arbitral tribunal invokes the police powers doctrine to uphold a host state's environmental regulation, such as in *S.D. Myers*, it does so without guidance from the host state's *actual* constitutional standards for the legitimate exercise of police power. Rather, the tribunal decides the matter on its *own view* of what constitutes legitimate police power. Without the

---

121. *See, e.g.* Glamis Gold Award, *supra* note 97, ¶¶ 332, 356.

122. *See id.*, ¶¶ 334, 335 (arbitral tribunal explicitly adopts ripeness rule from Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1172–73 (Fed. Cir. 1991) that "when a statute [prohibiting surface coal mining] is enacted, at least in part, specifically to prevent the only economically viable use of a property, an official determination that the statute applies to the property in question is *not necessary* to find that a taking has resulted") (emphasis added).

123. Pupolizio, *supra* note 107, at 154–55.

124. *Id.*

125. *Id.*

necessary competence, arbitral tribunals convert a delicate constitutional balancing task to one close to arbitrariness.[126]

The unprecedented reach of arbitral tribunals exacerbates this tendency towards unpredictability. The creation of *ad hoc* international legal regimes threatens the traditional divide between public and private law.[127] Now, by simply bringing a claim, private organizations, such as transnational corporations, can easily make use of private tools and adjudicators to perform prototypically public law functions — such as deciding what constitutes legitimate police power to regulate and how much protection to afford property rights without the constraint of constitutional values.[128] In doing so, the private adjudicators "control the very core of sovereignty."[129] Further, given that there is no stare decisis,[130] limited appeals mechanisms,[131] and readily enforceable arbitral awards,[132] tribunals can give property protections to the investor's expectations of market value, vindicating the "right to an unchanging world" on an *ad hoc* basis.

---

126. *Id.*

127. *Id.* at 159.

128. *Id.* at 155, 159.

129. *Id.* at 160.

130. *See* NAFTA, *supra* note 1, at art. 1136(1), http://www.sice.oas.org/Trade/NAFTA/chap-112.asp#A1136 [https://perma.cc/5XZW-USKV] ("An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.").

131. Aaron Cosbey, *NAFTA's Chapter 11 and the Environment: A Briefing Paper for the CEC's Joint Public Advisory Committee* at 7 (June 17–18, 2002), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.537.5918&rep=rep1&type=pdf [https://perma.cc/92XF-TAEP] ("Further, the process allows only a very limited form of review – essentially a challenge of the arbitral award in the courts of the country where the Tribunal was legally located. The review then proceeds under the applicable international arbitration laws of the country or state/province in question, but the standard for review in such cases is much higher than that set for domestic appeals. The Tribunal would have to be shown to have committed an error of law so great that it amounted to an exceeding of its jurisdiction, rendering its decision null and unenforceable.").

132. *See* NAFTA, *supra* note 1, at art. 1136(4), http://www.sice.oas.org/Trade/NAFTA/chap-112.asp#A1136 [https://perma.cc/5XZW-USKV] ("Each Party shall provide for the enforcement of an award in its territory."); art. 1136(6), http://www.sice.oas.org/Trade/NAFTA/chap-112.asp#A1136 [https://perma.cc/5XZW-USKV] ("A disputing investor may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the Inter-American Convention regardless. . . ."). Under the Convention on the Settlement of Investment Disputes Between States and National of Other States (ICSID Convention) and the New York Convention, or the Inter-American Convention, arbitral awards are to be treated as equivalent to a final judgment in the courts of the state in which they are enforced. *See* ICSID Convention, art. 54, Oct. 14, 1966, 17 U.S.T. at 1291–92, 575 U.N.T.S. at 194; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. 3, 21 U.S.T. 2517, 2519, 330 U.N.T.S. 38, 40; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, art. 4, 104 Stat. 448, 449, 1438 U.N.T.S. 249, 249.

C. NO REVIVING A "RIGHT TO AN UNCHANGING WORLD"

While Pupolizio's argument against indirect expropriations highlights structural problems with indirect expropriations and arbitral tribunals, its fears about the revival of a "right to an unchanging world on a global scale"[133] are overblown for two reasons. First, in practice, arbitral tribunals are generally reluctant to invalidate regulations and give property protections to investor expectations of market value. Consider again the *Tippetts*, *Bilouene*, and *Metalclad* decisions that found indirect expropriation. Recall that *Tippetts* involved Iran's appointment of a manager to be solely responsible for making financial and personnel decisions on behalf of the joint venture.[134] The government's direct assumption of control over the entire joint venture deprived the private investor of the fundamental right of ownership: control.[135] In finding indirect expropriation, the arbitral tribunal vindicated a rather traditional right to private ownership and not some right to unchanging profit expectations. *Biloune* involved the demolishing of a hotel building project and the arrest, detention, and deportation of the principal investor and manager of the project.[136] Likewise, the government's action deprived the private investor of control through actual destruction of the property and deportation of the owner from the country. Arguably, only the *Metalclad* decision remains as a vindication of a "right to an unchanging world." But, as Pupolizio notes, the *Metalclad* decision represents something of a one-off case, explained by the specific representations of the Mexican federal government that the company had acquired all the necessary permits to run the landfill.[137] As such, the arbitral tribunal's decision can be seen as a vindication of something closer to a reliance interest created by specific representations rather than some abstract right to expected profits.

Second, arbitral tribunals are generally sensitive towards investors' plans to exploit regulatory risks to create profit, and hence wary of any claims of expropriations of expected returns

---

133. Pupolizio, *supra* note 107, at 146.
134. *See* Tippetts Case, *supra* note 26, at 225.
135. *Id.* at 225–26.
136. Biloune v. Ghana Inv. Ctr. (Syria v. Ghana), 95 I.L.R. 183, 203–04 (1989), https://www.trans-lex.org/260700 [https://perma.cc/NQP4-UQKB].
137. Pupolizio, *supra* note 107, at 154.

due to changing regulations. Consider again *S.D. Myers* and *Methanex*. Both tribunals pointed out that private investors engaged in intensive lobbying to create favorable regulatory environments.[138] Both tribunals reasoned that private investors who engage in the business of exploiting regulatory risk do not have a right to expected returns from a favorable regulatory environment. Thus, arbitral tribunals have already rejected arguments for a "right to an unchanging world." In short, Pupolizio's fears have not practically materialized. Though arbitral case law has been inconsistent, arbitral tribunals have been conservative in vindicating property rights of investors and restrained in invalidating state regulations.

IV. Dynamically Interpreting Property in International Regulatory Taking

Though Pupolizio's fears have not materialized, the fears of private adjudicators creating *ad hoc* property rules in a vacuum without constitutional structure or values remains real. Given the difficulty of this theoretical problem, scholars have suggested eliminating indirect expropriations altogether,[139] establishing uniform standards,[140] and establishing a system of review by an appellate body supervised by the Free Trade Commission.[141] Each of these suggestions is flawed. First, given that 2,329 bilateral investment treaties (BITs) are currently in force[142] and a record-high 70 investor-state dispute settlement (ISDS) cases were filed in 2015,[143] it might be too late to return to a world without international takings. Second, if the NAFTA Article 1110 incorporated a uniform two-step standard of "substantial deprivation"

---

138. *See* S.D. Myers Partial Award, *supra* note 53, ¶¶ 113–16; Methanex Final Award, *supra* note 86, at Part IV - Chapter D - Page 5.

139. Been & Beauvais, *supra* note 9, at 60.

140. Peter D. Isakoff, *Defining the Scope of Expropriation for International Investments*, 3 GLOBAL BUS. L. REV. 189, 202 (2013).

141. Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 37 (2003).

142. United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, http://investmentpolicyhub.unctad.org/IIA (last visited Mar. 4, 2017) [https://perma.cc/5NBF-6ZVX].

143. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2015, at 1 (June 2016), http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d4_en.pdf [https://perma.cc/F4JF-3H62].

and "reasonable predictability,"[144] it still would fail to address the lack of constitutional competence of these arbitral tribunals. Third, establishing an appellate body suffers the same flaw. None of these proposals address the lack of competency and legitimacy of arbitral tribunals to draw the line that separates the limits of legislative power from the scope of property rights.

Thus, this Note proposes that the authoritative bodies created by the NAFTA dynamically interpret property in light of the public welfare concerns raised by global climate change. Specifically, it proposes that the NAFTA's Free Trade Commission issue authoritative Notes of Interpretation, addressing the problem of the "dialogic nature of property rules and police power" and renegotiating the interdependent nature of property rights and state regulatory practices.[145] In place of constitutional structure and values, the Free Trade Commission would use the customary principles of treaty interpretation, as restated by the Vienna Convention of the Law of Treaties (VCLT), to draw on values in current international law to balance against the investor's private property rights in issuing authoritative interpretations of Article 1110. This part describes the role of the Free Trade Commission and how it has used its Notes of Interpretation in the past, suggesting that it use this power to authoritatively interpret Article 1110. Then, it illustrates the basic rules of treaty interpretation, as restated by the VCLT, and applies them to Article 1110 to create a more holistic interpretation of property.

A. THE FREE TRADE COMMISSION AND NOTES OF INTERPRETATION

The Commission has power to supervise the implementation of the NAFTA, to oversee its further elaboration, and to "resolve disputes that may arise regarding its interpretation or applica-

---

144. *See* Isakoff, *supra* note 140, at 202 ("Arbitral tribunals should only find that indirect expropriation occurs when (i) state actions substantially deprive a foreign investor of the economic use and enjoyment of its investment, and (ii) the state action was not reasonably predictable to the investor.").

145. On the dialogic conception of property as "a kind of social relation that is renegotiated over time as circumstances change," *see, e.g.,* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 945 (2000) ("Property is a dynamic institution that evolves over time . . ."); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 116, 179 (2002) ("[t]echnological shifts, shifts in mores or tastes, new socioeconomic situations, and new scientific information can all prompt regulatory readjustment of property rights").

tion."[146] The Free Trade Commission is composed of "cabinet-level representatives of the Parties or their designees."[147] An interpretation by the Commission of a provision is governing law binding on Chapter 11 arbitral tribunals,[148] in addition to other "applicable rules of international law."[149] This is not unique. Similar or identical mechanisms are provided in numerous trade agreements.[150] For example, the Marrakesh Agreement provides that the Ministerial Conference and the General Council have exclusive authority to adopt interpretations of the World Trade Organization (WTO) Agreement.[151]

The Commission has made use of its interpretative powers only once, on July 31, 2001,[152] when it interpreted the minimum standards of treatment under the NAFTA Article 1105.[153] Recall that Article 1105 functions like the Due Process Clause of the United States Constitution, requiring that signatory governments treat foreign investors from NAFTA parties "in accordance with international law, including fair and equitable treatment

---

146. NAFTA, *supra* note 1, at art. 2001(2), http://www.sice.oas.org/Trade/NAFTA/CHAP-201.ASP#A2001 [https://perma.cc/56VV-Q64G].

147. *Id.* at art. 2001(1).

148. *Id.* at art. 1131(2), http://www.sice.oas.org/Trade/NAFTA/chap-112.asp#A1131 [https://perma.cc/W3R7-CSTU].

149. *Id.* at art. 1131(1).

150. *See, e.g.* Canadian Model Foreign Investment Promotion and Protection Agreement of 2004, art. 51(2)(b), http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf [https://perma.cc/LHU5-VLWR]; Free Trade Agreement between Canada and the States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland) (in force as of July 1, 2009), art. 26(2)(g), http://www.efta.int/media/documents/legal-texts/free-trade-relations/canada/EFTA-Canada%20Free%20Trade%20Agreement%20EN.pdf [https://perma.cc/8VRW-U75B]; United States-Australia Free Trade Agreement (Jan. 1, 2005), art. 21.1(2)(e), https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf [https://perma.cc/77FQ-8DL9]; United States–Korea Free Trade Agreement (signed on June 30, 2007), art. 22.2(3)(d), https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file973_12721.pdf [https://perma.cc/3M6L-UQAF]; United States–Singapore Free Trade Agreement (entered into force on Jan. 1, 2004), art. 20.1(2)(e), https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf [https://perma.cc/MG6V-6ZCJ].

151. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187.

152. Free Trade Commission, *Notes of Interpretation of Certain Chapter Eleven Provisions* (July 31, 2001), at B [hereinafter NAFTA Notes of Interpretation], http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp [https://perma.cc/5C3Q-XUHP].

153. *Id.*

and full protection and security."[154] The Commission made two authoritative interpretations.

First, the Commission interpreted Article 1105 as merely incorporating customary international law and not providing additional protections. This narrow interpretation may have been a response to the *Metalclad* tribunal's expansive interpretation of Article 1105 as requiring Mexico "to ensure a transparent and predictable framework" and "orderly process and timely disposition" for Metalclad's business planning and investment."[155] Second, the Commission held that "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1) [Minimum Standards of Treatment]."[156] Again, this narrow interpretation may have been a response to *S.D. Myers*, where the tribunal considered that a breach of Article 1102 National Treatment was also a breach of Article 1105 Minimum Standards of Treatment.[157] Recall that like the Privileges and Immunities Clause of the United States Constitution, the Article 1102 National Treatment provision requires that signatory governments treat foreign investors from NAFTA parties "no less favorabl[y]" in "like circumstances" than they treat domestic investors.[158] Logically, treating foreign investors less favorably than domestic investors does not necessarily mean treating them below the minimum required by customary international law.

B. A NOTE OF INTERPRETATION ON ARTICLE 1110

In interpreting NAFTA Article 1105, the Free Trade Commission acted the same way as the U.S. Supreme Court does when it interprets the Due Process Clause. Similarly, the Commission can interpret Article 1110 just as the U.S. Supreme Court interprets the Takings Clause. Instead of drawing on constitutional values, the Free Trade Commission can draw on values embodied

---

154. NAFTA, *supra* note 1, at art. 1105(1), http://www.sice.oas.org/trade/nafta/chap-111.asp#A1105 [https://perma.cc/LM3E-2222].

155. Metalclad Arbitration Award, *supra* note 8, ¶¶ 99.

156. NAFTA Notes of Interpretation, *supra* note 152, at B(3).

157. S.D. Myers Partial Award, *supra* note 53, ¶¶ 256, 268.

158. NAFTA, *supra* note 1, at art. 1102, http://www.sice.oas.org/trade/nafta/chap-111.asp#A1102 [https://perma.cc/4JMF-R22F]. *See generally* Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment* 25–26, THE INT'L INST. FOR SUSTAINABLE DEV. (1999), http://www.iisd.org/pdf/nafta.pdf [https://perma.cc/MF95-RMBX].

in the treaties of international law, the structural relationships between different international bodies, and customary international law principles to balance the sovereign power to regulate against values of individual property rights. The Commission can use the interpretative tools found in the Vienna Convention on the Law of Treaties (VCLT) to draw on the structure and values of international law.

Because this proposal situates the Free Trade Commission in an analogous role to domestic constitutional courts, it answers Professor Pupolizio's critiques that arbitral tribunals lack institutional competence and legitimacy to answer the hard questions about legitimate sovereign power to regulate and private property rights. Unlike the arbitral tribunals, the Free Trade Commission is the body ordained by the NAFTA to give authoritative interpretations of the treaty. First, by enacting the NAFTA, the signatory nations endowed the Free Trade Commission's ordained functions with legitimacy while retaining control over the exercise of such functions. Second, the administrators of NAFTA have the necessary competence over international law issues, because trade agreements are drafted with the background of international law developments in mind.[159] Furthermore, the Cabinet-level members of signatory nations can designate other members to sit on the Commission.[160] Through this mechanism, the signatory nations could appoint legal experts who have the independence and competence to address delicate questions of international law.[161] Under this proposal, the Free Trade Commission would occupy a position in the international legal order analogous to constitutional courts in the limited contexts of disputes between investors and host states, and would be empowered to fashion new standards of what constitutes legitimate sov-

159. For an example of how provisions of international agreements develop, and how the expropriation provisions evolved over time, *see supra* Part II.A.

160. NAFTA, *supra* note 1, at art. 2001(1), http://www.sice.oas.org/Trade/NAFTA/CHAP-201.ASP#A2001 [https://perma.cc/56VV-Q64G].

161. These judges could by chosen from candidates "whose independence is beyond doubt" and "who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults [legal experts] of recognised competence," in the way that the judges on the European Court of Justice are chosen. *See* Foundation for EU Democracy, 2008 Consolidated Reader-Friendly Edition of the Treaty of the European Union (TEU) and the Treaty on the Treaty on the Functioning of the European Union (TFEU) as amended by the Treaty of Lisbon (2007), art. 253, http://fchub.it/temp/FCHub/da_karlsruhe_(ri)corsi_e_ricorsi_minano_la_stabilita_europea_I_parte/D-Reader_friendly_latest%20version.pdf [https://perma.cc/9RV5-ANW3].

ereign power to regulate and what constitutes a taking of investment property.

This proposal also answers Professor Pupolizio's critique that indirect expropriations adjudicated by arbitral tribunals allow private law actors to "control the very core of sovereignty." Empowering the Free Trade Commission is a way to integrate public law and private law functions. Through the Commission, the signatory nations can issue authoritative interpretations of public law that bind private law adjudicators. As such, the private law adjudicators do not "control the very core of sovereignty" because the Commission — composed of public law actors representing the signatory nations — ultimately controls the balancing of sovereign values against private property rights. Presumably, the Commission, aided by advice from independent legal experts, would not create unclear and expansive property rights on an *ad hoc* basis. But if it did, at least the Commission would be acting analogously to a public law institution, such as the U.S. Supreme Court.

C. AN INTERPRETATION USING PRINCIPLES OF TREATY INTERPRETATION

Unlike the U.S. Supreme Court, the Free Trade Commission — as a public international law body — is informed by an interpretative framework of customary rules of treaty interpretation, as restated by the VCLT.[162] This interpretative framework can be used to address the delicate balancing of the sovereign power to regulate, individual property rights, and international public interests such as environmental protection, public health, or peace and security.

Recognizing the importance of treaties as a source of international law, the VCLT provides principles aimed at "developing peaceful co-operation among nations, whatever their constitutional and social systems."[163] In Section 3, the VCLT specifically provides principles of interpretation.[164] Because investment trea-

---

162. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention on the Law of Treaties], http://www.oas.org/legal/english/docs/Vienna%20Convention%20Treaties.htm [https://perma.cc/DF6S-32TM].

163. *Id.* at Preamble.

164. *Id.* § 3. Interpretation of Treaties.

ties are international law treaties, the VCLT's principles of treaty interpretation apply to them.[165] Article 31, the General Rule of Interpretation, states:

> 1. A treaty shall be interpreted 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.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
>   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>   (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.[166]

165. *See* Valentina Sara Vadi, *Through the Looking-Glass: International Investment Law through the Lens of a Property Theory*, 8 MANCHESTER J. INT'L ECON. L. 22, 51 (2011). Granted, though Mexico and Canada have ratified the VCLT, the United States has not ratified the VCLT but considers many of its provisions to constitute customary international law on the law of treaties. *See* United Nations Treaty Collection, Vienna Convention on the Law of Treaties, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en [https://perma.cc/KX2K-CKAC]; U.S. Dep't of State, Office of the Legal Adviser, *Treaty Affairs, Frequently Asked Questions, Vienna Convention on the Law of Treaties*, https://www.state.gov/s/l/treaty/faqs/70139.htm [https://perma.cc/RQY3-J64U].

166. Vienna Convention on the Law of Treaties, *supra* note 162, at art. 31.

Article 31 roughly lays out a framework for textual interpretation ("the ordinary meaning to be given to the terms of the treaty"), contextual interpretation ("in their context"), and teleological interpretation ("in the light of its object and purpose"). Further, it specifies that contextual and teleological interpretations depend on the text of the preamble, annexes (31.2), and other related agreements between the parties, made in connection to the main treaty (31.2(a)-(b)). The contextual and teleological interpretations are dynamic — changes in subsequent agreements (31.3(a)), subsequent practice (31.3(b)), or international law (31.3(c)) can change the interpretation of treaty provisions.[167] Because the text of the expropriation provision sheds little light by itself on how treaty provisions relevant to international regulatory takings should be interpreted, this following analysis focuses on contextual, teleological, and dynamic interpretations of Article 1110 to define property as the balance between limits of the individual property rights and legitimate sovereign powers to regulate.

1. *Contextual Interpretation*

Beginning with the context closest to Article 1110, the NAFTA Article 1114 Environmental Measures provides:

> 1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
> 2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures . . . .[168]

This provision shifts the balance toward the sovereign power to regulate in health, safety and environmental protection against regulatory takings of private property. If the Free Trade Commission found that arbitral tribunals are not taking this provi-

167. *Id.*
168. NAFTA, *supra* note 1, at art. 1114, http://www.sice.oas.org/trade/nafta/chap-111.asp#A1114 [https://perma.cc/9V8U-K2CF].

sion seriously, then it could issue an authoritative interpretation aimed at making tribunals weigh this provision heavily against a finding of expropriation.

At the level of the NAFTA agreement, Article 104: Relation to Environmental and Conservation Agreements provides that specific obligations in recognized international environmental and conservation agreements — such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal — prevail over NAFTA obligations to the extent that a signatory nation has "a choice among equally effective and reasonably available means of complying with such obligations" and "chooses the alternative that is the least inconsistent with the other provisions of [the NAFTA]."[169] In other words, this provision gives priority to recognized environmental and conservation treaties if the means to implement those treaties are tailored to minimize conflict with the NAFTA. For example, if Canada chooses to implement the Basel Convention through a ban on the import of the highly toxic PCB and the ban tried to minimize conflict with NAFTA's other provisions, then it is clear an American corporation cannot succeed in an Article 1110 expropriations claim.[170] Again, this priority defines property with the balance toward the international public interest in conservation and environmental regulation and away from the private property rights of investors.

2. *Teleological Interpretation*

At an abstract level, teleological interpretation seeks to interpret provisions in the light of the purpose, values, and legal, social or economic goals these provisions aim to achieve.[171] Accordingly, in the preamble of the NAFTA, the signatory nations re-

---

169. *Id.* at art. 104(1), http://www.sice.oas.org/trade/nafta/chap-01.asp#A104 [https://perma.cc/XGB3-BT2E].

170. This is a slight variation on the facts of S.D. Myers Partial Award, *supra* note 53. For a more thorough discussion of that case, *see supra* Parts II.C and II.D.2.

171. Teleological interpretation goes beyond mere purposive interpretation. According to General Advocate Miguel Poiares Maduro, "Teleological interpretation in EU law does not refer exclusively to a purpose driven interpretation of the relevant legal rules. It refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules." Oreste Pollicino, *Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint*, 5:3 GERMAN L.J. 283, 289 (2004), http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/POLLICINO_Reasoning_ECJ_Equality_GLJ_2004.pdf [https://perma.cc/C3AR-RHW7].

solved, *inter alia*, to contribute to "expansion of world trade," create "an expanded and secure market for the goods and services produced in their territories," and "ensure a predictable commercial framework for business planning and investment."[172] But also, they resolved to accomplish these goals in "a manner consistent with environmental protection and conservation" that "preserve[s] their flexibility to safeguard the public welfare," "promote[s] sustainable development," and "strengthen[s] the development and enforcement of environmental laws and regulations."[173] Though the *telos* of free trade agreements or investment treaties is to superficially protect investor assets, the preamble of the NAFTA suggests that its *telos* can be interpreted as acknowledging the social function of property while also upholding corresponding duties to the public welfare. This particular interpretation is bolstered by the North American Agreement on Environmental Cooperation (NAAEC), a side agreement complementing the NAFTA, which recognizes "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."[174] In this way, the NAFTA can be interpreted to accommodate a property theory that subordinates private property interests to sovereign interests toward the public welfare, as represented in some national constitutions.[175]

---

172. NAFTA, *supra* note 1, at Preamble, http://www.sice.oas.org/trade/nafta/PREAMBLE.ASP [https://perma.cc/C6PA-KF33].

173. *Id.*

174. North American Agreement on Environmental Cooperation art. 3, Sept. 14, 1993, 32 I.L.M. 1480, 1483, http://www.cec.org/sites/default/files/naaec.pdf [https://perma.cc/4DHW-CW97].

175. *See, e.g.*, Article 41 of the Italian Constitution, Art. 41 Costituzione [Cost.] (It.); Article 14.2 of the German Constitution, Grundgesetz [GG] [Basic Law] ('Property imposes duties. Its use should also serve the public weal') and Section 33.2 of the Spanish Constitution ('the social function of these rights [the right to private property and inheritance] shall determine the limits of their content in accordance with the law'). Notably, the U.S. Constitution does not explicitly refer to the public welfare limits of property. The 5th Amendment provides that no person "shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Likewise, the 14th Amendment provides "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1, cl. 3.

3. *Dynamic Interpretation*

Beyond the initial interpretation at the time of enactment, the NAFTA can be dynamically interpreted by the Free Trade Commission according to changed circumstances. As Article 31 provides, the changed circumstances could be changes brought about by subsequent agreements (31.3a), subsequent practices (31.3b), or rules of international law (31.3c).[176]

The NAFTA entered into force on January 1, 1994.[177] Three months later, on March 21, 1994, the United Nations Framework Convention on Climate Change (UNFCCC) took effect, with the United States, Mexico, and Canada as parties.[178] Beginning in 1995, the parties to the convention have met annually in Conferences of the Parties (COP) to assess progress in dealing with global climate change.[179] In December 1997, the UNFCCC parties concluded the Kyoto Protocol, in which they agreed to the broad outlines of greenhouse gas emission targets.[180] Though the United States has never ratified the Kyoto Protocol and Canada withdrew from it,[181] the increasing importance of addressing climate change figures into the changed circumstances in dynamic interpretations of provisions of the NAFTA. In particular, the NAAEC emphasizes "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"[182] in order to

---

176. Vienna Convention on the Law of Treaties, *supra* note 162, at art. 31.

177. *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/issue-areas/industry-manufacturing/industrial-tariffs/free-trade-agreements#North American Free Trade Agreement (NAFTA) [https://perma.cc/2WBH-5XP3] (last visited Mar. 8, 2017).

178. United Nations Framework Convention on Climate Change (UNFCCC), Status of Ratification of the Convention, http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php [https://perma.cc/FZ4U-MMZZ] (last visited Mar. 8, 2017).

179. United Nations Framework Convention on Climate Change (UNFCCC), Conference of the Parties (COP), http://unfccc.int/bodies/body/6383.php [https://perma.cc/3CTC-49XY] (last visited Mar. 8, 2017).

180. United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, http://unfccc.int/kyoto_protocol/items/2830.php [https://perma.cc/QZ58-7DPH] (last visited Mar. 8, 2017).

181. United Nations Framework Convention on Climate Change (UNFCCC), Status of Ratification of the Kyoto Protocol, http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php [https://perma.cc/X347-G6RB] (last visited Mar. 8, 2017).

182. North American Agreement on Environmental Cooperation (NAAEC) art. 3, Sept. 14, 1993, art. 3, 32 I.L.M. 1480, 1483.

better address climate change. Thus, these values would weigh more heavily in the balance against private property rights of investors when it comes to defining property in the context of regulatory takings.

V. The Interpretation Applied to Keystone XL

This Part applies an interpretation of property that weighs global environmental priorities in domestic regulation against investor property interests to TransCanada's Keystone XL claim. To begin, it details that TransCanada's claim for indirect expropriation is based on losses to large capital investments and expenditures in anticipation of building the Keystone XL oil pipeline resulting from unjustifiable delay and denial of the Presidential Permit.[183] To show how this new interpretation departs from standing arbitral case law, this Part will first analyze TransCanada's claim under current regulatory takings case law. Second, it will change the underlying facts of the claim to show how this Note's approach presents a new interpretation of property under Article 1110.

A. The Keystone XL Claim

On September 19, 2008, TransCanada submitted an application to the State Department for a Presidential Permit to construct the Keystone XL Pipeline — a cross-border pipeline that would transport approximately 830,000 barrels per day (bpd) of oil sands crude from Alberta to refineries in Oklahoma and Texas.[184] The Keystone XL Pipeline was to be an expansion of the already-approved Keystone I Pipeline with a more direct route and larger-diameter pipe.[185]

---

183. Because the Trump administration is supportive of the Keystone XL pipeline, the following discussion of Keystone is hypothetical in nature. With the change in environmental policies that accompany different Presidential administrations, future indirect expropriations claims based on changing regulations are likely to continue to arise.

184. *See* Kristine L. Delkus & James P. White, Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United States-Canada Border (May 4, 2012), at 1–3 [hereinafter 2012 Keystone XL Presidential Permit Application], https://2012-keystonepipeline-xl.state.gov/documents/organization/189504.pdf [https://perma.cc/Q4BQ-R997].

185. *You Have Questions. We Have Answers*, TransCanada Corp., http://www.keystone-xl.com/kxl-101/faqs/ [https://perma.cc/HB8K-3BA8] (last visited Mar. 4, 2017).

On November 6, 2015, seven years after the initial application, and three years after a second application,[186] the State Department denied the permit as not in the U.S. national interest.[187] It set forth the following reasons. First, the net effects of the proposed pipeline's impact on global climate change were critical to the determination.[188] Second, although the Final Supplemental Environmental Impact Statement concluded that the proposed pipeline was unlikely to significantly impact greenhouse gas emissions (GHG) related to extraction of oil sands crude given current demand levels, the market for oil is extremely volatile and difficult to predict.[189] Third, given the crucial leadership of the U.S. on global climate change, the decision to approve or deny a new pipeline would be understood as a litmus test for U.S. commitment to making hard choices on the issue.[190] Because U.S. actions relating to climate change have a significant leveraging effect on global emissions trends, a decision to approve the permit would undermine U.S. climate leadership and discourage other states from addressing climate change.[191] Put simply, the State Department decided that permitting the pipeline was not in the U.S. national interest because the pipeline hurt U.S. leadership in international relations matters related to global climate change.

After the denial of its second application, TransCanada filed its "Notice of Intent" to submit a claim to arbitration under the NAFTA on January 6, 2016.[192] Six months later, in June 2016, TransCanada filed a "Request for Arbitration," alleging that the United States breached its obligations under Article 1102: National Treatment, Article 1103: Most-Favored Nation Treatment, Article 1105: Minimum Standard of Treatment, and Article 1110:

---

186. *See* 2012 Keystone XL Presidential Permit Application, *supra* note 184, at 48.

187. *See* U.S. DEP'T OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION, TRANSCANADA KEYSTONE PIPELINE, L.P. APPLICATION FOR PRESIDENTIAL PERMIT (2015), at 31–32 [hereinafter 2015 Keystone XL ROD], https://2012-keystonepipeline-xl.state.gov/documents/organization/249450.pdf [https://perma.cc/RY7P-2RUG].

188. *Id.*

189. *Id.* at 12, 29.

190. *Id.* at 29–31.

191. *Id.* at 26–29.

192. TransCanada Corp. v. United States of America, ICSID Case No. ARB/16/21, Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of NAFTA (Jan. 6, 2016) [hereinafter Keystone XL Notice of Intent], http://www.italaw.com/sites/default/files/case-documents/ITA%20LAW%207030.pdf [https://perma.cc/4ARJ-6TF2].

Expropriation and Compensation.[193] As is typical in other cases, the Article 1110: Expropriation and Compensation claim is joined with other related claims.[194] Given that NAFTA's Chapter 11 forms a "foreign investor's bill of rights,"[195] considering the related claims under different provisions sheds light on this legal regime.

Articles 1102, 1103, and 1105, regarding National Treatment, Most-Favored Nation Treatment, Minimum Standard of Treatment, respectively, are roughly analogous to the U.S. Constitution's Privileges and Immunities,[196] Equal Protection,[197] and Due Process[198] Clauses, respectively.[199] Like the Privileges and Immunities Clause, the Article 1102: National Treatment provision requires that signatory governments treat foreign investors from the NAFTA parties "no less favorabl[y]" in "like circumstances" than they treat domestic investors.[200] Like the Equal Protection Clause, the Article 1103: Most-Favored Nation Treatment provision requires that signatory governments treat foreign investors from the NAFTA parties "no less favorabl[y]" in "like circumstances" than foreign investors who are not parties to the NAFTA and parties to other trade agreements.[201] The provision means that foreign investors from the NAFTA parties are automatically entitled to the same advantages conferred to other foreign investors who enjoy most-favored nation status with the signatory government.[202] Like the Due Process Clause, the Article 1105: Minimum Standard of Treatment provision requires that signato-

---

193. *See* Keystone XL Request for Arbitration, *supra* note 3, at 1.

194. *See* NAFTA Dispute Table, *supra* note 10 (listing NAFTA Chapter 11 investor-state disputes with Article 1110 (expropriation and compensation) claims joined with other related claims, such Article 1105 (minimum standards of treatment) and Article 1102 (national treatment)).

195. *See* Been & Beauvais, The Global Fifth Amendment, *supra* note 9, at 40.

196. U.S. CONST. amend. XIV, § 1, cl. 2.

197. U.S. CONST. amend. XIV, § 1, cl. 4.

198. U.S. CONST. amend. XIV, § 1, cl. 3.

199. *See supra* note 195.

200. NAFTA, *supra* note 1, at art. 1102, http://www.sice.oas.org/trade/nafta/chap-111.asp#A1102 [https://perma.cc/JVJ4-8DAN]. *See generally* Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment*, at 21–47, THE INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, http://www.iisd.org/pdf/nafta.pdf [https://perma.cc/YW7Q-N7YC].

201. NAFTA, *supra* note 1, at art. 1103, http://www.sice.oas.org/trade/nafta/chap-111.asp#A1103 [https://perma.cc/QZ93-DFU2].

202. For a discussion of the background and operation of most-favored-nation clauses like Article 1103, *see* Stephan W. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT'L L. 496 (2009).

ry governments treat foreign investors from the NAFTA parties "in accordance with international law, including fair and equitable treatment and full protection and security."[203]

TransCanada alleges three grounds underlying the breach of related NAFTA obligations. TransCanada argues that the U.S. unjustifiably delayed processing its Presidential Permit application,[204] that the U.S. unjustifiably denied its Presidential Permit,[205] and that the U.S. unjustifiably discriminated against it.[206]

First, TransCanada argues that the U.S. delayed its decision on the Presidential Permit for the Keystone XL Pipeline for seven years, which is about six times longer than the average processing time of roughly one and a half years.[207] TransCanada argues that if the State Department had decided the application within the typical time period of less than two years, the politicization of the pipeline as a climate change symbol would never have occurred.[208] TransCanada notes that the Obama administration approved two pipelines that connect the Canadian oil sands to refineries in the U.S. — the Alberta Clipper Pipeline in August 2009 and the Cochin Pipeline in November 2013[209] — dur-

---

203. NAFTA, *supra* note 1, at art. 1105, http://www.sice.oas.org/trade/nafta/chap-111.asp#A1105 [https://perma.cc/87NT-D2DX].

204. Keystone XL Request for Arbitration, *supra* note 3, at 30.

205. *Id.* at 32.

206. *Id.* at 33.

207. *See* NAFTA, *supra* note 1, at art. 1105, http://www.sice.oas.org/trade/nafta/chap-111.asp#A1105 [https://perma.cc/8JWC-BQ4X]; Josh Lederman, *Keystone XL Review Drags on 5 Times Longer than Average*, ASSOCIATED PRESS (Aug. 12, 2015, 7:34 AM), https://www.usnews.com/news/politics/articles/2015/08/12/keystone-xl-review-drags-on-5-times-longer-than-average [https://perma.cc/8N9R-398K].

208. NAFTA, *supra* note 1, at art. 1105, http://www.sice.oas.org/trade/nafta/chap-111.asp#A1105 [https://perma.cc/M498-5TUU]. *See also* Andrew C. Revkin, *Prodded by Climate Campaigners and Aided by Cheap Oil, Obama Kills Keystone*, N.Y. TIMES (Nov. 6, 2015, 1:34 PM), https://dotearth.blogs.nytimes.com/2015/11/06/prodded-by-climate-campaigners-and-aided-by-cheap-oil-obama-kills-keystone/?rref=collection%2Ftimestopic%2FKeystone%20XL&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=42&pgtype=collection [https://perma.cc/LW97-7VJJ] (outlining the significance of the Keystone pipeline for the contemporary environmental movement).

209. *See* U.S. DEP'T OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION, ENBRIDGE ENERGY, L.P., ALBERTA CLIPPER APPLICATION FOR PRESIDENTIAL PERMIT (Aug. 3, 2009), at 2 [hereinafter 2009 Alberta Clipper ROD], https://static01.nyt.com/images/blogs/greeninc/ROD.pdf [https://perma.cc/NQ6D-RTCM]; Notice of Issuance of a Presidential Permit for the Proposed Enbridge Energy Alberta Clipper Pipeline Project, 74 Fed. Reg. 43212-01 (Aug. 26, 2009) [hereinafter 2009 Alberta Clipper Presidential Permit]; Presidential Permit for Kinder Morgan Cochin, LLC, 78 Fed. Reg. 73582-01 (Dec. 6, 2013) [hereinafter 2013 Kinder Morgan Presidential Permit].

ing the time that it took processing the Keystone XL application from 2008 to 2015.[210]

Second, TransCanada argues that the State Department should have approved the Presidential Permit because the proposed pipeline met the existing border security, safety, public health, and environmental impact standards.[211] Prior to the politicization of the Keystone XL oil pipeline, the Obama Administration had approved a Presidential Permit for the Alberta Clipper pipeline in August 2009.[212] Similar to Keystone XL, the Alberta Clipper pipeline, running from Alberta to Wisconsin, integrated the Canadian oil sands system with storage and processing facilities in the U.S.[213] In weighing the concerns of increased GHG emissions, the State Department considered the fact that (i) construction of the pipeline would send a positive economic signal during a difficult economic period, (ii) the pipeline would immediately create construction jobs, and (iii) the U.S. and Canada would, through bilateral diplomacy and new technology, reduce the GHG emissions of the pipeline, in favor of granting the permit.[214] TransCanada argues that if the State Department had followed the objective criteria of its prior decisions, then it would have granted Keystone XL a Presidential Permit.[215] The objective criteria of safety, public health, and actual impact on GHG emissions were satisfied.[216] But the State Department changed its criteria and denied the permit because of the political issue of the pipeline's impact on perceptions of U.S. leadership in addressing climate change.[217] TransCanada argues that this shift from actual impact of GHG emissions on climate change to net impact on global climate change on the basis of international perception of U.S. leadership was an unjustifiable basis for denial.[218]

Third, TransCanada claims that the State Department discriminated against the Keystone XL permit application because

210. While the Keystone XL Pipeline would have a capacity of 830,000 bpd, the Alberta Clipper Pipeline had capacity of 450,000 bpd. *See* 2012 Keystone XL Presidential Permit Application, *supra* note 184, at 1–3; 2009 Alberta Clipper ROD, *supra* note 209, at 5.

211. Keystone XL Request for Arbitration, *supra* note 3, at 33.

212. 2009 Alberta Clipper ROD, *supra* note 209, at 25–27.

213. *Id.* at 1–2.

214. *Id.* at 25.

215. Keystone XL Request for Arbitration, *supra* note 3, at 33.

216. *Id.*

217. *Id.*

218. *Id.* at 30, 32–33.

the pipeline became a political symbol for climate change activism.[219] The State Department had approved other similar transnational pipelines — such as the Alberta Clipper and the Cochin Pipelines — using the standard criteria of safety, public health, and environmental impact,[220] all in a significantly shorter amount of time than it took to review and ultimately deny the Keystone XL application.[221] The arbitrary change in the criteria to focus on public perception of climate change discriminated against TransCanada while allowing other companies to pass merely on the standard criteria of safety, public health, and environmental impact.[222]

The State Department's delay resulted in lost capital expenditures for TransCanada, such as investments in easements, pipe, materials, equipment, and lost future revenues from the oil pipeline.[223] The construction of an oil pipeline required a substantial amount of advance work while the application for a Presidential Permit was pending.[224] During the delay, TransCanada argued that it had no other choice but to continue making capital expenditures so that it could begin construction as soon as the permit was granted.[225]

B. UNDER THE CURRENT LAW

Under the standing arbitral case law, the analysis is straightforward. An arbitral tribunal could resolve the question on the grounds of the vested rights doctrine or on the lack of reasonable

---

219. *Id.* at 31. *See also* Ben Adler, *The fight against the Keystone XL changed the climate movement. Here's how*, GRIST (Nov. 6, 2015), http://grist.org/climate-energy/the-fight-against-keystone-xl-changed-the-climate-movement-heres-how/ [https://perma.cc/J5Z8-2FYM] (detailing how the U.S. Climate movement made Keystone XL into a major target and kept the pressure on Obama's energy policies).

220. *See* 2009 Alberta Clipper ROD, *supra* note 209, at 25; U.S. Dep't of State, Kinder Morgan Cochin Pipeline Permit (Nov. 19, 2013), https://www.state.gov/e/enr/applicant/applicants/217905.htm [https://perma.cc/9XXQ-E4KQ].

221. The Alberta Clipper Pipeline application was submitted on May 15, 2007, and the State Department granted the permit a little more than two years later on August 20, 2009. *See* 2013 Kinder Morgan Presidential Permit, *supra* note 209. The Cochin Pipeline application was submitted on November 14, 2012 and the State Department granted the permit about a year later on November 12, 2013. *See* U.S. Dep't of State, *Kinder Morgan (Cochin Pipeline)*, https://www.state.gov/e/enr/applicant/applicants/c55085.htm [https://perma.cc/PT26-LKLV].

222. Keystone XL Request for Arbitration, *supra* note 3, at 33–34.

223. *Id.* at 31.

224. *Id.*

225. *Id.*

investment-backed expectations. First, recall the facts of *Metalclad* and the vested rights doctrine.[226] The vested rights doctrine protects investors acting in good-faith reliance upon government representations that turned out to be erroneous.[227] Prototypically, the government grants a permit, changes the zoning rules, then revokes the permit for noncompliance with new rules.[228] Here, the U.S. did not grant TransCanada a permit only to revoke it under a change in regulation, as it did not grant a discretionary permit to begin with. Thus, the right never vested. Unlike in *Metalclad*, the federal entity in this case, the State Department, did not grant a permit nor did it make special representations to TransCanada that state governments would grant further permits. To the contrary, the State Department refused to expedite the second permit application in order to conduct further environmental impact assessments.[229]

Second, even if the U.S. had changed its course by granting the permit and subsequently revoked it, the question of whether TransCanada had reasonable investment-backed expectations in the permit still remains. Here, the industrial context surrounding large oil pipelines does not favor TransCanada's claim. Like the chemical waste disposal industry in *S.D. Myers*, large oil pipelines are heavily regulated because of their potential impacts on health, safety, and in particular, the environment. TransCanada was aware of U.S. regulatory agencies' sensitivity toward GHG emissions and global climate change as a criterion for granting a permit. After all, the State Department had approved TransCanada's application for the Keystone I pipeline on the basis that the U.S. and Canada would continue to address GHG emissions caused by the pipeline.[230] Thus, it seems unrealistic that TransCanada could have had reasonable investment-backed expectations that it would be granted a highly discretionary permit. Un-

---

226. The doctrine and case are more fully discussed *supra* Part II.D.3.

227. *See* Timothy E. DePalma, Comment, *Developers' Vested Rights*, 23 URB. L. ANN. 487, 494–96 (1982).

228. *Id.*

229. *See* Kerri Ann Jones, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Dep't of State, Briefing on the Keystone XL Pipeline, (Jan. 18, 2012), https://2009-2017.state.gov/r/pa/prs/ps/2012/01/181492.htm [https://perma.cc/EP5X-78TY].

230. *See* Press Release, U.S. Dep't of State, Keystone Pipeline Presidential Permit (Mar. 14, 2008), https://2001-2009.state.gov/r/pa/prs/ps/2008/mar/102254.htm [https://perma.cc/5DDY-WTD6].

der the current case law, an arbitral tribunal would very likely find no expropriation by the U.S. government.

C. UNDER A NEW INTERPRETATION OF PROPERTY

It is unclear what would occur if an arbitral tribunal found an expropriation by the U.S. and the Free Trade Commission subsequently stepped in to issue an authoritative narrowing interpretation of Article 1110 reversing the tribunal's finding. In March 2017, President Trump's State Department granted the Keystone XL permit to TransCanada.[231] TransCanada could begin building the oil pipeline, and the U.S. could subsequently revoke the permit, citing that expanding oil production would be detrimental to international policies for combating global climate change. Then, the question would become whether the Free Trade Commission could justifiably interpret the property to subordinate the private property rights of the investor to sovereign interests in regulating large industries in order to address global climate change.

At this point, it is not clear that an international law consensus has developed around commitments to drastic regulations to curb GHG emissions. A dynamic interpretation of Article 1110 extending sovereign power and limiting private property would likely not be warranted. In this imagined scenario, the Free Trade Commission would likely refuse such an interpretation and find a regulatory taking by the U.S. government. Though in June 2017, President Trump announced that the United States would withdraw from the Paris Agreement, Prime Minister Justin Trudeau of Canada and corporate leaders in the U.S. condemned the withdrawal.[232] At a global level, the sea change may be slowly happening as business and political leaders become focused on addressing climate change.[233] As international law values shift away from strongly protecting investor property and toward the great public welfare need to address the specter of climate

---

231. *See* Press Release, U.S. Dep't of State, Issuance of Presidential Permit to TransCanada for Keystone XL Pipeline (Mar. 24, 2017), https://www.state.gov/r/pa/prs/ps/2017/03/269074.htm [https://perma.cc/LY6T-TPUC].

232. *See* Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html [https://perma.cc/2DYU-YHE6].

233. *See* Somini Sengupta et al., *As Trump Exits Paris Agreement, Other Nations Are Defiant*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/world/europe/climate-paris-agreement-trump-china.html [https://perma.cc/UVS2-YW6F].

change, Article 1110 expropriations should shift to define property in these cases with greater limits in the face of state regulations.[234] This shift would be possible under this Note's dynamically interpretative framework.

VI. Conclusion

With the proliferation of expropriations provisions with arbitration mechanisms in trade agreements and the indefinitely-long-lasting legal regimes that these provisions create, the need for establishing predictability and consistency in defining property in the regulatory takings context is readily apparent. Though scholars have suggested imposing uniform standards of reasonable predictability, creating appellate mechanisms, or sophisticated economic analyses, none thus far has suggested a dynamic definition of property in the investment context that draws on international law values. If these legal regimes of property are to last into the future, they need to be responsive to the changing landscape of public welfare and private interests in the way that constitutional definitions of property for takings attempt to be. Though the suggestion of this Note may seem radical at first, as these property regimes created by expropriations endure into the future, the need for them to reflect changing circumstances and values grows stronger.

234. There is already some evidence that investor-state dispute settlement tribunals have shifted toward favoring host-state environmental regulations over investor property. *See generally* Nikesh Patel, *An Emerging Trend in International Trade: A Shift to Safeguard Against ISDS Abuses and Protect Host-State Sovereignty*, 26 MINN. J. INT'L L. 273 (2017).