Ocean and Coastal Law Journal

Volume 12 | Number 2 Article 4

2006

The Next Generation Of Chilling Uncertainty: Indirect Expropriation Under CAFTA And Its Potential Impact On Environmental Protection

Benjamin W. Jenkins
University of Maine School of Law

THE NEXT GENERATION OF CHILLING UNCERTAINTY: INDIRECT EXPROPRIATION UNDER CAFTA AND ITS POTENTIAL IMPACT ON ENVIRONMENTAL PROTECTION

Benjamin W. Jenkins[*]

For centuries, the signatory countries of the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA) have been linked by the migratory patterns of their sea turtle populations.[1] This Comment proposes to use the sea turtle as a means of analyzing the CAFTA agreement. The goal is not simply to evaluate the potential effects of this trade proposal on sea turtle populations, but rather to examine how the sea turtle illuminates the unique challenges of protecting the natural environment in this region. In considering the challenges of creating effective environmental protections in the Caribbean and Central America, it is possible to forecast the potential impact of CAFTA's environmental and investor's rights chapters.

President George W. Bush stated the goals of CAFTA: "Open trade and investment bring healthy, growing economies, and can serve the cause of

---

* University of Maine School of Law, Class of 2007.

1. The seven signatory countries are: the United States, the Dominican Republic, Guatemala, Honduras, El Salvador, Nicaragua, and Costa Rica. The Dominican Republic joined the agreement later than the other six countries; on March 15, 2004, it agreed to become fully integrated into the Agreement by assuming the same general obligations and commitments as CAFTA participants Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. Office of the United States Trade Representative, Dominican Republic Advisory Group Reports, http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/DR_Reports/Section_Index.html (last visited Feb. 11, 2007). For the purposes of this Comment, the Central America-Dominican Republic-United States Free Trade Agreement will be referred to as CAFTA. The Agreement is not set out in the United States Code. The Central America-Dominican Republic-United States Free Trade Agreement Implementation Act is Pub. L. No. 109-53, 119 Stat. 462 (2005) see Short Title note set out under 19 U.S.C.A. § 4001 and Tables. For approval and entry into force of the Agreement, see 19 U.S.C.A. § 4011. The full text of the Agreement can be seen at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

democratic reform. [With CAFTA][,] our purpose is to strengthen the economic ties we already have with these nations . . . to reinforce their progress toward economic, political and social reform."[2] Although CAFTA did not draw much attention from the mainstream media in the United States, it created widespread protest in the other six signatory countries.[3] The Agreement is similar in many regards to the North American Free Trade Agreement[4] (NAFTA) signed by the United States, Mexico, and Canada in 1994; an analysis of NAFTA ten years after implementation is a useful tool to examine the potential effects of CAFTA. Additionally, the *Harken Oil* case, in which Costa Rica's efforts to protect the Talamanca coast ecosystem were challenged by an international oil company, offers an opportunity to apply the environmental and investment language of CAFTA to a real-world scenario in order to understand its potential impact on the protection of the marine environments of the region. This Comment maintains that, while CAFTA contains language that superficially addresses the issue of environmental protection, the underlying heart of the Agreement ultimately could hinder efforts to protect the natural environment in Central America.

I. SEA TURTLE SPECIES IN NORTH AMERICA

A. Why Sea Turtles?

This Comment focuses on sea turtles because of their multi-faceted importance in the greater Caribbean ecosystem. Sea turtle meat and eggs are a source of food, their shells are a traditional trade commodity, they are an important cultural symbol, they attract thousands of tourists to the region

---

2. CAFTA POLICY BRIEF, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, THE CASE FOR CAFTA: GROWTH, OPPORTUNITY, AND DEMOCRACY IN OUR NEIGHBORHOOD (Feb. 2005), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file235_7178.pdf. For further language regarding the overarching goals of the Agreement, see the Preamble to the text, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file308_3917.pdf.

3. *See* Elisabeth Malkin, *Central American Trade Deal is Being Delayed by Partners*, N.Y. TIMES, March 2, 2006, at C10; CISPES, Violent Arrest of Union Activists Continues Wave of Repression in El Salvador (July 21, 2006), http://www.cispes.org/index.php?option=com_content&task=view&id=57&Itemid=28; Anti-CAFTA Protest Photos, http://socialism.com/whatsnew/anticaftaprotestphotos.html (last visited Feb. 11, 2007).

4. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA]. The NAFTA agreement is also available at 19 U.S.C. §§ 3301-3473 (2000).

annually, and they depend on some of the most biologically diverse and threatened areas in the region for survival. Additionally, their migration patterns demand that conservation efforts coordinate local, national, and international agreements.

Six of the world's seven species of sea turtles nest on beaches in North and Central America and migrate through the coastal waters of the North Pacific Ocean, North Atlantic Ocean, and Caribbean Sea.[5] The Loggerhead, Green turtle, and Pacific Ridley are listed as endangered species.[6] The Leatherback, Hawksbill, and Atlantic Ridley are listed as critically endangered species.[7] All six species are listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[8] The majority of population models are based on counting nesting females;[9] the life-cycle of a sea turtle, however, makes estimating world-wide populations extremely difficult.[10] Therefore, many

---

5. MARCO SOLANO ET AL., INTER-AMERICAN CONVENTION FOR THE PROTECTION AND CONSERVATION OF SEA TURTLES (IAC): AN INTRODUCTION 4 (Sept. 2004), *available at* http://www.iacseaturtle.org/iacseaturtle/English/download/The%20Inter-American%20Convention-%20An%20Introduction%20(hi%20res).pdf.

6. IUCN Red List of Threatened Species: Database Search, http://www.iucnredlist.org/search/search-basic (last visited Feb. 11, 2007) (enter the common name for each type of turtle). The Pacific Ridley is also known as the Olive Ridley.

7. *Id.* The Atlantic Ridley is also known as the Kemp's Ridley, Gulf Ridley, and Mexican Ridley.

8. CITES, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, Appendices I, II, and III (June 26, 2006), http://www.cites.org/eng/app/appendices.pdf. CITES works by placing restrictions on the import or export of listed species. Species listed in Appendix I are those species threatened with extinction. Only in exceptional circumstances is trade in specimens of these species permitted. CITES, How CITES works, http://www.cites.org/eng/disc/how.shtml (last visited Feb. 11, 2007). All members of CAFTA are signatories to CITES. CITES, Alphabetical List of Parties, http://www.cites.org/eng/disc/parties/alphabet.shtml (last visited Feb. 11, 2007).

9. PETER PRITCHARD ET AL., GLOBAL STATUS OF MARINE TURTLES: AN OVERVIEW 5 (2002), *available at* http://www.iacseaturtle.org/iacseaturtle/English/download/CondicionGlobalTortugasMarinas_PritchardIngles.pdf.

10. *Id.* A general overview of the life-cycle of a sea turtle is sufficient for the scope of this paper.

> All sea turtles reproduce by way of internal fertilization. After mating, the females migrate toward their respective nesting beaches, generally the same beach where they emerged as hatchlings. Turtles may recognize their natal beaches by chemical imprinting during the hatchling's journey from the nest to the sea, or other unknown mechanisms. When the females are ready to nest, they emerge on tropical, subtropical or temperate beaches, generally at night. Using their flippers, they prepare their nesting site by excavating a body pit to accommodate themselves in the sand. Later, they use their hind flippers to dig an egg chamber, where they will lay

organizations look to combine current estimates regarding world-wide populations with historical, site-specific comparisons. For example, estimating the population size of the Atlantic Ridley is a manageable task because of the smaller population and range of this species, and because this turtle nests almost exclusively on a twenty kilometer section of beach in Rancho Nuevo, Tamaulipas, Mexico.[11] In film footage from 1947, an estimated 40,000 females could be seen nesting in a single day; extrapolating from this number, the population at that time was a few hundred thousand.[12] In 1985, there were approximately 300 adult females, but now, the current population stands at approximately 1700 adult females.[13] The population of nesting females for the other five species of marine turtle in the region has been estimated as well: Hawksbill—8000,[14] Leatherback—34,000,[15]

---

between 50 and 200 eggs per nest, depending on the species. Once the turtle has finished laying her eggs, she fills in the nest chamber with sand. With the possible exception of the kemp's ridley, female sea turtles do not reproduce every year; they usually take between two to four years to return to nest. The eggs will take between 45 and 75 days to hatch. The sex of the hatchling is determined by the temperature of the sand. In general, warmer temperatures produce females and cooler temperatures produce males. It is believed that approximately one out of every 1,000 hatchlings that emerge will survive to maturity. Hatchlings usually emerge from the nest during the early evening or morning hours, immediately crawling seaward and disappearing offshore where they begin swimming towards the open ocean and take refuge in circular current systems. They are not seen again until they have grown to be much larger juveniles. This largely unknown stage of sea turtle life history is called the "lost years." Sea turtles reach sexual maturity between 10 and 50 years of age, although this varies among species. There is no way to determine the age of a sea turtle by physical appearance; however, it is thought that some species may live to be more than 100 years old.

BELINDA DICK ET AL., AN INTRODUCTION TO THE SEA TURTLES OF THE WORLD 4 (2004), *available at* http://www.iacseaturtle.org/iacseaturtle/English/download/Introduction_Sea_Turtles_World_ingl.pdf.

11. World Wildlife Fund, Endangered Species: Kemp's ridley turtle, http://www.panda.org/about_wwf/what_we_do/species/our_solutions/endangered_species/marine_turtles/kemps_ridley_turtle/index.cfm?SID=34&LID=2&FH=E&SECTION=3 (last visited Feb. 11, 2007).

12. *Id.*

13. *Id.*

14. World Wildlife Fund, Endangered Species: Hawksbill turtle, http://www.panda.org/about_wwf/what_we_do/species/our_solutions/endangered_species/marine_turtles/hawksbill_turtle/index.cfm (last visited Feb. 11, 2007) (an estimated decline of eighty percent).

15. World Wildlife Fund, Endangered Species: Leatherback turtle, http://www.panda.org/about_wwf/what_we_do/species/our_solutions/endangered_species/marine_turtles/leatherback_turtle/index.cfm (last visited Feb. 11, 2007) (a decline from approximately 115,000 in 1982).

Loggerhead—60,000,[16] Green turtle—203,000,[17] and Pacific Ridley—800,000.[18] In an effort to better understand sea turtles' life-cycles and population numbers, satellite tracking devices have been attached to several individual Leatherbacks to monitor their migration patterns.[19] Similar efforts are underway to track Hawksbill, Loggerhead, Green, and Atlantic Ridley turtles.[20]

B. Threats to Sea Turtle Populations

The specific threats to sea turtle populations in the region can be roughly broken into the following groups: threats on shore during nesting, threats to specific marine habitat, threats due to fishing, threats due to incidental catch, and threats due to pollution.

1. Predation

The impact of predation on sea turtle populations is most significant in regard to the rates of mortality caused by natural predators, including humans, hunting for sea turtle eggs and hatchlings.[21] Sea turtle nests are raided by many animals, and hatchlings are easy targets for these predators.[22] Humans also consume sea turtle eggs; many cultures in the

---

16. World Wildlife Fund, Endangered Species: Loggerhead turtle, http://www.panda.org/about_wwf/what_we_do/species/our_solutions/endangered_species/marine_turtles/loggerhead_turtle/index.cfm (last visited Feb. 11, 2007).

17. World Wildlife Fund, Endangered Species: Green turtle, http://www.panda.org/about_wwf/what_we_do/species/our_solutions/endangered_species/marine_turtles/green_turtle/index.cfm (last visited Feb. 11, 2007).

18. World Wildlife Fund, Endangered Species: Olive ridley turtle, http://www.panda.org/about_wwf/what_we_do/species/our_solutions/endangered_species/marine_turtles/olive_ridley_turtle/index.cfm (last visited Feb. 11, 2007).

19. World Wildlife Fund, Endangered Species: Marine Turtles, http://www.panda.org/about_wwf/where_we_work/latin_america_and_caribbean/our_solutions/marine_turtle_programme/projects/leatherback_tracking_project/index.cfm (last visited Feb. 11, 2007).

20. Caribbean Conservation Corporation & Sea Turtle Survival League, Sea Turtle Migration-Tracking Education Program, http://www.cccturtle.org/satellitetracking.php (last visited Feb. 11, 2007).

21. DICK ET AL., *supra* note 10, at 8. Predation of adult sea turtles can be broken into two categories: focused human fishing and other natural predators. The effects of fishing and bycatch will be discussed later in this Comment. In general, as sea turtles physically grow larger, threats from natural predation are reduced, but a small number of adult sea turtles are killed each year by natural predators, namely, sharks. *Id.*

22. *Id.* (dogs, pigs, various bird species, crabs, and raccoons all eat sea turtle eggs and hatchlings).

region believe that such eggs act as an aphrodisiac, and hundreds of thousands of eggs are stolen from nests each year.[23]

2. Fishing and Bycatch

In some areas of the region, turtles are targeted by fishermen for their meat and shells.[24] There is an interesting cultural and socio-economic divide in the consumption of sea turtle meat and the use of sea turtle by-products: many families in coastal communities in Central America and the Caribbean eat sea turtle meat and there is also a lucrative overseas market for turtle soup in England, turtle shells in Japan, and turtle leather in Italy.[25] In addition to targeted fishing, the incidental capture of sea turtles on the hooks and in the nets of fishing operations targeting other species is equally problematic.[26] Drift nets, shrimp trawlers, and gill nets all threaten sea turtles by trapping and entangling them therein, causing them to drown. The scope of the problem is demonstrated in an examination of the bycatch impact on two species: "[m]ore than 250,000 loggerhead and leatherback marine turtles are caught annually by commercial longline fisheries."[27]

---

23. Chris Hawley, *Sex shells: Turtle lovers get racy for egg rescue*, THE ARIZONA REPUBLIC, Apr. 18, 2005, *available at* http://www.azcentral.com/arizonarepublic/news/articles/0418seaturtles18.html.

24. SOLANO ET AL., *supra* note 5, at 8.

25. PRITCHARD ET AL., *supra* note 9, at 3. Between 1970 and 1992, Japan imported about thirty-three tons of Hawksbill shell per year, a total equivalent to the deaths of 31,000 turtles annually. World Wildlife Fund, Global Species Programme, http://www.panda.org/about_wwf/what_we_do/species/our_solutions/endangered_species/marine_turtles/hawksbill_ turtle/index.cfm?SID=33&LID=2&FH=E&SECTION=4 (last visited Feb. 11, 2007). *See also* Caribbean Conservation Corporation & Sea Turtle Survival League, Illegal harvest of nesting green turtles *Chelonia mydas* in Tortuguero National Park, Costa Rica, http://www.cccturtle.org/ists/troeng-1998.htm (last visited Feb. 11, 2007) (comparing the effects of local consumption of the green turtle with the illegal harvest of the green turtle for export to foreign markets). A kilogram of uncrafted Hawksbill shell is worth thousands of dollars. DIDIHER CHACÓN-CHAVERRI, CARRIBEAN HAWKSBILLS- AN INTRODUCTION TO THEIR BIOLOGY AND CONSERVATION STATUS 28 (2005), *available at* http://assets.panda.org/downloads/monographcaribbean hawksbills.pdf.

26. SOLANO ET AL., *supra* note 5, at 7.

27. World Wildlife Fund, Global Species Programme, http://www.panda.org/about_wwf/what_we_do/species/problems/fisheries_bycatch/index.cfm (last visited Feb. 11, 2007).

3. Beach Habitat Destruction

Human development and traffic along coastal property has had a destructive effect on sea turtles' ability to nest.[28] Physical structures can prevent access to beaches and change erosion patterns; artificial lighting can disorient sea turtle hatchlings; automobile traffic on the beach can compact sand preventing female turtles from digging nests and hatchlings from leaving a nest; and the increased shade or sun on a beach can distort sea turtle hatchlings' gender ratio.[29]

4. Marine Habitat Destruction

The sea turtle populations in North America, Central America, and the Caribbean are a part of two key ecological areas: the MesoAmerican Reef and the Greater Antilles Reef. The MesoAmerican Reef stretches from Mexico's Yucatan Peninsula, past Belize and Guatemala to the Northern coast of Honduras.[30] This reef system provides feeding areas for the Green, Hawksbill, and Loggerhead turtles, as well as hundreds of other species, and is the economic center for many coastal communities.[31] The Greater Antilles Reef is composed of a series of three island chains that are centrally located in an ecosystem that extends over seventy million square kilometers.[32]

---

28. SOLANO ET AL., *supra* note 5, at 9.

29. *Id.* at 9. "As with other sea turtle species, higher incubating temperatures favor the production of females." DIDIHER CHACÓN-CHAVERRI, SYNOPSIS OF THE LEATHERBACK SEA TURTLE 6 (2004), *available at* http://www.iacseaturtle.org/iacseaturtle/English/download/INF-16-04%20eng.pdf.

30. World Wildlife Fund, MesoAmerican Reef 1, http://assets.panda.org/downloads/mesoamericanreef.pdf (last visited Feb. 11, 2007).

31. *Id.* The ecosystems of the MesoAmerican reef include "some of the most diverse coral reefs in the western Atlantic in barrier and fringing reefs, atolls and patch corals, lagoons, sea grass beds, and mangrove systems - all providing critical habitats for threatened species and supporting thousands of coastal communities in both food security and livelihoods." *Id.*

32. World Wildlife Fund, Greater Antilles Marine Ecosystem 1, http://assets.panda.org/downloads/antillescoral.pdf (last visited Feb. 11, 2007).

> An extravagant variety of life relies on the region's rich marine ecosystems - some 6,000 species in the Florida Keys alone. Stoplight parrotfish, clown wrasse, and Nassau grouper join the humpback whale and other endangered species such as the West Indian dugong (manatee) and the marine turtle . . . . Important migratory fish, including tuna and sharks, move through the waters, while Cuban and American crocodiles inhabit the coastal margins. And thousands of migratory birds - from flamingoes to white-tailed tropicbirds to black-capped petrels - make their temporary or permanent homes here.

Id.

5. Pollution

The introduction of pollutants, sediment, fertilizer, and other chemicals into the marine environment, via runoff and discharge, negatively effects sea turtle populations by destroying coral reef ecosystems, a critical sea turtle habitat.[33] Floating waste discarded into the ocean also has a dangerous effect on sea turtle populations. For example, sea turtles often mistake floating plastic bags as jellyfish, a key component of many turtles' diets, and eat the debris as it floats on the ocean surface.[34]

II. THE CONNECTIONS BETWEEN MULTI-NATIONAL, NATIONAL, AND LOCAL EFFORTS TO PROTECT SEA TURTLE POPULATIONS

Because of their life cycle and migration patterns, sea turtles require local, national, and multinational cooperation in order to ensure proper protection.[35] In order to grasp the myriad agreements and programs aimed at protecting sea turtles, it is useful to examine the connections between the Cartagena Convention, the Protocol Concerning Specially Protected Areas and Wildlife, the International Convention for the Protection and Conservation of Sea Turtles, and the Wider Caribbean Sea Turtle Conservation Network.[36] These agreements reflect the ongoing work in the wider Caribbean region to create both a comprehensive, multinational program to protect the marine environment, and also to encourage small-scale organizations and local communities to create site-specific plans to protect sea turtles.

The Cartagena Convention is the legal implementation of the Action Plan for the Caribbean Environment Programme, signed on March 24, 1983, in Cartagena, Colombia.[37] All CAFTA countries with coastline on the Caribbean Sea have either signed or ratified the Cartagena Convention,

---

33. SOLANO ET AL., *supra* note 5, at 9.

34. *Id.* at 10. "The ingestion of plastic or entanglement in netting, cords or other kinds of wastes, can cause flotation problems, reduced mobility or the loss of extremities, which can eventually lead to the death of the turtles." *Id.*

35. For example, a well run beach protection program is essentially rendered useless if all the hatchlings that reach adulthood are captured in driftnets offshore.

36. This is not meant to be an exhaustive list of relevant conservation efforts; rather, these agreements are to be used to illustrate ongoing efforts to create effective environmental protection in the region.

37. Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Mar. 24, 1983, T.I.A.S. No. 11.085 [hereinafter Cartagena Convention], *available at* http://www.cep.unep.org/pubs/legislation/cartxt.php.

which protects the marine environment within the "Gulf of Mexico, the Caribbean Sea[,] and the areas of the Atlantic Ocean adjacent thereto, south of 30 deg[rees] north latitude and within 200 nautical miles of the Atlantic coasts of the States . . . of the Convention."[38] The Cartagena Convention is the only legally binding environmental treaty for the wider Caribbean region.[39] It states that:

> The Convention and its Protocols constitute a legal commitment by these countries to protect, develop, and manage their common coastal and marine resources individually and jointly. The Cartagena Convention and its Protocols enhance not only protection but also development, as specifically noted in its provisions.
>
> Under the United Nations Convention on the Law of the Sea, each coastal country is responsible for managing the marine environment of its territory. Because of the large number of countries in a relatively small area, almost the entire marine environment of the WCR [Cartagena Convention] falls within one exclusive economic zone or another, leaving management of these areas under national jurisdiction. Further, the ecological and oceanographic interconnectivity of the Caribbean Sea and the Gulf of Mexico is widely documented. This situation exemplifies the need for regional co-operation and coordination.
>
> Article 10 of the Cartagena Convention, requires Parties to take "all appropriate measures" to protect and preserve "rare or fragile ecosystems," as well as the "habitats of depleted, threatened or endangered species," and, to this end, establish specially protected areas.[40]

---

38. *Id.* art. 2, ¶ 1.

39. United Nations Environment Programme, *Factsheet: Specially Protected Areas and Wildlife in the Wider Caribbean Region- A Regional Protocol on Biodiversity* 1 (2006) [hereinafter SPAW Factsheet], *available at* http://www.cep.unep.org/operational-components/plonearticlemultipage.2005-10-03.4690343384/plonearticle.2005-10-03.5299274574 (follow "SPAW Factsheet" hyperlink at bottom of page). The convention has twenty-one contracting parties of the possible twenty-eight states. Of the CAFTA nations, Nicaragua and Honduras have signed the Agreement but have not ratified it; the remainder of the CAFTA nations have ratified the Agreement. United Nations Environment Programme, Convention and Protocols Status Page, http://www.cep.unep.org/law/cartstatus.html (last visited Feb. 11, 2007). El Salvador does not have a Caribbean coast and is therefore not included in the Agreement.

40. SPAW Factsheet, *supra* note 39, at 1.

In order to further the goals of Article Ten of the Cartagena Convention,[41] the member nations adopted a protocol on Specially Protected Areas and Wildlife (SPAW).[42] The purpose of this 1991 protocol is to protect, preserve, and manage in a sustainable way: 1) areas and ecosystems that require protection to safeguard their special value; 2) threatened or endangered species of flora and fauna and their habitats; and 3) species with the objective of preventing them from becoming endangered or threatened.[43]

The cooperation between worldwide and regional environmental treaties leads to a more comprehensive and consistent approach to ecosystem protection. This has resulted in regional, species-specific programs created to protect sea turtles in the wider Caribbean region. One such example is the Inter-American Convention for the Protection and Conservation of Sea Turtles (IAC).[44] The IAC is:

> [A]n intergovernmental treaty which provides the legal framework for countries in the American Continent to take actions in benefit of these species. The IAC entered into force in May of 2001 and currently has eleven Contracting Parties, in addition to two countries awaiting national ratification.
>
> The Convention promotes the protection, conservation and recovery of the populations of sea turtles and those habitats on which they depend, on the basis of the best available data and taking into consideration the environmental, socioeconomic and cultural characteristics of the Parties (Article II, Text of the Convention). These actions should cover both nesting beaches and the Parties' territorial waters.[45]

---

41. The text of Article Ten:

> The Contracting Parties shall, individually or jointly, take all appropriate measures to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species, in the Convention area. To this end, the Contracting Parties shall endeavour to establish protected areas . . . . In addition, the Contracting Parties shall exchange information concerning the administration and management of such areas.

Cartagena Convention, *supra* note 37, art. 10.

42. Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Jan. 18, 1990, *available at* http://www.cep.unep.org/pubs/legislation/spaw.html [hereinafter SPAW].

43. *Id.*

44. Inter-American Convention for the Protection and Conservation of Sea Turtles, About the Convention [hereinafter Inter-American Convention], http://www.iacseaturtle.org/iacseaturtle/English/acerca.asp (last visited Feb. 11, 2007).

45. Inter-American Convention for the Protection and Conservation of Sea Turtles,

A second example of species-specific conservation efforts is the Wider Caribbean Sea Turtle Conservation Network (WIDECAST). WIDECAST provides a forum for collaborative conservation action regarding the six species of sea turtle in the region, and focuses on local ecosystems and site-specific solutions by incorporating the input of all interested parties.[46]

The connection between the Cartegena Convention and ground-level conservation efforts supported by groups such as WIDECAST demonstrates the successful top to bottom integration needed to protect migratory species, such as sea turtles. However, this is only the first step in protecting the marine environment; the next critical phase is full enforcement of these existing regulations and the creation of more comprehensive protection. For example, the creation of effective Marine Protected Areas (MPAs) around critical marine habitats would be a tremendous step towards stabilizing the sea turtle populations in the region.[47] Nevertheless, increased enforcement and the creation of new, expansive laws to protect the marine environment are two types of measures that will most likely be negatively impacted by CAFTA.

Introduction, http://www.iacseaturtle.org/iacseaturtle/English/home.asp (last visited Feb. 11, 2007).

The history of the IAC is as follows:

> In 1994, recognizing the regional nature of the threats to sea turtle survival, the nations of the western hemisphere began a collaborative effort to negotiate an agreement for the future of these species.
>
> In 2001, with the ratification of the eighth nation, the Inter-American Convention for the Protection and Conservation of Sea Turtles entered into force. The Convention attends to the need for implementation of harmonious measures between nations, multilateral coordination of conservation and protection actions, and oversight of the implementation of a regional agenda that will enable the recovery of these species.

Inter-American Convention, *supra* note 44.

46. United Nations Environment Programme, WIDECAST and SPAW, http://grid2.cr.usgs.gov/cepnet/programmes/spaw/widecast.html (last visited Feb. 11, 2007). WIDECAST involves the "direct involvement of resident scientists, conservationists, enforcement officers, policy-makers, fishermen, teachers and others" in an attempt to create a conservation plan that is not only biologically sound, but also accurately reflects the needs of local communities. *Id.*

47. For a somewhat dated overview of the location and status of existing MPAs in the Caribbean, including a map, see Australian Dept. of the Environment and Heritage, Global Representative System of Marine Protected Areas, Marine Region 7: Wider Caribbean (1995), *available at* http://www.deh.gov.au/coasts/mpa/nrsmpa/global/volume2/chapter7.html; and TIGHE GEOGHEGAN ET AL., CHARACTERIZATION OF CARIBBEAN MARINE PROTECTED AREAS: AN ANALYSIS OF ECOLOGICAL, ORGANIZATIONAL, AND SOCIO-ECONOMIC FACTORS (2001), *available at* http://www.canari.org/thacker.pdf.

III. THE CENTRAL AMERICA- DOMINICAN REPUBLIC-UNITED STATES FREE TRADE AGREEMENT

The seven signatory countries to CAFTA established a target date of January 1, 2006, for full implementation of the Agreement.[48] As of June 30, 2006, all countries except Costa Rica ratified the Agreement, and each signatory country is currently in the process of completing internal procedures to complete full implementation.[49] A CAFTA policy brief, produced by the Office of the United States Trade Representative, states that the United States exports over fifteen billion dollars annually to the CAFTA region, and that the Agreement will "level the playing field for U.S. workers" by allowing U.S. products, services, and farm products to enter the region without duties or tariffs.[50] Once CAFTA is fully implemented, the United States would save "nearly $1 billion per year in foreign taxes on . . . manufactured goods and farm products."[51]

---

48. Statement of USTR Stephen Norton Regarding CAFTA-DR Implementation (Dec. 30, 2005), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2005/December/Statement_of_USTR_Spokesman_Stephen_Norton_Regarding_CAFTA-DR_Implementation.html.

49. Statement of USTR Susan C. Schwab Regarding Entry Into Force of the CAFTA-DR for Guatemala (June 30, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/June/Statement_of_USTR_Susan_C_Schwab_Regarding_Entry_Into_Force_of_the_CAFTA-DR_for_Guatemala.html. The United States Senate passed the implementing legislation in June 2005, and the House of Representatives in July 2005, and President Bush signed the Agreement in August 2005. As of July 1, 2006, El Salvador, Honduras, Nicaragua, and Guatemala had fully implemented the Agreement. *Id.*

50. CAFTA POLICY BRIEF, *supra* note 2. This Brief states that "nearly 80% of products from Central America and the Dominican Republic already enter the U.S. duty-free . . . America's market is already open." *Id.*

51. Rob Portman, *Why Fear CAFTA?*, WALL ST. J., May 10, 2005, *available at* http://www.ustr.gov/Document_Library/Op-eds/2005/Why_Fear_CAFTA.html.

The relative bargaining power between the United States and the six other signatories has been a source of concern as CAFTA has moved toward full implementation. The fact that the U.S. is such an unequal trading partner with the six other signatories of CAFTA raises the question of the equity of the content of the Agreement. The relative bargaining power of each signatory can be roughly examined by an analysis of each country's per capita Gross Domestic Product (GDP). United States $43,500, Costa Rica $12,000, Dominican Republic $8,000, El Salvador $4,900, Guatemala $4,900, Honduras $3,000, Nicaragua $3,000. CIA, The World Factbook, https://www.cia.gov/cia/publications/factbook/rankorder/2004rank.html (last visited Feb. 11, 2007). In 2003, it took the United States economy approximately five days to produce the combined GDP of Costa Rica, Honduras, El Salvador, Guatemala, and Nicaragua. PUBLIC CITIZEN'S GLOBAL TRADE WATCH, CAFTA BY THE NUMBERS: WHAT EVERYONE NEEDS TO KNOW 1 (July 2004), *available at* http://www.citizen.org/documents/CAFTAbyNumbers.pdf.

A. Key Provisions of CAFTA

For the purposes of this Comment, the two key provisions of the CAFTA agreement are Chapter Seventeen: Environment, and Chapter Ten: Investment.

1. Chapter Seventeen: Environment

Chapter Seventeen first outlines the levels of environmental protection expected of each member, stating that each country has the right "to establish its own levels of domestic environmental protection[,] . . . encourage high levels of environmental protection, and . . . strive to continue to improve those laws and policies."[52] Regarding the enforcement of environmental protection, Chapter Seventeen states that "[a] Party shall not fail to effectively enforce its environmental laws."[53] This Chapter includes a public submissions process,[54] which is designed to "create an important new avenue for civil society to raise specific problems associated with enforcement of environmental laws."[55] This Chapter also recognizes the role of multilateral environmental agreements "in protecting the environment globally and domestically."[56]

a. A Critical Reading of Chapter Seventeen

CAFTA does not require any member country to adopt or maintain any environmental laws or regulations; rather, it creates largely unenforceable suggestions. Article 17.10.7 provides that the only provision of Chapter Seventeen that is subject to any level of enforcement via dispute resolution is Article 17.2.1.a, which demands that "[a] Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement."[57] This enforceability relates only to environmental laws that are already in existence, and the terms "sustained or recurring course of action or inaction" imply that a single event of environmental destruction would not trigger the enforcing

52. CAFTA art. 17.1.
53. CAFTA art. 17.1.a.
54. CAFTA art. 17.7.
55. CAFTA POLICY BRIEF, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ENVIRONMENTAL FIRSTS IN CAFTA (Feb. 2005), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file601_7194.pdf.
56. CAFTA art. 17.12.
57. CAFTA art. 17.2.1.a.

language. Any fines associated with this enforceable provision have an annual limit of fifteen million dollars.[58] In addition, this enforceable provision is contradicted by two subsequent sections of Chapter Seventeen: CAFTA allows countries "the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters,"[59] and there is no level of inquiry regarding the judicial enforcement of the aforementioned environmental laws: "nothing in this Chapter shall be construed to call for the examination under this Agreement of whether a Party's judicial, quasi-judicial, or administrative tribunals have appropriately applied that Party's environmental laws."[60]

Even if strong enforcement language existed in Chapter Seventeen, the fact that only existing environmental laws fall under the Agreement means that there is currently very little to enforce. For example, "Guatemala has not passed a wide spectrum of environmental laws, and lacks specific laws dealing with the major issues of water, forests, solid wastes, [and] biodiversity,"[61] and "Honduras also has a more limited slate of domestic environmental legislation."[62] In countries with more extensive environmental laws on the books, the enforcement of such laws is often lax: "[a]lthough the Central Americans are making progress toward designing and implementing effective environmental laws, the United States is already aware these laws may not yet be adequate and certainly are not well enforced. Asking a country with weak enforcement capability to enforce (perhaps) insufficient laws means little in terms of real environmental protection."[63] The much touted citizen submission procedure does not create any clear results from such a submission: "[t]he citizen submission process' lack of enforcement tools contrasts starkly with the monetary compensation that private investors can demand of governments under CAFTA's investor rights rules."[64] CAFTA's Chapter Seventeen creates no new environmental provisions; rather it limits the means of enforcing

58. CAFTA art. 20.17.2.

59. CAFTA art. 17.2.1.b.

60. CAFTA art. 17.3.6.

61. OFFICE OF THE U.S. TRADE REPRESENTATIVE, INTERIM ENVIRONMENTAL REVIEW, U.S.-CENTRAL AMERICA FREE TRADE AGREEMENT 31 (Aug. 2003), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/asset_upload_file946_3356.pdf.

62. *Id.*

63. JOHN AUDLEY & VANESSA ULMER, STRENGTHENING LINKAGES BETWEEN U.S. TRADE POLICY AND ENVIRONMENTAL CAPACITY BUILDING 16 (July 2003), *available at* www.ceip.org/files/pdf/wp40.pdf.

64. Open Letter from the Sierra Club to Congress re: Oppose the Central American Free Trade Agreement (Apr. 13, 2005), *available at* http://www.sierraclub.org/trade/cafta/cafta_letter.asp.

existing environmental laws, and it provides no meaningful way to monitor the national enforcement of those existing limited environmental laws. Practically, this means that the creation of new, significant environmental protections (for example, large scale MPAs) becomes less likely, and the enforcement of the few laws protecting sea turtles and their habitat is potentially more difficult.

2. Chapter Ten: Investment

The fact that CAFTA has under-realized its potential to act as a vehicle for comprehensive, regional environmental protection is certainly disappointing. The more damaging reality of the Agreement, however, is Chapter Ten, the investment portion of CAFTA. The stated purpose of Chapter Ten is to establish "rules to protect investors from one Party against unfair or discriminatory government actions when they make or attempt to make investments in another Party's territory."[65] Investment is defined as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[66] The language protecting the expropriation of a covered investment is of particular importance to this Comment:

> No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation") except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate and effective compensation . . . and (d) in accordance with due process of law and Article 10.5.[67]

An indirect expropriation is defined as:

> [A]n action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
>
> (a) [t]he determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

---

65. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, SECTION BY SECTION SUMMARY OF THE CAFTA 12, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file128_7284.pdf (last visited Feb. 11, 2007).

66. CAFTA art. 10.28.

67. CAFTA art. 10.7.1.

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
(iii) the character of the government action.[68]

For example, an environmental law that limits an investor's expectation of gain or profit could be viewed as being equivalent to expropriation and thus require compensation to the investor equivalent to the "fair market value of the expropriated investment immediately before the expropriation took place."[69] The Agreement does state that "[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner *sensitive to environmental concerns*."[70] Additionally, the Agreement states, "*[e]xcept in rare circumstances*, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[71]

Should an investment dispute arise, the claimant and respondent are directed to "resolve the dispute through consultation and negotiation."[72] Should such methods fail, one party may submit to arbitration before a three person, private tribunal.[73] This private tribunal "shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party."[74] No deference is given to legislative judgments or local courts; there is no check on the authority of the tribunals to ensure

68. CAFTA Annex 10-C.4.

69. CAFTA art. 10.7.2. Other public policy regulations, such as safety, health, or labor laws, would be impacted in a similar manner.

70. CAFTA art. 10.11 (emphasis added).

71. CAFTA Annex 10-C(4)(b) (emphasis added).

72. CAFTA art. 10.15.

73. CAFTA arts. 10.16, 10.19. By signing CAFTA, "[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement." CAFTA art. 10.17.

74. CAFTA art. 10.20.3. The NAFTA tribunal process, which is the model for the CAFTA procedure, has been roundly criticized for its lack of transparency. *See* Anthony DePalma, *NAFTA's Powerful Little Secret: Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, at Section 3.

that their personal values are not being applied to disputes between investors and states.[75]

a. A Critical Reading of Chapter Ten

The expansive definition of "investment," the uncertain boundaries of indirect expropriation, and the lack of deference given to domestic law all place an immense amount of power in the hands of the private tribunal and create uncertainty for the governments of the signatory nations.[76] The fact that foreign investors can bypass domestic courts and challenge a country's environmental laws in front of a CAFTA tribunal threatens the role of democratic governance, despite the rhetoric surrounding the Agreement claiming that CAFTA will strengthen the delicate democracies of the region. The mere threat of such lawsuits could undermine the development of needed environmental laws; this chilling effect caused by the uncertainty of the interpretation of the expropriation language could effectively prevent governments from creating and enforcing effective measures for the public interest.[77]

Historically, the creation of investor-state protections and potential remedies were designed to oppose "arbitrary and unreasonable government actions against foreign companies."[78] This protection is critical to foreign

---

75. The governing law to be applied in a dispute is to be "in accordance with [CAFTA] and applicable rules of international law." CAFTA art. 10.22.1. Specific rules of law are used when the dispute involves an investment agreement or investment authorization. CAFTA art. 10.22.2.

76. Article 10.7, the expropriation requirement, contains the most potentially problematic language of Chapter Ten. The Investment Chapter also includes requirements regarding: national treatment (art. 10.3), most favored nation treatment (art. 10.4), minimum standard of treatment in accordance with international law (art. 10.5), and prohibitions on certain types of performance requirements (art. 10.9).

77. Imagine a signatory country wanting to protect a portion of its coastline from oil exploration in order to protect a particularly important portion of marine habitat. Under CAFTA, the worry of a multi-million or multi-billion dollar claim could be enough to prevent the creation of such an MPA. *See infra*, notes 124-28 and accompanying text.

78. Howard Mann & Konrad von Moltke, NAFTA's Chapter 11 and the Environment, Addressing the Impacts of the Investor-State Process on the Environment, Working Paper 5 (1999), *available at* http://www.iisd.org/pdf/nafta.pdf.

A quick overview of the historical underpinnings of investor-to-state dispute resolution:

> [D]isputes were commonly waged between states because private investors lacked standing under international law. If private investors sought action against a foreign state, the investors had to rely on their home governments to bring the claim in accordance with an international dispute resolution treaty, assuming the two countries were a part of a bilateral or multilateral agreement. Unfortunately for

investors who must adhere to a host country's laws, but do not have the traditional access to the political process of the host country.[79] This traditional concept of a legal shield to protect foreign investors has shifted, and language incorporated in Article 10.7 creates a sword for foreign investors; this enables investors to protect themselves "from the adoption of new laws or policies that would have an economic impact on them. This strategic development has changed, and arguably misappropriated, the investor-state provisions from their traditional role as a defensive investor protection mechanism to a potent offensive strategic tool."[80] The concept behind allowing an investor to challenge a government action in an independent tribunal is the presumption that such an investor might not receive fair treatment in the domestic court system of that country. By creating a private tribunal, investors will be presented with more certainty regarding the adjudication they receive. However, allowing this shield to be wielded as a sword, especially when the government action is the creation and implementation of public policy measures, cuts in the opposite direction, which creates uncertainty for the state and threatens the public good.[81]

> investors, the home government was under no obligation to bring the claim, and few investors were able to obtain relief. This lack of representation for private investors was one of the biggest reasons why NAFTA included Chapter 11 [and CAFTA included Chapter 10] investor-to-state dispute resolution. Too often under the old system investors had no recourse, so Chapter 11 was created to act as a "shield" for foreign investors who needed a mechanism to protect their interests from host nations.

Ray C. Jones, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to be Embraced or a Sword to be Feared?*, 2002 B.Y.U. L. REV. 527, 529 (2002) (internal citations omitted).

The historical stance of the United States regarding expropriation:

> [T]he debate over the international law standard governing expropriation has been rooted in North American politics since at least the beginning of the twentieth century. In 1915, Mexico began nationalizing private property belonging to U.S. citizens. Mexico maintained that they had a right under international law to deny compensation for "expropriations of a general and impersonal character." The United States however, supported the Hull Doctrine, named after Secretary of State Cordell Hull, which asserts: "no government is entitled to expropriate private property; for whatever purpose, without provision for prompt, adequate, and effective payment therefor [sic]."

Jeffrey Turk, *Compensation for "Measures Tantamount to Expropriation" Under NAFTA: What it Means and Why it Matters*, 1 INT'L L. & MGMT. REV. 41, 42-43 (2005) (internal citations omitted).

79. Jones, *supra* note 78, at 531.

80. MANN & VON MOLTKE, *supra* note 78, at 6.

81. The investor-state process is based on a commercial model of arbitration, which makes for a particularly poor fit when considering issues of public policy. This model of

This idea of being awarded compensation based on indirect expropriation, when the challenged state activity is an environmental regulation, is in complete contrast to the "polluter pays principle."[82] This concept has been recognized internationally: the Rio Declaration on Environment and Development states that "[n]ational authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution."[83]

Where to draw the line between a non-compensable government regulation and a measure that triggers compensation under Article 10.7 is extremely important to both governments and investors:

---

arbitration has traditionally been:

> [H]eld between private sector litigants, these types of international or domestic commercial arbitrations commonly deal with private matters of a commercial nature. As commercial issues began to arise between corporations and foreign governments, the procedures were adapted to accommodate this new development . . . . [The expropriation language] has gone well past private commercial issues to include any type of public policy or public welfare measure that might impact on the establishment, operation, management, control, or divestiture of a company.

MANN & VON MOLTKE, *supra* note 78, at 50.

82. The polluter pays principle was developed by the Organization for Economic Co-operation and Development (OECD);

> The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter-Pays Principle." This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.

Organization for Economic Co-operation and Development, *Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies*, C(72)128, May 26, 1972.

83. United Nations Conference on Environment and Development, June 3-14, 1992, Rio Declaration on Environment and Development, U.N. Doc A/CONF. 151/26 (Vol. I) (Aug. 12, 1992).

This inversion of the polluter pays principle has spawned a series of hypothetical "perverse incentives;" for example, "companies may be more willing to market products that entail potential health and safety concerns under NAFTA, knowing that if a state bans their product, they will be compensated." Turk, *supra* note 78, at 70. Another example would be that "[allowing regulatory expropriations] may create an incentive to over-invest in areas likely to be regulated in order to reap the full benefit of compensation." Joel C. Beauvais, *Regulatory Expropriations Under NAFTA: Emerging Principles & Lingering Doubts*, 10 N.Y.U. ENVTL. L.J. 245, 282 (2002).

> [T]o the investor, the line of demarcation between measures for which no compensation is due and actions qualifying as indirect expropriations [that require compensation] may well make the difference between the burden to operate (or abandon) a non-profitable enterprise and the right to receive full compensation (either from the host State or under an insurance contract). For the host State, the definition determines the scope of the State's power to enact legislation that regulates the rights and obligations of owners in instances where compensation may fall due. It may be argued that the State is prevented from taking any such measures where these cannot be covered by public financial resources.[84]

B. Police Power vs. Indirect Expropriation: International Perspectives

The issue at the heart of interpreting Article 10.7.1 is the distinction between legitimate police power regulation, indirect expropriation, and direct expropriation. Direct expropriation is defined as when "an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure."[85] Indirect expropriation is triggered when a party's action "has an effect equivalent to direct expropriation."[86] Direct expropriations are easy to identify and relatively easy to remedy: "[t]he classic controversy occurs when one state nationalizes or expropriates private property owned by a foreign investor. The act of expropriation is clear, the legal obligation to compensate is clear, and typically the only difficult legal question is how to calculate compensation."[87] Indirect expropriations, or regulatory expropriations, are difficult to both identify and remedy: "[r]egulatory takings claims require contextual, essentially *ad hoc*, fact-based determinations much of the time. It seems to be impossible to specify in a few words or sentences all the circumstances that go into our

---

84. J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465, 471-72 (1999) (quoting RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 99-100 (1995)). The goals of the investor and state are often in opposition, but a balance must be maintained between the two extremes: "[a]n international community of investors may desire property rules and practices of a clear and certain type. But this desire cannot be allowed to overshadow the equally legitimate claims of local communities to be able to renegotiate property practices piecemeal, in appropriate circumstances, without undue constraint." Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 ENVTL. L. 851, 860 (2003).

85. CAFTA Annex 10-C(3).

86. CAFTA Annex 10-C(4).

87. Poirier, *supra* note 84, at 859.

sense of fairness and reasonableness when a property owner is affected by regulation . . . ."[88] An examination of international law can at the least frame the interpretation of the indirect expropriation language of Article 10.7.1.

The *Vienna Convention on the Law of Treaties*[89] provides a general rule of interpretation:

> 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 connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection 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.[90]

The terms of a treaty are interpreted "in their context," which includes the text, its preamble, and annexes. The context of a treaty also includes "any relevant rule of international law applicable in the relations between the parties."[91]

---

88. *Id.* at 859-60.

89. The 1969 Vienna Convention on the Law of Treaties is a collection of mostly pre-existing customary law on how to create, interpret, and challenge treaties. Because it was considered to not be a change in existing international law, it, unlike most treaties, arguably could be applicable to even non-parties, such as the United States.

90. Article 31 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969), 8 I.L.M. 679 (1969).

91. Both CAFTA and NAFTA allow the application of international law when interpreting and applying the language of the Agreements. CAFTA art. 1.2.2, NAFTA art. 1131(1).

The Preamble section of the CAFTA text states:

> [The Parties Resolve to]:
>
> . . .
>
> Implement this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters;
>
> Protect and preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories;
>
> Preserve their flexibility to safeguard the public welfare; . . . .[92]

The offensive use of direct and indirect expropriation would clearly contradict an implementation of CAFTA that is "in a manner consistent with environmental protection and conservation," and such an interpretation would hinder a state's "flexibility to safeguard the public welfare." Such an interpretation would also counter the polluter pays principle, which is a "relevant rule of international law."

Assuming that Article thirty-one leaves the meaning of expropriate ambiguous, Article thirty-two, "Supplementary means of interpretation," provides guidance:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.[93]

It could be argued that allowing the concept of expropriation to limit the legitimate regulatory power of a government, along with the potential inversion of the "polluter pays" principle, would constitute an "absurd or unreasonable" result. Such an interpretation would run counter to the promotion of sustainable development and would weaken the development and enforcement of environmental laws and regulations.[94]

---

92. CAFTA Preamble.
93. Vienna Convention, *supra* note 90, Article 32.
94. MANN & VON MOLTKE, *supra* note 78, at 46-47.

The Restatement provides that a government must normally pay compensation for expropriating property,[95] but comment g holds that a state need not pay compensation for:

> [L]oss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory . . . and is not designed to cause the alien to abandon the property to the state or sell it at a distress price.[96]

The idea of an exception for legitimate regulation is supported by the general concept of a state's police powers.

This analysis is supported by a review of the international investor-state arbitrations created by the Iran-United States Claims Tribunal (IUSCT).[97] One veteran international arbitrator reached the following set of conclusions on the state of law regarding expropriation coming from this Tribunal:

> 1. The Tribunal has been concerned to ensure that property rights are respected and that compensation is paid when the alien owner of those rights is deprived of them by acts attributable to a state.
> 2. Liability exists whenever acts attributable to a state have deprived an alien owner of property rights of value to him, regardless of whether the state has thereby obtained anything of value to it.
> 3. Liability is not affected by the intent or absence of intent attributable to the state.

---

95. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712.

96. *Id.* at cmt. g.

97. These arbitrations were "the most extensive set of international investor-state arbitrations ever undertaken . . . . [They] followed the overthrow of the Shah of Iran by the Islamic Government in 1979, an event which resulted in claims for property losses from both American investors in Iran and Iranian investors in the United States." MANN & VON MOLTKE, *supra* note 78, at 40.

The application of the IUSCT to NAFTA cases has proven controversial. One NAFTA tribunal expressly rejected such use precedent because "[the IUSCT's] mandate expressly extends beyond expropriation to include other measures affecting property rights." Turk, *supra* note 78, at 59 (internal citations omitted). However, the cautious use of precedent stemming from the IUSCT decisions can be defended: "[t]hat tribunal rendered final decisions in a large number of cases, many of which include facts that could be analogized to potential NAFTA disputes. Failure to consider the experiences of that tribunal only results in increased uncertainty for both investors and states under the relatively new NAFTA scheme." *Id.* at 59-60.

> 4. Liability does not require the transfer of title to the property.
> 5. *Liability does not arise from actions that are non-discriminatory and are within the commonly accepted taxation and police powers of states.*
> 6. Liability is not affected by the fact that the state has acted for legitimate economic or social reasons and in accordance with its laws.[98]

The issue is how to draw a line between an action that indirectly expropriates a covered investment, thus requiring compensation under Article 10.7.1, and a measure that is within the "commonly accepted . . . police powers of states." The IUSCT does provide some useful points of reference; the IUSCT's definition of expropriation can be seen as "establishing at least an outer bound for the definition of the term."[99] The IUSCT utilized five different definitions of expropriation:

> a compulsory transfer of property rights[,] . . . an unreasonable interference test[,] . . . interference to such an extent that the property rights are rendered so useless that they must be deemed to have been expropriated[,] . . . non-ephemeral deprivation of the fundamental rights of ownership[,] . . . [and] whether the effective use of the property has been lost.[100] Taken together, these formulations suggest that, for there to be a compensable taking, there must be a sufficient degree of interference with the most important rights of ownership for that interference to be equivalent to a transfer of the property . . . . [T]he concept of a "compensable taking" used by the Tribunal arguably constitutes an outer bound for the definitions of "indirect expropriation" . . . .[101]

The specific issue of interpretation is whether the three factors listed in Annex 10-C (4)(a) (economic impact, interference with distinct, reasonable investment-backed expectations, and the character of the government action) provide a certain enough framework to fall within the outer boundary established by the IUSCT.

---

98. Timothy Wilson, *Trade Rules: Ethyl Corporation v. Canada (NAFTA Chapter 11) Part II: Are Fears Founded?*, 6 NAFTA L. & BUS. REV. AM. 205, 222 (2000) (citing George Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AM. J. OF INT'L L. 585, 609 (1994)) (emphasis added).

99. Kevin Banks, *NAFTA's Article 1110- Can Regulation be Expropriation?*, 5 NAFTA L. & BUS. REV. AM. 499, 515 (1999).

100. *Id.* at 515-16 (internal quotations omitted).

101. *Id.* at 516.

A synthesis of the various interpretations of indirect expropriation discussed above could result in a compelling argument that a legitimate environmental regulation should never be considered to be an indirect expropriation. While this type of analysis is an interesting academic exercise, the more pragmatic issue is whether the uncertainty of what constitutes an acceptable state regulation could have a direct impact on creating effective environmental and other public policy laws among the CAFTA signatory countries.[102]

C. An Additional Source of Interpretation: An Examination of NAFTA's Expropriation Language

Determining the boundaries of indirect expropriation has been an ongoing process throughout the ten years of NAFTA interpretation. An assessment of that process can shed some light on the potential impact of Article 10.7.1 of CAFTA.[103]

One means of forecasting the impact of CAFTA's Article 10.7.1 is to examine the interpretation of NAFTA's similar Article 1110(1):

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.[104]

---

102. For example, the fear of having to pay compensation to a foreign investor could prevent a country from creating a MPA that could protect an extremely vulnerable area of marine habitat in the region.

103. An analysis of NAFTA is critical in forecasting the impact of CAFTA:

> At the very least, the legal and institutional issues raised by the early [NAFTA] Chapter 11 jurisprudence demand a radical reconsideration of the underlying model before it is imported wholesale into . . . other agreements. At stake is nothing less than the integrity of the democratic process and states' ability to regulate effectively for the preservation of public health and the natural environment.

Beauvais, *supra* note 83, at 296.

104. NAFTA art. 1110(1). The relevant compensation language is: "[c]ompensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place . . . ." *Id.* art. 1110(2).

Under both NAFTA and CAFTA, legislation that is determined to directly or indirectly expropriate an investment, even if it is for a public purpose, is only allowable in conjunction with a payment of compensation. The Preamble to NAFTA states that the parties resolved to "contribute to the harmonious development and expansion of world trade . . . in a manner consistent with the environmental protection and conservation; . . . [to promote] sustainable development; . . . [and to strengthen] the development and enforcement of environmental laws and regulations."[105] However, this language is further modified by provisions within NAFTA that highlight the uncertainty surrounding when a legitimate public policy goal might be considered an expropriation:

> Article 1101(4) commands those interpreting chapter 11 to not construe it so as to prevent a party from providing a range of public services (such as policing or social welfare) "in a manner that is not inconsistent" with that chapter. This wording seems to allow interpretations of chapter 11 that prevent a party from providing those services in a manner that is inconsistent with the chapter. It also suggests, without providing more information, that in some circumstances such services could be provided in a way that is inconsistent with chapter 11. Similarly, article 1114(1) provides that nothing in chapter 11 shall be construed to prevent a party from adopting any environmental measure *otherwise consistent* with that chapter. The net effect of the "otherwise consistent" qualifier in article 1114(1) is to indicate that an environmental measure will not necessarily comply with chapter 11 simply by virtue of being an environmental measure.[106]

The same ambiguity regarding the interpretation of indirect expropriation exists in NAFTA and CAFTA; an examination of the actual interpretation undertaken by NAFTA tribunals shifts this analysis from the theoretical to the practical by creating a functional definition.

---

105. *Id.* at Preamble.

106. Banks, *supra* note 99, at 511, n.64 (emphasis in original). CAFTA contains similar modifying language regarding the implementation of environmental regulations. *See supra*, notes 75 and 76 and accompanying text.

1. *Metalclad Corporation v. Mexico*

The facts of the case are as follows:

> In 1995, the Mexican federal government authorized Quimica Omega de Mexico, a subsidiary of the US-based Metalclad Corporation, to take over and operate a toxic waste facility in the Mexican state of San Luis Potosi. The facility had a history of contaminating local groundwater. Metalclad reportedly spent $22 million preparing the facility.
>
> From before the outset of this project, Metalclad was aware that its "proposed business in Mexico is highly regulated and is subject to Mexican Environmental law." This law regulates both the construction and operation of hazardous waste facilities, and requires environmental impact studies and permits from the National Institute of Ecology (INE), as well as local and state agencies. Operation of such facilities and compliance with INE regulations is subject to continual monitoring by the Federal Attorney for the Protection of the Environment.
>
> Environmentalists and local citizens were not satisfied with the environmental impact assessment for the facility, and successfully pressed the local government not to permit its operation. In late 1996, the Governor of San Luis Potosi deemed the facility to be an environmental hazard to surrounding communities and ordered the Metalclad waste facility shut down. The Governor's decision was supported by a geological audit performed by environmental impact analysts at the University of San Luis Potosi, who found that the facility was located on an underground alluvial stream and could therefore contaminate the local water supply. The Governor subsequently declared the site part of a 600,000 acre ecological zone.[107]

As a result of this government action, Metalclad filed a claim under the NAFTA investment chapter, alleging that, "having been denied the right to operate its constructed and permitted facility, its property has therefore been, as a practical matter, expropriated, entitling the Company to the fair

107. Wagner, *supra* note 84, at 488-89.

market value of the facility as damages."[108] Metalclad claimed "that the facility was worth ninety million dollars."[109]

The Tribunal laid out the applicable law,[110] and gave their interpretation of what constitutes an expropriation:

> [E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[111]

---

108. *Id.* at 489-90. The Notice of Intent was filed on December 30, 1996, and the Notice of Arbitration was filed on January 2, 1997. The Final Award was announced September 2, 2000. Metalclad also claimed a violation of Article 1105-Fair and Equitable Treatment; the Tribunal found that Metalclad was not treated fairly or equitably under the NAFTA and therefore succeeded on its claim under Article 1105. A procedural review of the case is available at NAFTA Claims, http://www.naftaclaims.com/disputes_mexico_metalclad.htm (last visited Feb. 11, 2007).

109. Wagner, *supra* note 84, at 490.

110. The Tribunal stated that:

> A Tribunal established pursuant to NAFTA Chapter Eleven, Section B must decide the issues in dispute in accordance with NAFTA and applicable rules of international law. (*NAFTA Article 1131*(*1*)). In addition, NAFTA Article 102(2) provides that the Agreement must be interpreted and applied in the light of its stated objectives and in accordance with applicable rules of international law. These objectives specifically include transparency and the substantial increase in investment opportunities in the territories of the Parties. (*NAFTA Article 102*(*1*)(*c*)). The Vienna Convention on the Law of Treaties, Article 31(1) provides that a treaty is to 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 the treaty's object and purpose. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty. (*Id., Article 31(2)(a)).* There shall also be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties. (*Id., Article 31(3)).* Every treaty in force is binding upon the parties to it and must be performed by them in good faith. (*Id., Article 26).* A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty. (*Id., Article 27).*

Metalclad Corporation v. The United Mexican States, International Centre for Settlement of Investment Disputes, Final Award of the Tribunal, ¶ 70 (Aug. 30, 2000), *available at* http://www.naftaclaims.com/disputes_mexico_metalclad.htm (follow "Final Award" hyperlink).

111. *Id.* at ¶ 103.

The Municipality's actions were deemed to be an expropriation. The Tribunal reasoned that the denial of a permit to construct the landfill was based upon "the adverse environmental effects of the hazardous waste landfill and the geological unsuitability of the landfill site," as opposed to any "proposed physical construction or any defect in the site."[112] As a result, the Tribunal held that "Mexico has indirectly expropriated Metalclad's investment without providing compensation to Metalclad for the expropriation. Mexico has violated Article 1110 of the NAFTA."[113]

2. *Methanex v. United States*

The facts of the case are as follows:

> The Methanex case is an investment dispute between Canadian-based Methanex Corporation and the United States, arising from the provisions in the North American Free Trade Agreement's Chapter 11 on investment. Methanex is a major producer of methanol, a key component of MTBE (methyl tertiary butyl ether), which is used to increase oxygen content and act as an octane enhancer in unleaded gasoline. Methanex launched its international arbitration against the United States in response to the March 1999 order by the State of California to ban the use of MTBE by the end of 2002.
>
> California argued that banning MTBE was necessary because the additive is contaminating drinking water supplies, and is therefore posing a significant risk to human health and safety, and the environment. Methanex argued in its original submission that the ineffective regulation and non-enforcement of domestic environmental laws, including the U.S. Clean Water Act, is responsible for the presence of MTBE in California water supplies. The company argued that the ban is tantamount to an expropriation of the company's investment and thus a violation of NAFTA's Article 1110; was enacted in breach of the national treatment obligation in Article 1102 of NAFTA; and was also in breach of the minimum international standards of treatment obligations in Article 1105 of NAFTA. It was seeking almost $1 billion in compensation from the United States.[114]

---

112. *Id.* at ¶ 106.

113. *Id.* at ¶ 112.

114. HOWARD MANN, THE FINAL DECISION IN METHANEX V. UNITED STATES: SOME NEW WINE IN SOME NEW BOTTLES 2 (2005). The Methanex claim has been described as

Similar to the Metaclad complaint, Methanex's argument focused on the economic impact of the regulatory measure. The Tribunal, however, focused on the role of a state's traditional police powers.[115] The Tribunal explained the distinction between legitimate regulations and prohibited measures that constitute expropriation:

> In the Tribunal's view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[116]

The Tribunal then held that, "[f]rom the standpoint of international law, the Californian ban was a lawful regulation and not an expropriation."[117] The Tribunal's formula—that a regulatory measure created for a non-discriminatory, public purpose, and enacted in accordance with due process is not an expropriation—cannot be used as a certain test in all future cases. First, the decision in one NAFTA case does not bind other Tribunals.[118] Second, the phrase "unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation" creates an area of uncertainty within the holding of the Tribunal.[119]

Examining the potential impact of this holding on CAFTA highlights additional uncertainties. Annex 10-C provides that the issue of regulatory

---

"probably the largest single takings case in U.S. history." Beauvais, *supra* note 83, at 245.

115. MANN, *supra* note 114, at 6.

116. Methanex Corporation v. United States of America, In the Matter of an Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Final Award of the Tribunal, Part IV, Chapter D, ¶ 7, (Aug. 7, 2005), *available at* http://www.naftaclaims.com/disputes_us_6.htm (follow "Final Award" hyperlink).

117. *Id.* at ¶ 15.

118. NAFTA art. 1136(1). "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case." Article 10.26.4 of CAFTA contains identical language.

119. For example, would new scientific information violate the "specific commitment" provision or would it be considered a "fundamental change in circumstances" and thereby not trigger the expropriation language? MANN, *supra* note 114, at 8.

expropriation is to be determined by three factors: "the economic impact of the government action, the extent of interference with distinct, reasonable investment backed expectations, and the character of the government action."[120] The holding of the *Methanex* Tribunal would directly impact the third factor, and the "specific commitment" provision addresses the second factor, but the decision does not address the first factor.[121] The *Metalclad* Tribunal used the issue of economic impact to trigger the expropriation award. Without further clarification, the prospect of a significant economic impact on an investor could trigger the "except in rare circumstances" provision of Annex 10-C.4.b and cause "nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives"[122] to be considered a regulatory expropriation. What is certain is that the *Metalclad* and *Methanex* decisions do not provide a clear analysis to determine what is or is not indirect expropriation.

D. Harken Oil: A Real Life Hypothetical

A recent challenge to a regulatory measure in Costa Rica provides an example of the types of factual settings that will eventually define the indirect expropriation language of CAFTA:

> Harken Costa Rica Holdings obtained a concession agreement to drill for oil off Costa Rica's Caribbean [coast], including the environmentally sensitive Talamanca coast. Drilling was contingent on the outcome of an environmental assessment. The Costa Rican government reviewed the assessment and determined that Harken's application for permission to drill was incompatible with the country's environmental law. In response, Harken tried to bring an international suit against the Costa Rican government. Harken demanded more than $57 billion in compensation, almost three times the country's GDP. Under the terms of the contractual agreement, however, the Government exercised its right to keep the case in Costa Rica before accepting international arbitration.[123]

---

120. CAFTA Annex 10-C.4.

121. MANN, *supra* note 114, at 9.

122. CAFTA Annex 10-C.4.b.

123. NATURAL RESOURCES DEFENSE COUNCIL AND FRIENDS OF THE EARTH FACT SHEET, THE THREAT TO THE ENVIRONMENT FROM THE CENTRAL AMERICA FREE TRADE AGREEMENT (CAFTA): THE CASE OF HARKEN COSTA RICA HOLDINGS AND OFFSHORE OIL 1, *available at* http://www.citizenstrade.org/pdf/foe_harkenfacts_april2004.pdf.

The Talamanca coast is an area of significant biological and economic importance; in particular, it contains nesting sights for three species of sea turtle.[124] The permit to drill was rejected because "[Harken Oil] failed to address concerns that oil drilling would harm critical nesting areas for endangered turtles and coral reefs that are central to the country's eco-tourism economy."[125] Harken Oil disputed this finding and filed a request for international arbitration.[126] International arbitration was not mandatory, and Harken Oil withdrew their request and entered settlement negotiations with the Costa Rican government.[127] Had CAFTA been in effect, Costa Rica would have been bound to the holdings of an international tribunal, and would therefore be in the position of forecasting where that particular group of three would draw the line between legitimate police powers and a regulatory expropriation.

IV. CONCLUSION

The offensive use of the expropriation language within NAFTA was a surprise,[128] and the need for a distinct line regarding the expropriation language of the agreement has been publicly acknowledged. For example, the Canadian Minister for International Trade stated that it was necessary to develop a "common understanding on the investor-state provisions to ensure that government's ability to legislate and regulate in the public interest is protected."[129] While the effects of Article 1110(1) might have been a surprise in the first few years of NAFTA, the functional harm created by this language was recognized, and yet nearly identical language was used in CAFTA's Article 10.7(1). The uncertainty created by this language

---

124. *Id.* at 2. The Talamanca coast contains key sea turtle breeding areas for the Hawksbill, Great-headed and endangered Leatherback, and Green Turtles. The population of green turtles in the area is the largest in the western hemisphere, and the Leatherback population has been increasing in numbers at an unprecedented rate since the protected area has been enforced. *Id*.

125. *Id.* "Harken decided not to appeal the decision made by Costa Rica's Environmental Authority." *Id.* (internal citation omitted).

126. Steven J. Barry, *Oil Controversy Heats Up*, TICO TIMES, Aug. 20, 2004, *available at* http://www.ticotimes.net/archive/08_20_04_nb.htm.

127. *Id.*

128. MANN & VON MOLTKE, *supra* note 78, at 4. "It is the unexpectedly broad and aggressive use of this process to challenge public policy and public welfare measures that has caught governments and observers off guard . . . ." *Id.*

129. *Id.* at 10 (quoting NOTES FOR AN ADDRESS BY THE HONOURABLE SERGIO MARCHI, MINISTER FOR INTERNATIONAL TRADE, TO THE NAFTA FIFTH ANNIVERSARY LUNCHEON (Apr. 23, 1999), *available at* http://w01.international.gc.ca/MinPub/Publication.asp?publication_id=374904&Language=E).

is exacerbated by Annex 10-C, which "requires a case-by-case, fact-based inquiry" for each "specific fact situation" to determine "whether an action or series of actions . . . constitutes an indirect expropriation."[130] The damaging effects of this uncertainty are intensified by the economic disparity between many investors and Central American/Caribbean signatories of CAFTA. Uncertainty is built into the Agreement: the lack of precedent, the vague language, and the requirement for case-by-case analysis regarding indirect expropriations allow the investor protection language to be used by investors as a sword to potentially attack needed public policy regulations.

The issues then are twofold: what does indirect expropriation mean and who gets to decide? Put differently, potential solutions to the issue of indirect expropriations are either substantive or procedural. Potential substantive solutions center on creating a more illustrative definition by changing the text of the Agreement,[131] providing examples of indirect expropriation,[132] or having the parties create an interpretive statement regarding the breadth of indirect expropriations.[133] Each of these substantive solutions could provide some context for a tribunal in making a decision regarding an indirect expropriation and each should be pursued.

---

130. CAFTA Annex 10-C(4)(a). The Office of the U.S. Trade Representative responded to the comparisons between NAFTA and CAFTA: "In CAFTA, labor and environment are enforceable parts of the core trade agreement . . . CAFTA has real teeth, including binding dispute settlement, monetary fines directed at solving problems, and potential trade sanctions." OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, CAFTA RHYMES WITH NAFTA BUT IS BETTER IN MANY WAYS (June 2005), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file133_7801.pdf. The "real teeth" created by the "binding dispute settlement" process is precisely the damaging language that CAFTA has adopted from NAFTA.

131. Jones, *supra* note 78, at 559.

132. Poirier, *supra* note 84, at 913 (quoting TRADE & ENV'T POLICY ADVISORY COMMITTEE, THE U.S. SINGAPORE FREE TRADE AGREEMENT: REPORT OF THE TRADE AND ENVIRONMENT POLICY ADVISORY COMMITTEE (TEPAC) 6 (2003)). TEPAC had the following recommendations:

> To further enlighten the appropriate development of this now more refined concept, we urge the respective national governments to exchange soon, and in an appropriately formal manner, exemplars of what currently constitutes such an "indirect expropriation" in each of their respective legal regimes in order to better inform each national perspective as to the current application of this critical concept in the other's jurisdiction. These exemplars should also be made available to any empanelled arbitral panel for appropriate reference.

Id. "The TEPAC also stated that the 'rare circumstances' language could be strengthened for greater clarity." *Id.*

133. *See generally* Beauvais, *supra* note 83, at 287-92 (examining the pros and cons of potential interpretive statements).

In reality, however, the problem with this approach is that written definitions are by nature inexact, and no matter how expansive a definition, a definition still needs to be applied to a given set of facts. The vagueness of the Agreement reflects the current state of international law; at best, "[t]here is some agreement at [a] very general level about international law on expropriations in the form of regulatory takings. The problem is how to apply this standard."[134]

Potential procedural solutions include: the use of a screening mechanism,[135] a requirement to exhaust local remedies before submitting a claim to arbitration,[136] and the use of an international appellate body.[137] The creation of an appellate body is considered within Annex 10-F of CAFTA, which directs the initial stages of the creation of such a body after the signatory countries implement CAFTA.[138] This Comment proposes two changes within the existing structure of CAFTA in order to procedurally address the problematic language of Article 10.7. First, an appellate body should be established. If the appellate body was created with a demand for transparency and composed of members drawn from a pool representative of the interests of all signatory states, then the decisions reached under CAFTA would be legitimized in the eyes of the public and member states.

The second procedural change suggested by this Comment is also anticipated within the current text of CAFTA. Article 10.20.9(a) states:

---

134. Poirier, *supra* note 84, at 903.

> The [NAFTA] negotiators considered whether or not they ought to try to draw a bright line in the text that would distinguish between legitimate, bona fide and nondiscriminatory regulation, one the one hand, and an expropriatory act requiring compensation, on the other. [They] quickly gave up that enterprise. [They believed that] [i]f the United States Supreme Court and arbitral tribunals could not do it in over 200 years, it was unlikely that the negotiators were going to do it in a matter of weeks with one line in a treaty.

Id. at 904 (internal citations omitted).

135. Jones, *supra* note 78, at 546. "By instituting a preliminary examination or some kind of screening mechanism that includes the threat of sanctions or litigation in a domestic court against a party who brings a meritless, frivolous, or needlessly expensive suit, many . . . arbitrations could be avoided." *Id.*

136. Poirier, *supra* note 84, at 919. *See also id.* at 915 (discussing the requirement "that domestic courts examine indirect expropriations claims in the first instance").

137. *Id.* at 924-25.

138. CAFTA Annex 10-F. The creation of such a body would arguably run counter to the goal of efficiency espoused by proponents of the current NAFTA arbitration model. To respond, the fear of inefficiency can act as a lever to encourage investors to settle rather than pursue a claim, arguably acting as an equalizer in the relationship between investor and state.

> In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.[139]

This Comment proposes a slight alteration to this portion of the text. In the situation of a claim of indirect expropriation, the tribunal should automatically transmit its proposed decision or award to the non-disputing states, inviting the non-disputing states to submit written comments to the tribunal concerning any aspect of its proposed decision or award. Next, the tribunal should consider the comments and make them public, along with the decision or award. The tribunal should also include the comments in the record if the decision or award is appealed. It is hoped that such procedural modifications would combine the "procedures and opportunity for review of the courtroom [with] the simplicity, informality, and expedition of arbitration."[140] Conflicts involving issues of great public importance need to be conducted in a transparent environment that fosters independence and accountability; the current arbitration model is slanted too far in favor of investor rights at the potential expense of legitimate public policy.

In its present structure, CAFTA creates a framework where the mere threat of a lawsuit has a chilling effect which acts against states implementing new measures designed to further public policy. The indirect expropriation language has proven difficult to manage under NAFTA, and two factors make that same language even more problematic in CAFTA: 1) the lack of existing environmental laws (and other public welfare laws) in

---

139. CAFTA art. 10.20.9(a).

140. Poirier, *supra* note 84, at 883. Arbitration and adjudication are both imperfect mechanisms to resolve these types of conflicts:

> Choices of forum and procedure situate the dispute resolution process within one *nomos* or the other. And these choices may subtly but pervasively influence the substantive outcomes over time. The very speed, clarity, and narrowness of the arbitration proceeding, along with its explicit lack of precedential value and of a disciplining appellate process, undermine the dialogic and negotiation-forcing aspects of judicial regulatory takings dispute procedures, which would typically be slower and sometimes muddier, but certainly more public.

Id. at 878.

the majority of the member states, and 2) the fact that CAFTA will impact the United States in very different ways than the other member countries. Foreign investors will challenge national laws of the Dominican Republic, Guatemala, Honduras, El Salvador, Nicaragua, and Costa Rica, but these countries will receive very little, if any, economic benefit from the investor protection language because of the scale of their economies in comparison to the United States economy.

The *Harken Oil* case highlights the problematic position that the signatory states will find themselves in under CAFTA. Protecting sensitive environmental areas such as marine ecosystems requires the enforcement of laws that are not yet on the books. Effective conservation measures require multinational agreements, national environmental laws, and local education and implementation; most importantly, these measures need to be enforced. The creation and enforcement of environmental regulations are the types of state action that will be chilled by the language of Chapter Ten. CAFTA needs to be modified to amend the uncertain language regarding indirect expropriation and to revise the arbitration process used by private corporations to challenge public policy measures.