NOTE: One Step Forward, Two Steps Back: The Central American Free Trade Agreement and the Environment

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LexisNexis Summary

… By limiting ***CAFTA***'s dispute settlement process to only disputes regarding enforcement, the agreement allows for many areas of environmental law and policy of member countries to go unchecked. … " Opponents of the investor suit provisions in free trade agreements recognize that the promotion of foreign investment is integral to the encouragement of sustainable development and the conservation of the environment and its useful resources. … … Also, ***CAFTA*** provides an opportunity for foreign investors to undermine existing domestic environmental regulations in ***CAFTA*** countries. … Lori Wallach, Director for Citizen's Global Trade Watch, has argued that the ***CAFTA*** provisions are far less than sufficient: ***CAFTA*** includes the NAFTA language that requires foreign investors be compensated for "indirect expropriation." … Since ***CAFTA*** did not narrow the restrictions on investor suits, U.S. environmental laws intended to protect the environment and the public welfare are still at risk of being challenged by a foreign investor; however, it may take more than one arbitration loss for the United States to comprehend the broad implications of ***CAFTA***'s investor suits.

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I. Introduction

On August 2, 2004, President George W. Bush signed the United States-Central America Free Trade Agreement (***CAFTA***) [1] between the United States and the Central American countries of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic. [2] Despite heated congressional debate, ***CAFTA*** was expeditiously passed, albeit narrowly, in both the House of Representatives and the Senate. [3] Similar to previous free trade agreements, such as the North American Free Trade Agreement (NAFTA), [4] ***CAFTA*** is designed to eliminate tariffs and barriers to trade while opening markets between the participating countries and promoting

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[1] David Armstrong, CAFTA Signed into Law: Bush Hails Trade Pact After Tough Fight in Congress, S.F. Chron., Aug. 3, 2005, at C1, available at http://www.sfgate.com/cgi-bin/article. cgi?f=/c/a/2005/08/03/BUGSFE1S5G1.DTL&hw=CAFTA&sn=002&sc=378.

[2] Central America Free Trade Agreement, May 28, 2004, 43 I.L.M. 514 (2004), available at http://www.ustr.gov/Trade Agreements/Bilateral/CAFTA/CAFTA- DR Final Texts/Section Index.html [hereinafter CAFTA].

[3] See Armstrong, supra note 1 (reporting that CAFTA passed in the Senate fifty-four to forty-five and narrowly escaped rejection in the House by a 217 to 215 vote).

[4] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, ***32 I.L.M. 289 (1993)*** [hereinafter NAFTA], available at http://www.nafta-sec-alena.org/DefaultSite/index e. aspx?DetailID=78.

foreign investment. [5] Proponents have touted ***CAFTA*** as a necessary step towards President Bush's ultimate goal of a Free Trade Area of the Americas (FTAA): a free trade agreement that would potentially include thirty-four economies within the Western Hemisphere. [6]

Proponents of ***CAFTA*** and free trade in general contend that free trade facilitates development and investment in countries, which ultimately leads to enhanced protection of the environment. However, ***CAFTA*** has received an onslaught of criticism from environmental groups who believe ***CAFTA*** only increases the threat to the environment and natural resources. Among various weaknesses in free trade agreements like ***CAFTA***, opponents point to the lack of environmental considerations in the agreement. Also, ***CAFTA*** provides an opportunity for foreign investors to undermine existing domestic environmental regulations in ***CAFTA*** countries. Criticism asserting that **[*547]** ***CAFTA*** provisions inadequately address environmental concerns is largely based on the alleged failures of prior free trade agreements, most notably NAFTA.

This Note addresses ***CAFTA***'s potential impact on the environment and domestic environmental laws. In the process, this Note evaluates the adequacy with which ***CAFTA*** addresses environmental concerns by including provisions which may offset any negative impact free trade has on the environment. Specifically, this Note analyzes the effectiveness of ***CAFTA***'s environmental chapter in addressing the potential negative effects ***CAFTA*** may have on the environment of its CentralAmerican countries. Also, this Note addresses whether ***CAFTA***'s investor suit provisions in Chapter 10 of the agreement are an improvement to NAFTA's similar Chapter 11.

This Note is not necessarily a comprehensive, comparative analysis of ***CAFTA*** and NAFTA, nor is there a specific determination of whether NAFTA was a success for the environments of the United States, Canada, or Mexico. Yet the relation between NAFTA, ***CAFTA***, and the environment is quite relevant. In evaluating ***CAFTA***'s potential impact on the environment, NAFTA can provide insight into ***CAFTA***'s environmental provisions and its strengths and weaknesses since ***CAFTA*** is a new free trade agreement modeled after NAFTA.

II. Free Trade's Potential Impact on the Environment

In addressing environmental concerns with free trade, proponents of free trade agreements have historically argued that the reduction of trade barriers and the encouragement of investment in different nations improves economies, which ultimately results in the enhanced protection of the environment and preservation of a country's natural resources. [7] In arguing for free trade agreements such as ***CAFTA***, the United States Trade Representative (USTR) stated that "[b]y fostering economic growth and job creation, investment can **[*548]** bring important benefits, including potential benefits to the environment: as wealth grows and poverty decreases, more resources become available for environmental protection, with potential benefits for developing countries, particularly as they develop constituencies in favor of increased environmental protection." [8] In reference to its support of ***CAFTA***, the USTR stated in its final review of ***CAFTA*** that the agreement "can have positive environmental consequences in

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[5] See Washington Office on Latin America (WOLA), ***CAFTA***, http://www.wola.org/ economic/***cafta***.htm (last visited June 3, 2007) [hereinafter WOLA, ***CAFTA***].

[6] Ben Lilliston, Inst. for Agric. & Trade Pol'y, ***CAFTA***'s Impact on U.S. Ethanol Market 11 (2005), available at http://www.tradeobservatory.org/library.cfm?refid=73232 (noting U.S. Trade Representative Robert Portman has called ***CAFTA*** the "gateway" to the FTAA).

[7] See, e.g., United States Trade Representative, Final Environmental Review of the Dominican Republic - Central America - United States Free Trade Agreement 29 (2005), available a t http://www.ustr.gov/assets/Trade Agreements/Bilateral/***CAFTA***/asset upload file953 7901.pdf [hereinafter ***CAFTA*** Final Environmental Review]; Comm'n for Envtl. Cooperation of North America (CEC), Free Trade and the Environment: The Picture Becomes Clearer 1 (2002), available at http://www.cec.org/files/PDF/Economy/ FreeTrade-en-fin.pdf [hereinafter CEC, Free Trade and the Environment] (stating "economic theory generally holds . . . that economic growth nurtures . . . higher levels of environmental protection . . .").

[8] ***CAFTA*** Final Environmental Review, supra note 7, at 29.

Central America . . . by reinforcing efforts to effectively enforce environmental laws, accelerating economic growth and development through trade and investment and disseminating environmentally beneficial technologies." [9]

In general, environmentalists and opponents of free trade agreements have vigorously argued that free trade agreements do not afford sufficient consideration to the environmental consequences of free trade, but rather focus on trade policy and the satisfaction of corporate interests. [10] Moreover, despite the strong voice of substantial international coalitions of professional and grassroots organizations against free trade, environmental interests are not adequately represented at the bargaining table. For example, during the debates leading up to the approval of ***CAFTA***, its supporters relied on only one gesture of support by environmental organizations: a January 2005 letter signed by ten environmental non- governmental organizations from Central America praising ***CAFTA***. [11] In 2002, the Commission for Environmental Cooperation of North America addressed the lack of representation of environmental interests in the free trade process:

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The integration of environmental and trade policies remains weak . . . [and] [t]he logic of integration remains fairly straightforward: as long as environmental considerations remain outside of, or external to, economic priorities-serving as little more than a policy appendage or after-thought to core economic decisions-then the world will find itself increasingly lurching from one ecological problem to the next. [12]

III. ***CAFTA*** and the Environment: Potential Negative Effects in Central America

Since ***CAFTA***'s inception, environmental organizations have been overwhelmingly against it. During the discussions and debates leading up to its signing, ***CAFTA***'s potential negative impact on each country's environment was one of the most controversial issues concerning the agreement. Environmental concerns are based largely on the alleged failure of NAFTA to protect the environments of participating countries from increased trade. ***CAFTA*** opponents argue that the agreement has failed to adequately address the detrimental environmental effects of free trade experienced under NAFTA. Deborah James, Global Economy Director at the international human rights organization Global Exchange, has described free trade agreements such as ***CAFTA*** as "generally little more than code words for corporate expansion across the globe at the expense of communities and our environment." [13] Although ***CAFTA*** ensures that "[t]he Parties recognize the importance of strengthening capacity to protect the environment and to promote sustainable development in concert with strengthening trade and investment relations," [14] environmental groups argue ***CAFTA*** will weaken existing environmental regulation in Central American countries seeking to attract foreign investment. [15] Due to the vast differences in the economies and environmental regulations of the United States and Central American countries, ***CAFTA*** may have a

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[9] Id. at 2.

[10] See CEC, Free Trade and the Environment, supra note 7, at 4.

[11] Compare Dominican Republic-Central America Free Trade Agreement: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Energy and Commerce Comm., 109th Cong. 21 (2005) (statement of Regina K. Vargo, Assistant United States Trade Representative) [hereinafter Vargo, ***CAFTA*** Hearing], with Deborah James, Environmental Impacts of ***CAFTA***, Global Exchange, http://www.globalexchange.org/campaigns/***cafta***/ Environment.html (last visited June 3, 2007) ("Most environmental organizations in the United States have written letters to the U.S. Trade Representative and members of the U.S. Congress, voicing their opposition to ***CAFTA***. Groups as diverse as Center for International Environmental Law, Defenders of Wildlife, Earthjustice, Friends of the Earth . . . have sounded out a warning about ***CAFTA***'s negative potential impact on our shared environment. And in Central America, over 800 social organizations - including many environmental groups - signed a petition in July of 2004 urging the U.S. Congress to reject ***CAFTA***.").

[12] CEC, Free Trade and the Environment, supra note 7, at 10.

[13] James, supra note 11.

[14] ***CAFTA***, supra note 2, art. 17.9.1.

[15] See James, supra note 11.

disproportionate detrimental impact to the environment of Central America, while posing a much less severe threat to the United States.

This Part sheds light on ***CAFTA***'s negative effects on Central America's environment and the ability of countries to improve their protection of natural **[*550]** resources. ***CAFTA***'s Central American countries face growing environmental degradation occurring rapidly throughout the region. There are numerous critical environmental problems in the region. For example, one of the more serious environmental concerns is deforestation. [16] From 1950 to 1990, Central America lost more than 70% of its forest cover, and between 1980 and 1990, deforestation occurred at rate of 1.4% annually. [17] Exacerbating the region's environmental crisis is the fact that environmental degradation continues to annihilate Central America's remarkable biodiversity. Despite accounting for less than 1% of the earth's land mass, 8% of the planet's biodiversity is found in Central America. [18] Four out of the five ***CAFTA*** Central American countries have tropical areas identified as "critical regions" requiring stringent protection of biodiversity, and "[t]hree out of four migratory bird routes in the Western Hemisphere pass through the DR-***CAFTA*** countries, making the forests in this tiny strip of land an essential habitat for the survival of 225 species of birds." [19] The rapidly depleting biodiversity occurring in Central America is not occurring in the United States, however, where environmental regulations are relatively strict in comparison to other countries.

Notably, some distinctions between ***CAFTA*** countries and NAFTA countries warrant an elevated degree of scrutiny in the assessment of ***CAFTA***'s negative impact on the environments of the Central American countries. Unlike NAFTA, ***CAFTA*** includes considerably "unequal trading partners;" the combined gross domestic product of Central America is equal to 0.5% of the U.S.'s gross domestic product. [20] Due to the disparity in economic resources between the United States and the Central American countries, a lack of uniformity likely exists in the environmental regulations between the trading partners. Central America's insufficient financial resources necessary to support effective environmental regulation present considerable risks in the face of increased trade. Central American parties will not have the regulatory capacity to address the increased development and investment facilitated by ***CAFTA***. John Audley and Vanessa Ulmer of the Carnegie Endowment for **[*551]** International Peace state, "[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." [21] The USTR has expressly acknowledged the weaknesses in environmental laws in Central American countries such as Honduras and Guatemala. [22] Despite progress in the address of the pressing environmental issues such as deforestation, Central America's "ability to effectively

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[16] Sierra Club, ***CAFTA***'s Impact on Central America's Environment, http://www.sierraclub. org/trade/***cafta***/***cafta*** centralamerica.asp (last visited on June 4, 2007).

[17] Id.

[18] Id.

[19] Dominican Republic-Central America Free Trade Agreement: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Energy and Commerce Comm., 109th Cong. 107 (2005) (prepared statement of David F. Waskow, Director of International Programs, Friends of the Earth) [hereinafter Waskow, ***CAFTA*** Hearing].

[20] WOLA, ***CAFTA***, supra note 5.

[21] John Audley & Vanessa Ulmer, Strengthening Linkages Between U.S. Trade Policy and Environmental Capacity Building 16 (Carnegie Endowment for Int'l Peace, Working Paper No. 40, 2003), available at http://www.carnegieendowment.org/files/wp40.pdf.

[22] See United States Trade Representative (USTR), Interim Environmental Review: U.S.-Central America Free Trade Agreement 31 (2003), available at http://www.ustr.gov/ assets/Trade Agreements/Bilateral/***CAFTA***/asset upload file946 3356 .pdf [hereinafter USTR, Interim Environmental Review of ***CAFTA***] (stating that "Guatemala has not passed a wide spectrum of environmental laws, and lacks specific laws dealing with the major issues of water, forests, solid wastes, biodiversity, etc. that many of the other countries possess," and that "Honduras also has a more limited slate of domestic environmental legislation . . .").

implement and enforce environmental laws is limited by the lack of fiscal and human resources." [23] A majority of the Central American countries "do not have appropriate regulations to implement their environmental legislation . . . [and] [m]ost environmentally related laws in the region have little or no implementing regulations, making enforcement a difficult and sometimes impossible task." [24]

Due to the disparity of environmental regulation between the United States and Central American countries, ***CAFTA*** presents countries with weak regulatory schemes, like Honduras and Guatemala, as attractive locations for factories and natural resource extraction. Environmental concerns over the potential exploitation of Central America's natural resources partially stem from the consequences of free trade under NAFTA. "[T]here is some evidence that differences in environmental regulations between the NAFTA trading partners is contributing to specific instances of pollution havens." [25] A stark example of where environmental regulatory disparities between NAFTA's parties led to pollution havens is the 400% increase in imports of hazardous wastes from the United States to Canada since NAFTA was implemented in **[*552]** 1994. [26] According to the Commission for Environmental Cooperation of North America, this prodigious increase is due mainly to the "significant difference in the cost of regulatory compliance between the two countries." [27]

It is important to note that NAFTA countries share geographical boundaries which may allow for more transportation of hazardous wastes between the United States, Canada, and Mexico, as compared to the distance between the United States and Central American countries. However, this issue of significant disparity between certain environmental regulations illustrates the potential environmental problems which could occur under ***CAFTA***. With Central American countries lacking effective environmental regulations relative to those of the United States, ***CAFTA*** could allow for further exploitation by American companies of Central America's dwindling natural habitats. Environments supporting rich biodiversity are threatened by polluting factories, sprawling resort developments, increased logging of ancient forests, and extractive industries that destroy the land and costal areas alike. [28]

Additionally, opponents of ***CAFTA*** have argued that free trade agreements have the effect of forcing exploitation of a country's resources by its own citizens. For example, under NAFTA, the "subsidized dumping of corn into Mexico has displaced many small farmers, and unfortunately, what that has led to is increased deforestation rates as those farmers try to supplement their incomes or to clear additional agricultural land when they are impoverished." [29] Moreover, an additional result from the "dumping of subsidized U.S. agricultural products" in Mexico under NAFTA, which could potentially occur in Central America, is the increase in industrial farms that have elevated the levels of nitrogen and pollution in Mexico. [30]

Proponents of ***CAFTA*** have argued that economic development in ***CAFTA*** countries will lead to improvements in environmental regulation. However, it is important to remember that enhancement of environmental regulations is

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[23] Id. at 7.

[24] See Carolina Mauri, Sixth International Conference on Environmental Compliance and Enforcement, Environmental Law Enforcement and Compliance in Central America 16-17 (2003), available at http://www.inece.org/conf/proceedings2/14-Env.%20Law%20Enforcement.pdf (stating that "[m]ost of the governmental officials and employees that work on environmental issues do not have a formal training in this field . . .").

[25] CEC, Free Trade and the Environment, supra note 7, at 3.

[26] Id. The 400% increase of hazardous waste imports is during the time period of 1994 to 2000. Id.

[27] Id.

[28] Sierra Club, Say "No" to NAFTA Expansion in Central America, available at http://www.sierraclub.org/trade/NAFTA/***CAFTA*** factsheet.pdf (last visited June 4, 2007).

[29] Waskow, ***CAFTA*** Hearing, supra note 19, at 110.

[30] Id.

not an automatic process, but rather a gradual one. [31] Kevin Gallagher, of Tufts **[*553]** Global Development and Environment Institute, explains that countries "need to have the right kind of institutional structures in place to be able to foster the market to be able to work better toward the environment." [32] ***CAFTA*** countries, notwithstanding the United States, may not have the adequate infrastructure and environmental regulatory regime to cope with the "major transformation that will occur in their econom[ies]" as a result of liberalizing trade under ***CAFTA***. [33] For example, Gallagher argues that "Central American countries are putting their eggs in the manufacturing basket. What they're really hoping to do is create large scale, many worker assembly plants, mainly in the apparel and textile industries, that will sell textiles and apparel into the US market." [34] An influx of populations will be migrating to the cities which are not prepared for the massive increase in urban populations. [35] Gallagher argues this is exactly what happened in Mexico under NAFTA:

[y]ou have all sorts of new folks moving into the manufacturing centers, you need water sanitization services, you need sewage, you need roads to get people around, but also to buttress the air pollution that could occur, so you get a real degraded makeshift what we call sprawl around the central areas. [36]

CAFTA countries may experience similar detrimental effects from free trade as Mexico has experienced under NAFTA. While the USTR argued that "as wealth grows and poverty decreases, more resources become available for environmental protection, with potential benefits for developing countries," [37] this argument may oversimplify ***CAFTA***'s threat to the environment of Central American developing countries. While economic development eventually leads to enhanced regulation and improved sustainable development, more immediate environmental degradation results as a consequence of increased **[*554]** trade and development. Central American countries do not have the present capacity to offset these detrimental effects to the environment. [38]

IV. ***CAFTA***'s Environmental Chapter

A.Is Chapter 17 an Improvement of NAFTA?

Now, eleven years after implementation, the debate over NAFTA's impact on the environment remains unresolved and future effects uncertain. [39] For example, according to Kevin Gallagher, although "Mexico's estimated levels of air, soil and water pollution, as well as solid waste, have all increased faster than economic and population growth"

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[31] Interview by Steve Curwood with Kevin Gallagher, Boston University Economist, on Living on Earth (July 8, 2005), available at http://www.loe.org/shows/segments.htm?program ID=05- P13-00027&segmentID=1%20.

[32] Id.

[33] Id.

[34] Id.; see also CEC, Free Trade and the Environment, supra note 7, at 13 (discussing studies that have shown "that differences in the enforcement of environmental regulations between the US and Mexico have played a contributing role in the locational shift in textiles production from the north to south").

[35] Interview with Kevin Gallagher, supra note 31.

[36] Id.

[37] ***CAFTA*** Final Environmental Review, supra note 7, at 29.

[38] See Interview with Kevin Gallagher, supra note 31 (stressing the need to address free trade's impact on the environment of developing countries prior the point of economic development at which countries "reach a sort of plateau where incomes get high enough where the environment starts to improve on a per capita basis").

[39] See CEC, Free Trade and the Environment, supra note 7, at 4 (discussing the lack of linear relationship between trade and the environment and both NAFTA's positive and negative impacts on the environment and participating parties' environmental regulations).

under NAFTA, the agreement's standards have "decelerated the deterioration of Mexico's environment." [40] Regardless of the true extent of NAFTA's impact on the environment, the widespread criticism of NAFTA's lack of environmental provisions has resulted in an immense amount of pressure on subsequent free trade agreements in which the United States has participated. Both the U.S.-Jordan Free Trade Agreement signed on October 24, 2000 and the U.S.-Chile Free Trade Agreement (U.S.-CFTA) that became effective on January 1, 2004 include environmental chapters in the text of each agreement-a step not taken in NAFTA. [41] Similar environmental pressure was placed on ***CAFTA*** parties resulting in the inclusion of ***CAFTA***'s Chapter 17, an environmental chapter. [42] This response to environmental concerns in ***CAFTA*** and in other free trade **[*555]** agreements is an attempt to follow obligations set forth in the United States Trade Act of 2002, [43] which "establishe[d] . . . negotiating objectives and other priorities relating to the environment." [44] The general environmental-related trade negotiating objectives include, among others:

(1) ensuring that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources; and (2) seeking provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade. [45]

Proponents of ***CAFTA*** have portrayed Chapter 17 as a substantial step in placing environmental concerns on equal footing with labor and economic considerations in free trade agreements. Assistant U.S. Trade Representative, Regina Vargo, boldly described Chapter 17 by stating: "We have also broken new ground on the environmental side. . . . ***CAFTA***['s] environmental provisions . . . are the most forward-leaning trade and environmental package ever." [46] Despite this showing of concern for ***CAFTA***'s effects on the environment, critics of ***CAFTA*** perceive Chapter 17 as a nominal gesture. According to the Sierra Club, "the [Chapter 17] provisions unfortunately do not have much teeth compared to other chapters of ***CAFTA*** [and] [w]hile there is some environmentally-friendly language in the chapter, it is mostly unenforceable." [47] Chapter 17 fails to provide an efficient mechanism for environmental protection among ***CAFTA*** countries. [48] The following Part examines the most glaring weaknesses of ***CAFTA***, exposing the agreement's **[*556]** failure to provide sufficient consideration to its potential negative impact on the environment.

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[40] Kevin P. Gallagher, ***CAFTA*** and the Environment, Providence Journal, Apr. 11, 2005, available at http://ase.tufts.edu/gdae/Pubs/news/NewsTribuneGallagher.pdf; see also Kevin P. Gallagher, Trading Away the Environment?, S.F. Chron., Sept. 23, 2004, at B9, available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/09/23/EDGHE8SM5M1.DTL&hw= trading+away+the+environment&sn=009&sc=490 (reporting that Mexico "estimates that the economic costs of environmental degradation as related to NAFTA have amounted to 10 percent of annual GDP," which overwhelms the country's economic growth of 2.6% of the annual GDP).

[41] Jay V. Sagar, Note, The Labor and Environment Chapters of the United States-Chile Free Trade Agreement: An Improvement Over the Weak Enforcement Provisions of the NAFTA Side Agreements on Labor and the Environment?, 21 Ariz. J. Int'l & Comp. L. 913, 922 (2004).

[42] ***CAFTA***, supra note 2, art. 17.

[43] Trade Act of 2002, 19 U.S.C. § 3801 (2002).

[44] ***CAFTA*** Final Environmental Review, supra note 7, at 5.

[45] Id. (citations omitted); see also Kevin P. Gallagher, Carnegie Endowment for Int'l Peace, The Environmental Review of the FTAA: Examining the U.S. Approach 1-2 (2003), available at http://www.carnegieendowment.org/files/TED 7.pdf. The Trade Act requires the U.S. government to conduct an environmental review that analyzes the "potential environmental benefits and costs of proposed trade agreements." Id. at 1.

[46] Vargo, ***CAFTA*** Hearing, supra note 11, at 20.

[47] Sierra Club, ***CAFTA***'s Impact on Central America's Environment, supra note 16.

[48] Letter from Central American Environmental Groups to United States Congress (May 11, 2005) (on file with author), available at http://www.sierraclub.org/trade/***cafta***/***CAFTA*** regional engo.doc.

B.Enforcement of ***CAFTA***'s Environmental Provisions

CAFTA's Article 17.1 of the environmental chapter states:

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall ensure that its laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies. [49]

The explicit recognition of each party's "right" to establish its own levels of protection is based on concerns of deference to national sovereignty. Without clear deference to a country's right to govern itself, ***CAFTA*** could infringe upon a country's sovereignty by forcing the participating parties to comply with international environmental standards. [50] Yet, by affording the countries party to ***CAFTA*** broad discretion in environmental protection, it is unclear how ***CAFTA*** will ensure countries will maintain or improve their existing laws under Chapter 17's enforcement provisions. Although Article 17.2.1(a) states a "Party shall not fail to effectively enforce its environmental laws," [51] in order to constitute a "failure" the lack of enforcement must be "a sustained or recurring course of action or inaction." [52] Stated simply, "a one-time violation may not be enough" for a party to be in violation of the agreement, regardless of how egregious the violation may be. [53]

The environmental enforcement section, Article 17.2.1(b), continues to weaken Article 17.1's enumerated environmental responsibilities that "each Party shall ensure that its laws and policies provide for and encourage high levels of environmental protection." [54] For example, Article 17.2.1(b) recognizes that "each Party retains the right to exercise discretion with respect **[*557]** to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities." [55] Arguably, providing such deference to each country's environmental enforcement contradicts Article 17.1's requirement that each country "ensure" substantial environmental enforcement and protection. Collectively, Article 17.1-.2 can be read as saying "you are supposed to enforce your environmental laws, but only if you want to." [56]

Lacking in ***CAFTA***'s enforcement section is a set of basic environmental laws and regulations each participating country must comply with and maintain. [57] Moreover, ***CAFTA*** countries are not required to adopt any international environmental standards. [58] As previously mentioned, it is unclear how ***CAFTA*** ensures that countries maintain and work to improve their environmental laws. Article 17.10 provides for future collaborative environmental consultations, which ideally allow a party to challenge another party's lack of enforcement of environmental laws or regulations. However, Article 17.10.7 states: "No party may have recourse to dispute settlement under this

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[49] ***CAFTA***, supra note 2, art. 17.1.

[50] Sagar, supra note 41, at 918.

[51] ***CAFTA***, supra note 2, art. 17.2.1(a).

[52] Id.

[53] Sierra Club, ***CAFTA***'s Impact on Central America's Environment, supra note 16.

[54] ***CAFTA***, supra note 2, art. 17.1 (emphasis added).

[55] Id. art. 17.2.1(b).

[56] Sierra Club, ***CAFTA***'s Impact on Central America's Environment, supra note 16; cf. Sagar, supra note 41, at 919 (noting that NAFTA's environmental side agreements "have been criticized for including weak enforcement provisions that are subject to political manipulation").

[57] Waskow, ***CAFTA*** Hearing, supra note 19, at 105-06.

[58] James, supra note 11.

Agreement for any matter arising under any provision of this Chapter other than Article 17.2.1(a)." [59] In other words, one provision in ***CAFTA***'s environmental chapter-that which requires ***CAFTA*** parties to enforce their already existing environmental laws-is subject to dispute settlement where penalties could be imposed on a violating country. [60]

By limiting ***CAFTA***'s dispute settlement process to only disputes regarding enforcement, the agreement allows for many areas of environmental law and policy of member countries to go unchecked. For example, there is no provision setting forth penalties or sanctions for countries that are allegedly creating weak environmental laws in order to attract investment. [61] Admittedly, Article 17.2.2 states that the ***CAFTA*** countries "recognize that it is inappropriate to encourage trade or investment by weakening or reducing the **[*558]** protections afforded in domestic environmental laws." [62] However, this admonition to member countries is not incorporated into the enforcement section in which a violation thereof is subject to dispute settlement. Furthermore, the recognition of the potential to weaken environmental laws is qualified in the immediately subsequent Article 17.2.3, which states, "[n]othing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party." [63]

Without explicit standards, and compounded by the loose language of Chapter 17, it is unclear as to what level of egregiousness a failure to enforce will warrant a penalty under the ***CAFTA***. [64] By limiting dispute resolution to allegations of another country's digression of environmental enforcement, ***CAFTA*** creates loopholes for participating countries. [65] In the interests of pursuing an investment, a country could pass a weak environmental regulation which could not be challenged in dispute settlement under Chapter 17. Exacerbating this seemingly large loophole is the broad discretionary language in Article 17.2.1(b) stating, "the Parties understand that a Party is in compliance . . . where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources." [66] By affording this immense amount of discretion to each party and by restricting the availability of a dispute resolution forum, "***CAFTA*** allows countries to decide not to enforce any portion of their environmental . . . law by deciding to allocate resources elsewhere"; these decisions are not subject to dispute settlement. [67] Additionally, ***CAFTA***'s environmental chapter does not apply to domestic judicial decisions and thus allows a country's "repeated failures by a country's court system to enforce environmental laws" to stand undisputed. [68]

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When analyzing ***CAFTA***'s environmental provisions, like the enforcement provision under Article 17.2, it is important to keep in mind the existing environmental regulations and enforcement regimes of the participating

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[59] ***CAFTA***, supra note 2, art. 17.10.7.

[60] Waskow, ***CAFTA*** Hearing, supra note 19, at 107.

[61] Sierra Club, ***CAFTA***'s Impact on Central America's Environment, supra note 16.

[62] ***CAFTA***, supra note 2, art. 17.2.2.

[63] Id. art. 17.2.3.

[64] See Quixote Center/Quest for Peace, Fair Trade or Free Trade? Understanding ***CAFTA*** 16 (2003), http://www.andrew.cmu.edu/user/mtoups/***cafta*** briefing final dec03. pdf ("Allowing for some degree of discretion is not itself a problem - and no doubt necessary to reach an agreement. However, the text is so broadly worded that it would be difficult to force a decision on non-compliance, should a conflict ever reach dispute settlement.").

[65] Id. at 16-17.

[66] ***CAFTA***, supra note 2, art. 17.2.1(b) (emphasis in original).

[67] Citizens Trade Campaign, Key Environmental Reasons to Oppose CAFTA, http://www.citizenstrade.org/pdf/Key%20Environmental%20Reasons%20to%20Oppose %20CAFTA.pdf (last visited June 5, 2007).

[68] Waskow, ***CAFTA*** Hearing, supra note 19, at 107.

countries. The USTR has recognized that Central American countries have weak environmental laws and lack sufficient resources for effective enforcement. [69] Without provisions in ***CAFTA*** mandating countries to adopt certain environmental laws, there is a lack of incentive to improve existing laws when less stringent environmental regulations attract foreign investment. Article 17.13 first draws a traditionally, and relatively broad (though ambiguous), definition of environmental law. [70] Yet, the definition of "environmental law" becomes increasingly restrictive by limiting the term to involve 1) environmental contaminants; 2) chemical products and toxic wastes; and 3) protection of conservation of wild flora and fauna. [71] This restrictive definition excludes other important areas of environmental law such as water and soil conservation. The exclusion of such environmental issues essentially precludes any challenge to a country's lack of enforcement of laws dealing with these environmental issues because they do not fall within the ***CAFTA*** definition of "environmental law." [72]

Arguably worse than failing to set basic recognized standards for environmental protection, ***CAFTA***'s Chapter 17 definition section affirmatively presents the opportunity for exploitation of natural resources. Article 17.13.1 states, "environmental law does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources." [73] Basically, the ***CAFTA*** mandate that countries "ensure that [their] laws . . . encourage high levels of environmental protection" [74] does not apply to those laws whose "primary purpose" is natural resource **[*560]** management involving precious resources such as timber, water, and natural minerals. [75] This exclusionary definition of "environmental law" makes it easier for Central American countries to relax their natural resource protection laws in order to attract foreign companies interested in exploiting natural resources. [76] Moreover, there is a lack of incentive to "strive to ensure" effective laws intended to protect natural resources since "weakening environmental laws in order to attract investment cannot become subject of an arbitral panel." [77]

C.Fines for Chapter 17 Violations

In the event a dispute settlement concludes a country has failed to enforce its environmental laws, the maximum fine is $ 15 million annually. [78] This monetary penalty appears to undermine Assistant USTR Regina Vargo's description of ***CAFTA*** as "the most forward-leaning trade and environmental package ever," [79] considering sanctions for commercial provisions violations are unlimited. If a country is fined for failure to enforce its

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[69] See generally USTR, Interim Environmental Review of ***CAFTA***, supra note 22.

[70] See Letter from Central American Environmental Groups to United States Congress, supra note 48; see also ***CAFTA***, supra note 2, art. 17.13.1.

[71] ***CAFTA***, supra note 2, art. 17.13.1.

[72] Letter from Central American Environmental Organizations to United States Congress (May 11, 2005), available at http://www.globalexchange.org/campaigns/***cafta***/3046.html (arguing that the definition "severely restricts that which is referred to as 'environmental legislation' if we compare it, for example with Costa Rica's Organic Environmental Law (No. 7554)," which includes "a broad array of crucial issues . . . such as water usage and conservation, the sovereign management of biological diversity, soil protection and the administration of energy resources").

[73] ***CAFTA***, supra note 2, art. 17.13.1 (bold type omitted).

[74] Id. art. 17.1.

[75] Waskow, ***CAFTA*** Hearing, supra note 19, at 107.

[76] See Inter-American Development Bank, Modernization of the State: Strategy Document 8 (2003), available at http://www.iadb.org/sds/doc/ModernizationStateStrategy.pdf. In analyzing sustainable development in Latin American countries, it is important to note that historically, much of the region's economic development has depended on natural resource extraction. Id.

[77] Citizens Trade Campaign, supra note 67.

[78] ***CAFTA***, supra note 2, art. 20.17.2.

[79] Vargo, ***CAFTA*** Hearing, supra note 11, at 25.

environmental laws, the monetary penalty is supposed to be returned to the violating country for the purposes of enhancing its enforcement. [80] Yet ***CAFTA***'s provisions "do[] not prohibit a violating country from redirecting its existing funds away from the area where funds [from the penalty] are being [placed]. . . ." [81] Thus, a penalty imposed due to a country's lack of enforcement could potentially result in "no net increase in enforcement funding." [82] In effect, dispute settlement penalties may not act as a deterrent nor as a means of improvement **[*561]** of existing ineffective enforcement in Central American countries where the enhancement of environmental laws is crucial in the context of increasing foreign investment and development. [83]

V. Investor Suits

A.The Relation Between Investor Suits and the Environment

Since environmental interests often conflict with economic ones, inevitably a country's domestic environmental laws may be at odds with foreign investments in that particular country. [84] A free trade agreement's "investor suits" offer protection of foreign investments by providing investors the right to "seek money damages in private international arbitration against the national government of the country in which they are investing." [85] ***CAFTA***'s Chapter 10 investor suit provision is arguably the most controversial provision with environmental implications. Article 10.7 states, "[n]o Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization. . . ." [86] An exception to this proscription of expropriation is that a country may expropriate an investment for a public purpose in a non-discriminatory manner. [87] In the scenario where appropriation has occurred, compensation must be paid to the investing party that is "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. . . ." [88]

Similar to NAFTA's Chapter 11, ***CAFTA***'s Chapter 10 investor suit provisions provide "foreign investors with guarantees that their investments will be protected against expropriation, denial of treatment required by **[*562]** international law, and discriminatory treatment by the government of the country in which they are investing." [89] A more skeptical perspective is that investor suit provisions allow foreign investors to bypass domestic courts in

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[80] ***CAFTA***, supra note 2, art. 20.17.4 ("Assessments shall be paid into a fund established by the Commission and shall be expended at the direction of the Commission for appropriate labor or environmental initiatives, including efforts to improve or enhance labor or environmental law enforcement, as the case may be, in the territory of the Party complained against, consistent with its law.").

[81] Sierra Club, ***CAFTA***'s Impact on Central America's Environment, supra note 16.

[82] Id.; ***CAFTA***, supra note 2, art. 20.17.4.

[83] See, e.g., Sierra Club, Faces of Trade: New Gold Rush Revives Old "Development" Model, http://www.sierraclub.org/trade/faces/pacific rim.asp (last visited June 5, 2007) (presenting examples of the implications of mining industry in Central America which "cause health and ecological damage, but under the banners of democracy and trade, these projects are imposed on poor and unprotected countries").

[84] See Sanford E. Gaines, Protecting Investors, Protecting the Environment: The Unexpected Story of NAFTA Chapter 11, in Greening NAFTA: The North American Commission for Environmental Cooperation 173 (David L. Markell & John H. Knox eds., 2003).

[85] Judith Wallace, Note, Corporate Nationality, Investment Protection Agreements, and Challenges to Domestic Natural Resources Law: The Implications of Glamis Gold's NAFTA Chapter 11 Claim, 17 Geo. Int'l Envtl. L. Rev. 365, 366 (2005).

[86] ***CAFTA***, supra note 2, art. 10.7.1.

[87] Id. art. 10.7.1(a)-(d).

[88] Id. art. 10.7.2(b).

[89] Wallace, supra note 85, at 366. Compare NAFTA, supra note 4, ch. 11, with ***CAFTA***, supra note 2, ch. 10.

CAFTA countries by filing a claim and seeking money damages in an international arbitration tribunal that "operate[s] outside a nation's regular legal system. . . ." [90]

Proponents of investor suit provisions emphasize that the "promotion of cross- border investments [is] an 'essential element' " in negotiating free trade agreements. [91] Proponents also argue investments in foreign countries facilitated by free trade agreements provide assistance in assuring sustainable development and improving effective environmental regulations. [92] In order to attract investments through free trade agreements, "national and international rules must substantially reduce the 'regulatory risk' that the investment will be . . . appropriated by the host government without compensation." [93] Foreign and U.S. companies demand protection for their investments that could be vulnerable, "usually in less developed countries with less transparent and impartial courts." [94] Also, foreign investors require international protections provided for by investor suit provisions because foreign corporations are not adequately represented in the political processes of the "host country." [95] Hence, proponents of the investment provisions of NAFTA and ***CAFTA*** contend that these provisions allow access to binding arbitration without "pressuring the investor's home government to resolve the dispute through diplomatic bargaining." [96]

Critics of both NAFTA and ***CAFTA***'s investor suit provisions focus on the expansive powers given to private corporations. Speaking before Congress, **[*563]** David F. Waskow, Director of International Programs for Friends of the Earth, stated, "Using these rules, which provide foreign investors broad rights that do not exist under U.S. or other countries' laws, multinational investors have been able to demand compensation for the implementation of legitimate environmental protections." [97] Opponents of the investor suit provisions in free trade agreements recognize that the promotion of foreign investment is integral to the encouragement of sustainable development and the conservation of the environment and its useful resources. [98] However, in order for "international investment to contribute to achieving development that is sustainable [i.e., environmentally friendly], governments will have to continue helping set the legal and economic context in which investment takes place." [99] Allowing investors to challenge a country's environmental laws may deter a country from developing sufficient environmental regulations because of the pressure and need to attract and accommodate economic development. Also, investor suits can require governments to pay compensation to investors whose activities at issue have detrimental effects

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[90] Sierra Club, NAFTA's Investor Rights: A Threat to the Environment and Our Democracy, http://www.sierraclub.org/trade/nafta/backgrounder.asp (last visited June 5, 2007); ***CAFTA***, supra note 2, art. 10.16.

[91] See Gaines, supra note 84, at 175 (describing similar investment interests of the United States, Canada, and Mexico during NAFTA negotiations).

[92] Id. at 184 (emphasizing "foreign direct investment has dwarfed official development assistance as an engine of development throughout the world, so development policies in countries like Mexico have focused on attracting foreign investment").

[93] Id. at 190.

[94] Wallace, supra note 85, at 373.

[95] See Gaines, supra note 84, at 188.

[96] Scott R. Jablonski, NAFTA Chapter 11 Dispute Resolution and Mexico: A Healthy Mix of International Law, Economics and Politics, 32 Denv. J. Int'l L. & Pol'y 475, 477 (2004).

[97] Waskow, ***CAFTA*** Hearing, supra note 19, at 108; see also James, supra note 11 (commenting on the expansive rights NAFTA's Chapter 11 affords to private investors to the extent that it has "undermined the sovereignty of democratically elected governments, and their ability to act in the public interest" and has served as a "virtual Bill of Rights for corporations").

[98] Int'l Inst. for Sustainable Dev., Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights vii (2001), available at http:// motherlode.sierraclub.org/fairTrade/Nafta%20citizens guide.pdf [hereinafter IISD].

[99] Id.

on the environment as well as on a country's "public health and welfare." [100] The criticisms of ***CAFTA***'s investor suit provisions in Chapter 10 are in part based on investor suits arising under NAFTA.

B.Investor Suits Under NAFTA

Despite investor suits being one of ***CAFTA***'s most contentious areas of debate, the similar provision in NAFTA's Chapter 11 did not receive a lot of attention from environmentalists during debates over NAFTA. [101] Chapter 11 **[*564]** makes only three references to environmental issues, [102] including Article 1114's "Environmental Measures," which says that member states "recognize that it is inappropriate to encourage investment by relaxing . . . environmental measures." [103] However, by 2002, close to a third of NAFTA investor suits concerned "environmental activities or environmental protection measures." [104]

In 1996, Ethyl v. Canada was the first case of a foreign investor initiating arbitration under Chapter 11's investor suits. [105] The Virginia-based Ethyl Corporation was the sole supplier of manganese-based gasoline additive, MMT. [106] Although not conclusive, studies had shown that MMT had the potential to cause certain health risks as well as "interfer[ing] with the operation of pollution-controlling catalytic converters." [107] In 1995, Canada passed the Manganese Fuel Additives Act, which essentially prevented Ethyl Corporation from selling MMT in Canada.

Due to the lack of a sufficient scientific basis for the ban on MMT and domestic pressures to rescind the ban, Canada signed a settlement with Ethyl Corporation in 1998. [108] Canada not only rescinded its ban, but also paid Ethyl Corporation $ 13 million, including legal fees and lost profits for the time the ban was in effect. [109] Canada lacked sufficient scientific proof to support its ban on MMT and withstand a foreign investor suit by Ethyl Corporation, yet the case illustrates the potency of the foreign investor suits and their potential to effectively undermine domestic laws directed towards the protection of public health and the environment.

In contrast, others have viewed Canada's ban on MMT in Ethyl v. Canada as "disingenuous" and believe the environment minister deliberately avoided making a science-based regulatory decision. [110] Moreover, the case is a perfect example of the necessity of free trade agreements to provide protection for foreign investors who lack representation in a country's political and legal processes. [111] Proponents of NAFTA's investor suit provisions "claim that **[*565]** critics' concerns are overblown, and emphasize that, unlike Canada and Mexico, the United States has yet to lose one of these cases." [112] According to Sanford E. Gaines, an international environmental and

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[100] Id. at 1.

[101] Gaines, supra note 84, at 173, 191 n.1 ("Among the public interest commentaries on NAFTA before it was approved, only a Canadian group perceived that Chapter 11 might put limits on a 'government's ability to initiate new public programs' and would 'reduce democratic control of the economy.' "); see also IISD, supra note 98, at 7 (stating that the United States, Canada, and Mexico all "embraced the goal of attracting new foreign investment").

[102] IISD, supra note 98, at 12.

[103] NAFTA, supra note 4, art. 1114(2).

[104] Gaines, supra note 84, at 173.

[105] IISD, supra note 98, at 15.

[106] Gaines, supra note 84, at 182.

[107] Id.

[108] Id. at 182-83.

[109] Id. at 183.

[110] Id. at 182-83.

[111] Id.

[112] Daphne Eviatar, A Toxic Trade-Off, Wash. Post, Aug. 14, 2005, at B1.

trade law professor at the University of Houston Law Center, cases like Ethyl v. Canada "support the view that Chapter 11 is functioning precisely as intended, protecting foreign investors who, as politically vulnerable outsiders, have fallen victim to unfair or arbitrary treatment by governments acting on short-term, locally based political motivations." [113]

Notwithstanding the need for protection of foreign investment, the influx of Chapter 11 suits following Ethyl v. Canada have involved individual private investors challenging domestic environmental laws intended to protect a nation's natural resources. For example, in 2001, Metaclad Corporation, a California-based waste disposal company, received an arbitration award of $ 16.7 million in compensation from Mexico. [114] After Metaclad had purchased an existing hazardous waste transfer facility and began constructing a landfill on the site, the Mexican government closed "the site after a geological audit showed the facility would contaminate the local water supply . . . [and] declared the site part of a 600,000- acre ecological zone." [115] Even though the creation of the ecological zone was premised on legitimate reasons including the protection of a rare cactus species, the Chapter 11 arbitration panel found that restrictions placed on the site were "tantamount to expropriation of Metaclad's good faith investment in its facility." [116]

Since Ethyl v. Canada, Canada and Mexico have paid millions of dollars from losing arbitration claims or legal fees in defending domestic environmental regulations in arbitration tribunals. [117] In the process, NAFTA countries have had to defend legitimate environmental regulations intended to protect public welfare and natural resources. For example, in 2003, a Canadian gold mining company, Glamis Gold Ltd., filed a Chapter 11 claim against the United States. Glamis Gold contended that certain California laws **[*566]** regulating mining that were passed after the company received a federal permit to mine would destroy its profit margins. [118] Originally, the U.S. Department of Interior rejected Glamis Gold's project due to the risks of toxic chemicals leaking into the surrounding water sources and because the site was on land that had critical cultural and religious importance to the Quechan Native American tribe. [119]

Unfortunately, in 2001, the Bush administration's secretary of the interior rescinded the prior denial of the permit to Glamis. [120] In response, California passed legislation in 2003 that "required the backfilling and restoration of mining sites to pre-mining conditions if the mines are near sacred Native American sites. . . ." [121] Glamis seeks $ 50 million, including the $ 14.3 million for purchasing the site and $ 35.7 million in compensation of projected lost profits from the site. [122] Although the case has not been resolved, it shows the reach of investor suits.

Under NAFTA's Chapter 11 (and now under ***CAFTA***'s investor provisions), one foreign company can have a costly effect on the ability of a country to protect its environment. Moreover, NAFTA critics argue that the use of Chapter 11 suits by foreign investors has changed from using investor protections as "a protective 'shield' to a strategic,

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113 Gaines, supra note 84, at 189.

114 Sierra Club, NAFTA's Investor Rights: A Threat to the Environment and Our Democracy, supra note 90.

115 Id.

116 Gaines, supra note 84, at 179-80 (explaining that the "[e]nvironmental critics of Chapter 11 see Metaclad as a case where a company failed to win local consent to the siting of its facility, built the facility anyway, and then claimed compensation when the local officials . . . block[ed] operation of the facility because of its threat to the local environment").

117 Waskow, ***CAFTA*** Hearing, supra note 19, at 108.

118 Patrick Woodall, Sierra Club, When Bad Things Happen to Good Laws: How International Trade Pacts Threaten California's Environmental Laws 4 (2004), available at http://www.sierraclub.org/trade/california/CATradeReport.pdf.

119 Id.

120 Id.

121 Id. at 5.

122 Id.

aggressive 'sword.' " [123] In regard to the apparent abuse of Chapter 11 suits by foreign investors, Dr. Howard Mann, an international lawyer specializing in environmental trade and investment elements of international sustainable development law and an associate with the International Institute for Sustainable Development, states:

Investment agreements have traditionally been thought of as recourses of last resort, aimed at protecting an investor through extraordinary means in extraordinary circumstances. Under Chapter 11, however, these provisions are now being turned into a means to fend off proposed new regulations, lobby for or against specific government actions, and generally to preserve or gain a competitive position. Threats to use Chapter 11 are now **[*567]** a routine lobbying instrument, and are given added impact by the broad scope tribunals have given the obligations in the initial cases. This fundamental shift- from protective shield to strategic weapon-means that the drafters of future investment agreements must carefully consider how the provisions can be used not just to protect the investor, but also as a strategic weapon against a government when investor interests are affected. [124]

The makeup of NAFTA's investor suit provisions has arguably led to the use of investor suits in ways antithetical to their intended purpose. For example, arbitration panels under NAFTA have no strict standard for determining whether an investor meets the necessary nationality qualifications. Some have suggested that arbitration panels use the "place in incorporation" test, which requires only that a parent company be incorporated under the laws of a NAFTA party. [125] Essentially, this test does not require any substantial connections to a country such as operations in the country of nationality. This "easy-to-meet nationality test" can potentially allow domestic companies to challenge domestic environmental regulations by gaining "access to a special forum and to arguably greater rights which are supposed to be conditioned on nationality." [126] An example of the problems with a weak nationality test in NAFTA, and now ***CAFTA*** tribunals, is exhibited in the case of Glamis Gold:

Th[e] problem is highlighted by the fact that only a company organized under the law of a U.S. state has the right to a hardrock mining claim on U.S. federal land, yet only a Canadian or Mexican investor has the right to make a claim under NAFTA Chapter 11 against the United States. Glamis Gold claims mining rights available only to U.S. citizens as well as the NAFTA-based rights available only to foreign investors. [127]

The lack of a strict nationality standard invites companies to reorganize in order to be able to pursue Chapter 11 suits. Access to a tribunal allows a **[*568]** company "the opportunity to circumvent U.S. courts or to relitigate unsuccessful claims . . . offer[ing] the opportunity for money damages that would be unavailable in U.S. courts." [128]

Among other weaknesses of NAFTA's investor suits provisions is the manipulation of the term "expropriation" in Article 1110. [129] NAFTA's arbitration panels have used traditional international law as opposed to a "law of NAFTA or U.S. law on takings," resulting in a much broader and investor-friendly definition of property interest. [130] By

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123 IISD, supra note 98, at 16.

124 Id.

125 Wallace, supra note 85, at 366.

126 Id. at 368 (citing the case of Glamis Gold Ltd. as an example of where a Canadian parent corporation met the nationality test because California's laws "expropriated its investment made via its American subsidiary").

127 Id. at 368-69.

128 Id. at 374.

129 NAFTA, supra note 4, art. 1110(1) (stating "[n]o Party shall directly or indirectly . . . expropriate an investment of an investor or another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment").

130 See, e.g., Wallace, supra note 85, at 382 (citing Pope & Talbot v. Canada, Award in Respect to Damages, May 31, 2002, para. 96-101) (stating the panel "hearing a challenge to Canada's ban on PCB exports found that market share is a protected property interest").

offering an expansive range in which a country's environmental regulations can affect an investor's property values or anticipated profits, investors can avoid a more stringent domestic law such as the U.S.'s regulatory takings rules. [131] Although attempts have been made by the North American Commission for Environmental Cooperation (NAAEC) to narrow and clarify NAFTA's "expropriation" provisions in order to quell attacks on domestic environmental laws, there has been little progress due to powerful political forces influencing the status quo. [132]

Further weaknesses of NAFTA's investor suit provisions are addressed below in the discussion on ***CAFTA***'s investor suit provisions.

VI. Are ***CAFTA***'s Investor Suit Provisions An Improvement?

A.Same Old Investor Suit Story

Again, there is widespread disagreement on whether ***CAFTA***'s investor suit provisions are an improvement on NAFTA, or if ***CAFTA***'s Chapter 10 is merely "a potential extension of the failures of NAFTA." [133] In its Final Environmental Review published in February 22, 2005, the USTR outlines ***CAFTA***'s "substantive clarifications and procedural innovations" made to **[*569]** NAFTA's investment chapter in light of NAFTA's apparent weaknesses. [134] However, ***CAFTA*** does not address the aforementioned concerns over NAFTA's lack of stringent nationality requirements which are susceptible to abuse. ***CAFTA*** replicates NAFTA's definition of an "investor of a Party" as a "Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party. . . ." [135] Also, similar to NAFTA, ***CAFTA*** sets no strict standards limiting the definition of an "investor." This vague term could allow investors who do not necessarily meet ***CAFTA***'s intended nationality requirement to challenge legitimate environmental laws in ***CAFTA*** countries. [136]

The USTR claims the expropriation provisions in ***CAFTA***'s Chapter 10 "have been clarified in an annex to ensure that they are consistent with U.S. legal principles and practice, including a clarification that nondiscriminatory regulatory actions designed and applied to protect the public welfare (including environmental protection) do not constitute indirect appropriation 'except in rare circumstances.' " [137] The USTR is referring to ***CAFTA***'s Annex 10-C, which does offer a more precise definition of "expropriation" than NAFTA's definition in Article 1110. [138] ***CAFTA*** provides an outline of factors to consider when determining whether there has been an indirect expropriation of an investor's properties. Indirect expropriation occurs "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure." [139]

CAFTA's listed factors used to determine whether an indirect expropriation has taken place are based on the regulatory takings analysis set forth in Penn Central Transportation Co. v. New York City. [140] These factors include: (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, **[*570]** does not establish that an

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131 See Sierra Club, Say "No" to NAFTA Expansion in Central America, supra note 28.

132 Id.

133 Dominican Republic-Central America Free Trade Agreement: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. on Energy and Commerce Comm., 109th Cong. 131 (2005) (prepared statement of Lori Wallach, Director, Citizen's Global Trade Watch) [hereinafter Wallach, ***CAFTA*** Hearing].

134 ***CAFTA*** Final Environmental Review, supra note 7, at 30; see also ***CAFTA***, supra note 2, annex 10-C.

135 Compare ***CAFTA***, supra note 2, art. 10.28, with NAFTA, supra note 4, art. 1139.

136 See IISD, supra note 98, at 23-24.

137 ***CAFTA*** Final Environmental Review, supra note 7, at 30.

138 Compare ***CAFTA***, supra note 2, annex 10-C, with NAFTA, supra note 4, art. 1110.

139 ***CAFTA***, supra note 2, annex 10-C.4(a).

140 438 U.S. 104 (1978); see also ***CAFTA*** Final Environmental Review, supra note 7, at 30.

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. [141]

CAFTA's inclusion of the Penn Central analysis expressly provides guidelines that are lacking in NAFTA and could serve as a limitation on investors attacking legitimate domestic environmental law in ***CAFTA*** countries. However, critics have argued this U.S. takings analysis is taken "out of context . . . ignoring many key Constitutional principles." [142] When an American court applies the Penn Central analysis in a regulatory takings case, it has other case law to provide insight and further assistance in determining whether governmental action constitutes a regulatory taking requiring compensation. Yet, an arbitration panel that follows international law will not have this contextual background and large amount of case law to assist it in accurately applying the Penn Central factors to a particular ***CAFTA*** case.

Moreover, under NAFTA, investors have prevailed on takings claims that would not have been permitted under U.S. law. [143] Thus, if ***CAFTA*** tribunals follow in the steps of NAFTA tribunals in takings cases, then rulings on indirect expropriation may potentially conflict with the legal principles surrounding the Penn Central analysis. Essentially, the factors listed in ***CAFTA***'s Annex 10-C expropriation section intended to limit investor claims will lose their effect. Lori Wallach, Director for Citizen's Global Trade Watch, has argued that the ***CAFTA*** provisions are far less than sufficient:

CAFTA includes the NAFTA language that requires foreign investors be compensated for "indirect expropriation." This provision has been the basis for an array of cases that would not be permitted under U.S. law, including regulatory takings cases. . . . Several additional ***CAFTA*** provisions promote regulatory takings cases not allowed under U.S. law. For instance, the Supreme Court has ruled that "mere diminution in the value of property, however serious, is insufficient to **[*571]** demonstrate a taking" and that the entire property must be affected permanently. In contrast, NAFTA Chapter 11 tribunals have found that a government action need only cause "significant" or "substantial" impairment of an investment's value to qualify as a taking. [144]

CAFTA does not remedy this overly-broad definition of "indirect expropriation," leaving the United States vulnerable to investors sidestepping U.S. courts in an attempt to gain more rights in a ***CAFTA*** tribunal where a U.S. law is challenged.

The USTR also notes that ***CAFTA***'s expropriation guidelines in Annex 10-C clarify that a government's actions intended to protect the environment do not constitute indirect expropriation "except in rare circumstances." [145] This "rare circumstances" limitation sounds great; however, Lori Wallach states, "this language has precisely the opposite effect claimed. . . . [as it] enshrines the right of foreign investors to challenge a wide array of . . . regulations not subject to U.S. taking claims." [146] Only the tribunal has the power to determine whether an indirect expropriation claim falls within "rare circumstances." [147] The United States is powerless when a domestic environmental regulation is challenged under ***CAFTA*** despite the fact that "U.S. law safeguards all public interest regulations governing personal property. . . ." [148] A country may spend millions defending what it holds as a

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141 ***CAFTA***, supra note 2, annex 10-C.4(a)(i)-(iii).

142 Sierra Club, Friends of the Earth, The Problem with NAFTA's Chapter 11 Investor Suit Rules Has Not Been Fixed in ***CAFTA***, http://www.sierraclub.org/trade/***cafta***/chapter 11 rules. pdf (last visited June 6, 2007).

143 Wallach, ***CAFTA*** Hearing, supra note 133, at 127.

144 Id. (citations omitted).

145 ***CAFTA*** Final Environmental Review, supra note 7, at 30; see also ***CAFTA***, supra note 2, annex 10-C.4(b).

146 Wallach, ***CAFTA*** Hearing, supra note 133, at 127.

147 Id.

148 Id.

legitimate environmental regulation intended to protect the environment and the public welfare. [149] In contrast, a foreign investor suit is "low-risk and low-cost to the plaintiff at the early stages of litigation. . . . [and] because there is no equivalent to the motion for summary judgment to quickly screen out meritless claims, defending governments must devote resources to mount a defense on the merits to even the most specious claims." [150]

[*572]

B.A Few Improvements to Investor Suits

CAFTA does provide innovations to NAFTA that will assist countries in protecting their environmental laws from investor suit challenges. The USTR argues that ***CAFTA*** has sufficient provisions that address the above-mentioned risk of frivolous investor claims. [151] ***CAFTA*** provides a procedure in which a country can move to dismiss a frivolous claim, and a tribunal is authorized to award attorney's fees and costs if the tribunal determines there is a lack of jurisdiction or there is a failure to state a claim. [152] Yet, ***CAFTA*** does not provide for any penalties or sanctions to be imposed on an investor bringing a claim in bad faith. Also, the fact that there is no judicial review further illustrates the disparity of risks between a foreign investor who has nothing to lose in bringing a suit and that of a ***CAFTA*** country whose legitimate environmental regulation is in jeopardy. [153]

One of the most important procedural additions to ***CAFTA*** that is absent in NAFTA is the provision allowing an "increased transparency in the investor-State mechanism." [154] In contrast to the relative secrecy of investor suit arbitration proceedings under NAFTA, ***CAFTA***'s Article 10.21 requires that documents submitted to the panel be promptly made available to the public and hearings are also open to the public. [155] Also, amicus curiae briefs can be submitted to the arbitration panel. [156] These provisions, which open investor-State suits to public scrutiny, have the potential to provide a much needed avenue for the environmental advocates to exert more influence in arbitration decisions where environmental regulations are threatened.

[*573]

VII. Conclusion

Under ***CAFTA***, foreign investment in Central America will stimulate economic growth in countries where the lack of financial resources is a leading cause of environmental degradation. Unfortunately, concerns with ***CAFTA***'s potential negative impact on the environment were apparently deflected by the general assertion that the agreement will ultimately lead to enhanced environmental protection. It is clear from the above analysis that despite small improvements to NAFTA's environmental provisions, ***CAFTA*** inadequately addresses the environmental implications of the free trade ***CAFTA*** is intended to facilitate.

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149 Id.

150 Wallace, supra note 85, at 383 (commenting on the weakness in NAFTA's investor provisions).

151 ***CAFTA*** Final Environmental Review, supra note 7, at 31.

152 ***CAFTA***, supra note 2, art. 10.20.

153 See generally ***CAFTA***, supra note 2, art. 10; Wallace, supra note 85, at 384 (commenting that "[u]nder the New York Convention, federal courts are required to enforce these judgments unless there is fraud, [or] noncompliance with the agreement . . ., but a court cannot review the award on the merits"). But see ***CAFTA***, supra note 2, annex 10-F (providing for an appellate panel: Parties "[w]ithin three months of the date of entry into force of this Agreement, the Commission shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter").

154 ***CAFTA*** Final Environmental Review, supra note 7, at 31.

155 ***CAFTA***, supra note 2, art. 10.21.1-.2.

156 Id. art. 10.20.3.

CAFTA's environmental chapter is an improvement from NAFTA's lack thereof, but the inclusion of an environmental chapter is close to moot if it does not provide sufficient measures to ensure the agreement will further environmental conservation rather than discourage it. Without clear-cut minimum environmental standards imposed on ***CAFTA*** parties, Chapter 17 does not create incentives for developing Central American countries to improve their environmental laws. There is even less of an incentive when these countries need, and are attempting, to attract foreign investment. Unfortunately, ***CAFTA***'s investor suit provisions in Chapter 10 exacerbate the problem of countries maintaining weak enforcement in order to attract foreign investment. Despite ***CAFTA***'s improvements to NAFTA's investor suit provisions, Chapter 10 continues the trend of allowing investors to use investor suits as means of undermining legitimate domestic environmental laws. Since ***CAFTA*** did not narrow the restrictions on investor suits, U.S. environmental laws intended to protect the environment and the public welfare are still at risk of being challenged by a foreign investor; however, it may take more than one arbitration loss for the United States to comprehend the broad implications of ***CAFTA***'s investor suits. In contrast, an investor suit under ***CAFTA*** could have devastating economic effects on one of the poorer, developing Central American countries.

CAFTA has followed NAFTA's lead in not placing environmental considerations on equal terms with trade and investment interests. Without sufficient safeguards in ***CAFTA***, Central American environments could likely suffer irreparable harm before the intended benefits from free trade manifest. ***CAFTA*** is a step forward in incorporating adequate environmental measures in free trade agreements. Yet, these improvements are clearly insufficient and jeopardize the immediate fate of the environment in Central America and the environmental laws of all ***CAFTA*** countries.