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ENVIRONMENTAL STANDARDS IN U.S. FREE TRADE AGREEMENTS: LESSONS FROM CHAPTER 11

by Hena Schommer*

The U.S. bipartisan trade compromise, concluded on May 10, 2007, was the first to create enforceable labor and environmental standards to be applied to the pending Free Trade Agreements (“FTAs”) with Peru, Panama, Colombia, and Korea.¹ In 1994, the North American Free Trade Agreement (“NAFTA”), signed by the United States, Mexico, and Canada, broke new ground with the mention of sustainable development in its preamble.² NAFTA was the first multilateral trade agreement to include environmental protection.³ While breaking new ground NAFTA also included a problematic clause, Chapter 11, which provides a “right of action to a foreign investor against the government of the country in which it invested, for a broad range of actions taken” by the government.⁴ This right of action, included in the new FTAs, proved to be without a proper mechanism to guard against claims brought against countries for passing legislation to protect the environment, which might affect the future profits of a company.

Many governments and environmentalists have found Chapter 11 actions problematic in relation to governments’ attempts to pass environmental laws and regulations. Indeed, the right of an investor claim can be important for the fair treatment of corporations doing business in a foreign country. However, merely allowing the actions to go forward without a mechanism to evaluate the merits of the claim can strain governmental decision-making powers. In some cases, the threat of a claim may deter a government from establishing environmental protections. *Methanex v. United States* is one example of an action that may chill future government regulations. Methanex brought a claim against California for banning the import of a toxic fuel additive that leaked into groundwater and affected the health of the population.⁵ Another example is *Sunbelt Water v. Canada*. Sunbelt brought a claim against Canada for the loss of potential future earnings from bottled water exports, due to a change in Canadian government policy regarding water resource exports.⁶ Claims of this kind could ultimately deter a country from passing legislation to protect natural resources.

The latest wave of FTAs create new enforceable environmental standards while inheriting many of the controversial clauses from NAFTA. There is a concern regarding the ability of developing countries to use or manage natural resources without fear of actions being filed against them under these clauses. The case of *Bayview Irrigation District v. Mexico*⁷ illustrates the difficult position a country may find itself in while attempting to manage natural resources. Sixteen U.S. irrigation districts along with twenty-eight individuals brought suit against the Mexican government for the diversion of water into Mexican farmlands,

claiming that this deprived claimants of their water rights.⁸ The arbitration tribunal in June of this year decided that it had no jurisdiction over these claims and thus the parties had no claim under NAFTA Chapter 11.⁹ The Mexican government had to cover the costs and expend resources for two years to defend itself in international arbitration for which there was no jurisdiction.¹⁰ The potential expenditure of resources in international arbitration could prove to be a burden to developing countries and deter them from passing further environmental protections.

The emergence of environmental standards in international bilateral and multilateral trade agreements is a decidedly positive evolution in the past fifteen years bringing environmental issues into spheres where it was historically precluded. However, the continued inclusion of clauses in the recent FTAs similar to Chapter 11 could deter both developed and developing countries from passing necessary environmental regulation to protect their natural resources in the future. The discouragement of countries to act on behalf of protecting their land could have drastic environmental costs in developing countries, which often lack adequate environmental protections.

Thus, a preliminary mechanism to determine the validity of a company’s claim under Chapter 11 before litigation would be a step to allay the concerns of countries that may hesitate to enact protections due to a threat of litigation under trade rules. This mechanism will potentially alleviate the excessive costs and other burdens a developing country faces while defending itself against a claim that is interfering with its right to protect the environment.



¹ See U.S. Dep’t of State, International Information Programs, *Free Trade Pacts Might Gain Congressional Support* (June 28, 2007), available at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2007&m=June&x=20070628130953saikceinawz0.8419306> (last visited Nov. 17, 2007).

² See Stephen P. Mumme, *NAFTA and Environment*, FOREIGN POL’Y IN FOCUS, Oct. 1999, available at <http://www.fpif.org/briefs/vol4/v4n26nafta.html> (last visited Nov. 17, 2007).

³ Mumme, *id.*

⁴ Madeline Stone, *NAFTA Article 1010: Environmental friend or foe?*, 15 GEO. INT’L ENVTL. L. REV. 763 (2003).

⁵ U.S. Dep’t of State, Office of the Legal Advisor, *Methanex Corp. v. United States*, available at <http://www.state.gov/s/l/c5818.htm> (last visited Nov. 17, 2007).

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⁶ *Sun Belt Water, Inc. v. Canada*, Notice of Claim and Demand for Arbitration (Oct. 12, 1999), *available at* <http://naftaclaims.com/Disputes/Canada/Sunbelt/SunBeltNoticeClaimDemandArbitration.pdf> (last visited Nov. 19, 2007).

⁷ U.S. Dep't of State, Office of the Legal Advisor, *Bayview Irrigation Dist. v. Mexico*, *available at* <http://www.state.gov/s/l/c20028.htm> (last visited Oct. 17, 2007) [hereinafter *Bayview*].

⁸ *Bayview, id.*

⁹ *See Bayview Irrigation Dist. v. Mexico (U.S. v. Mex.)*, ICSID ARB(AF)/05/1, Award (June 21, 2007), *available at* http://www.naftaclaims.com/Disputes/Mexico/Texas/Bayview_Jursdictional_Award_19-05-07.pdf (last visited Nov. 19, 2007) [hereinafter *Bayview award*].

¹⁰ *See Bayview award, id.*
