COMMENT

KEYSTONEWALLED: TRANSCANADA'S DISCRIMINATION CLAIM UNDER NAFTA AND THE FUTURE OF INVESTOR-STATE DISPUTE SETTLEMENT

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I. INTRODUCTION

TransCanada, a Canadian oil company, applied to the United States government in 2008 to begin building the Keystone XL ("Keystone") pipeline in order to transport bitumen, a mixture of hydrocarbons occurring naturally as a result of petroleum distillation, from the oil sands in Alberta, Canada, to refineries in Louisiana.[1] The southern section of the pipeline connecting Cushing, Oklahoma, to the Gulf Coast is already operating, but the northern section crosses the border between Canada and the United States, and, therefore, requires permission from the executive branch of the

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1. *See* Suzanne Goldenberg, *Keystone XL Oil Pipeline—Everything You Need to Know*, GUARDIAN (Jan. 31, 2014, 9:27 AM), http://www.theguardian.com/environment/2014/jan/31/keystone-xl-oil-pipeline-everything-you-need-to-know (describing the background and arguments for and against the Keystone XL pipeline).

United States government before TransCanada can build it.[2] However, after almost seven years since TransCanada filed the first application to build Keystone, President Obama rejected the project.[3]

Opposition to the pipeline stems from concerns about the effect exploitation of the oil sands will have on climate change.[4] Although the United States State Department conducted numerous environmental reviews of the project, finding that it would not significantly affect United States carbon emissions, opponents contend that any new fossil fuel infrastructure is unacceptable given the current state of the climate.[5]

President Obama's rejection of Keystone has left TransCanada with very few options to move the project forward. The company chose to pursue one of these by filing Fa discrimination claim against the United States government under the Investor-State Dispute Settlement ("ISDS")[6] provisions written into the North American

2. *Id.* (explaining that because the pipeline crosses an international border it requires approval from nine government agencies, including the State Department).

3. Elise Labott & Dan Berman, *Obama Rejects Keystone XL Pipeline*, CNN (Nov. 6, 2015, 3:27 PM), http://www.cnn.com/2015/11/06/politics/keystone-xl-pipeline-decision-rejection-kerry/.

4. *Id.* (listing problems with the pipeline, including: bitumen being "highly-polluting," potential pipeline leaks, past shipment accidents that caused loss of life and property, and unwanted routing through irrigation and drinking water); CARBON TRACKER INITIATIVE, KEYSTONE XL PIPELINE (KXL): THE "SIGNIFICANCE" TRAP 1, 17-18 (2014) (predicting an enormous increase in carbon dioxide emissions from the pipeline); Kate Sheppard, *Study Finds Keystone XL Would Have Much Larger Impact Than State Department Suggests*, HUFFINGTON POST (Mar. 3, 2014, 7:03 PM), http://www.huffingtonpost.com/2014/03/03/keystone-xl-emissions-state-department_n_4892806.html.

5. *Compare* U.S. STATE DEP'T, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT: KEYSTONE XL PROJECT 4.16-1–4.16-8 (2014), *with* Sheppard, *supra* note 4 (reporting the State Department's analyses were incomplete and did not consider factors, such as transportation), *and* Juliet Eilperin, *Environmentalists Take Hard Line with Obama on Keystone XL*, WASH. POST (Sept. 24, 2013), http://www.washingtonpost.com/blogs/post-politics/wp/2013/09/24/environmentalists-warn-obama-against-keystone-xl-even-if-canada-compromises-on-climate/ (quoting Michael Brune, executive director of the Sierra Club, "Canada simply cannot mitigate the carbon pollution from the pipeline; those emissions would simply be too big").

6. *See* Nia Williams & Valerie Volcovici, *TransCanada Sues U.S. over Keystone XL Pipeline Rejection*, REUTERS (Jan. 6, 2016, 7:59 PM), http://www.reuters.com/article/us-transcanada-keystone-idUSKBN0UK2JG20160107. *See also* Elana Schor, *NAFTA's Specter May Haunt*

Free Trade Agreement ("NAFTA").[7] However, TransCanada will likely lose because there is insufficient evidence to show that the United States has treated comparable projects better than Keystone.

Section II of this Comment gives an overview of the history of negotiations over ISDS, as well as prominent challenges brought under Chapter 11 of NAFTA.[8] NAFTA's ISDS provisions were the first of their kind to be included in a comprehensive trade agreement between developed and developing nations.[9] This makes its drafting history, and subsequent jurisprudence, particularly useful in assessing ISDSs that will appear in free trade agreements currently under negotiations, such as the Trans-Pacific Partnership ("TPP").[10] Section II also describes the timeline of TransCanada's application.

Section III discusses four challenges under NAFTA Chapter 11 that TransCanada can argue now that the United States rejected Keystone.[11] After analyzing each of these challenges, it nevertheless seems unlikely that TransCanada will succeed because there is insufficient evidence to prove that the United States has treated Keystone comparatively worse than similar projects.

Keystone Verdict, POLITICO (Feb. 26, 2015, 5:47 AM), http://www.politico.com/story/2015/02/keystone-pipeline-nafta-115511.html (citing former Canadian Prime Minister, Brian Mulroney, and former Canadian ambassador to the U.S., Derek Burney, describing the six-year delay in the Keystone decision as undermining NAFTA's goal of unlimited trade in energy); Todd Weiler, *With Veto, It's Time for the NAFTA Option*, GLOBE AND MAIL (Mar. 2, 2015, 3:00 AM), http://www.theglobeandmail.com/globe-debate/time-for-keystones-nafta-option/article23232598/ (noting that the U.S. government took the NAFTA threat seriously before the claim was launched, as evidenced by the transfer of a State Department lawyer, who defended the U.S. against NAFTA claims for three years, to the unit responsible for the Keystone XL application).

7. North American Free Trade Agreement, U.S.-Can.-Mex., arts. 1101-20, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

8. However, the U.S. had included similar provisions in smaller bilateral trade agreements. *See infra* Section II.

9. *See* Todd Weiler, *The Ethyl Arbitration: First of Its Kind and a Harbinger of Things to Come*, 11 AM. REV. INT'L ARB. 187, 188 (2000) (explaining NAFTA Chapter 11's novel approach to multilateral trade and investor-state arbitration).

10. Lydia DePillis, *Everything You Need to Know About the Trans Pacific Partnership*, WASH. POST WONKBLOG (Dec. 11, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/12/11/everything-you-need-to-know-about-the-trans-pacific-partnership/ (discussing the negotiations involved in the TPPs).

11. *Infra* Section III.

Section IV recommends three policy reforms that would increase public support for ISDSs and, by extension, free trade agreements in general.[12] The first proposed reform is to remove article 1121 from NAFTA entirely. The second is to make Chapter 11 arbitration as transparent as possible. Finally, when drafting ISDSs for new free trade deals, especially the TPP, drafters should incorporate these reforms, and, where possible, expand on them. These recommendations would also help ensure that ISDSs are not used by investors to improperly influence environmental regulation, as TransCanada is arguably trying to do.

II. BACKGROUND

In order to assess TransCanada's likelihood of success on a discrimination claim, it is essential to review three issues: the factual history regarding TransCanada's specific claim, the relevant treaty provisions, and the evolution of ISDS. The facts behind TransCanada's claim are needed to determine whether any of the relevant treaty provisions can be used by TransCanada to find relief. Analyzing the evolution of NAFTA's ISDS, and the lines of reasoning that Tribunals have employed in the past, will help decide the likelihood of that relief.

A. TRANSCANADA'S APPLICATION

TransCanada first announced its plan to expand its existing Keystone pipeline to the Gulf Coast in July 2008.[13] Two months later, the company filed its application with the State Department for a presidential permit.[14]

In August 2011, the State Department released its environmental impact statement finding that the pipeline will not significantly affect the environment.[15] However, three months later, it decided that alternate routes needed to be considered in order to preserve

12. *Infra* Section IV.

13. *See* Scott Haggett, *Timeline: The Six-Year Battle over the Keystone XL Pipeline*, REUTERS (Nov. 13, 2014, 4:25 PM), www.reuters.com/article/2014/11/13/us-usa-keystone-chronology-timeline-idUSKCN0IX2JX20141113 (expanding the pipeline from Hardisty, Alberta, to Steele City, Nebraska, where it would connect with the Gulf Coast section).

14. *Id.*

15. U.S. STATE DEP'T, *supra* note 5.

Nebraska's ecologically sensitive Sandhills.[16]

The United States Congress responded by attaching a provision to an unrelated taxation bill stating that Obama must issue TransCanada a permit within sixty days unless he determines that the product is not in America's national interest.[17] The next month Obama declined to issue the permit, stating that not enough time was given to properly assess Keystone's environmental impact on Nebraska.[18]

TransCanada responded by re-applying.[19] Obama delayed approval on the grounds that the Nebraska courts were still assessing Keystone's route through the state.[20] The litigation in Nebraska focused on a narrow legal question of whether the Governor had the right to approve the pipeline route unilaterally.[21] Finally, by the end of 2014, the Nebraska Supreme Court issued a sixty-four-page ruling that failed to resolve the dispute; however, because neither side received a majority, the Governor's action was not overturned, clearing the path for Keystone's approval.[22]

This left Obama's veto as the only thing standing in the way of Keystone's construction. Now that the President has rejected the

16. Haggett, *supra* note 13 (explaining that the delays caused by litigation over TransCanada's original route through the Sandhills require TransCanada to reach "an agreement with Nebraska's Department of Environmental Quality to find an alternative route").

17. *Id.*

18. *Id.* (explaining that Obama declined to issue the permit, claiming that ongoing litigation in Nebraska made an assessment of the pipeline's contribution to the national interest premature).

19. *Id.* (noting that in addition to re-applying, TransCanada announced its plan to build the southern section of the pipeline because it does not cross any national borders and does not require a presidential permit).

20. Under NAFTA article 105, federal governments are required to take all necessary measures to give effect to the agreement's provisions and can be held responsible for the actions of sub-federal authorities. *See* Guillermo Aguilar Alvarez, *Commentary: Investment Disputes Under NAFTA*, 18 ARB. INT'L 309, 310 (2002). However, this responsibility is interpreted narrowly for pragmatic reasons and attempting to sue the U.S. government for losses incurred by litigation-based delays in Nebraska state court does not serve TransCanada well.

21. Thompson v. Heineman, 857 N.W.2d 731, 739 (Neb. 2015).

22. *Id. See also* Aruna Viswanatha & Patrick Rucker, *Nebraska Court Clears Pipeline Route as Showdown Looms in Washington*, REUTERS (Jan. 9, 2015, 12:54 PM), www.reuters.com/article/2015/01/09/us-usa-keystone-court-idUSKBN0KI1FV20150109 (explaining that it requires five judges to agree in order to rule on whether a legislative enactment was constitutional).

pipeline, NAFTA's Chapter 11 provides TransCanada with a way to "appeal" his decision.[23] Past decisions made by NAFTA Tribunals adjudicating Chapter 11 claims, however, are limited in their application to TransCanada's case for two important reasons: (1) Tribunal decisions are only binding on the parties to the case at hand; and (2) the unique political environment surrounding Keystone.

Nevertheless, certain decisions concerning the scope of investor protections and the burden of proof placed on the parties involve substantially similar issues as TransCanada's claim.[24] Therefore, analysis of these cases is helpful in determining how a Tribunal may decide on a discrimination claim underlying Keystone's rejection.

B. VIENNA CONVENTION ON THE LAW OF TREATIES (1969)

Like all treaties, NAFTA must be interpreted according to the principles laid out in the Vienna Convention ("VC").[25] Even though the United States is not a signatory to the VC, American judges have ruled that the provisions of the treaty merely codify customary international law, and, therefore, should direct United States treaty interpretation.[26] In particular, article 102(2) of NAFTA stipulates

23. NAFTA, *supra* note 7, at art. 1136(3) (allowing a disputing party to appeal within 120 days from arbitration under International Centre for Settlement of Investment Disputes ("ICSID") rules and three months under United Nations Commission on International Trade Law ("UNCITRAL") rules).

24. Kara Dougherty, Note, Methanex v. United States: *The Realignment of NAFTA Chapter 11 with Environmental Regulation*, 27 NW. J. INT'L L. & BUS. 735, 735 (2007) (discussing whether protecting private investors is as important to public policy as protecting the environment, and whether foreign investors are protected by NAFTA when domestic investors may not be).

25. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *see also* Methanex Corp. v. United States, Final Award, 44 I.L.M. 1345, 1353 (NAFTA Trib. 2005) (stating that NAFTA provisions must be interpreted in accordance with the customary international law rules of interpretation, included in article 31(1) of the Vienna Convention ("VC")); Charles H. Brower, II, *Fair and Equitable Treatment Under NAFTA's Investment Chapter*, 96 AM. SOC'Y INT'L L. PROC. 9, 9 (2002) [hereinafter Brower, *Fair and Equitable Treatment*] (noting that article 1131(1) of NAFTA orders tribunals to decide cases in "accordance with 'applicable rules of international law,'" and that these rules are set forth in the VC).

26. *See Methanex Corp.*, 44 I.L.M. at 1446-47 (deciding that "NAFTA, as a treaty, is to be interpreted in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties"). *See also* SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW 239-40 (2002) (explaining that because the U.S. has de facto accepted the VC's rules of treaty interpretation as authoritative, it

treaty enforcement in accordance with "applicable rules of international law," which has been interpreted to mean customary international law.[27]

C. CANADA-UNITED STATES FREE TRADE AGREEMENT (1988)

Before NAFTA set the benchmark, the Canada-United States Free Trade Agreement included groundbreaking investor protections, such as the first set of rules designed to govern trade in services and robust protections for foreign direct investments.[28] The problem with the General Agreement on Tariffs and Trade ("GATT"), the primary vehicle for international trade regulation before the establishment of the World Trade Organization ("WTO"), was its inefficient enforcement powers,[29] essentially leaving wronged states to devise and apply diplomatic pressures in order to force compliance.[30]

To remedy this, Canada in particular insisted on the inclusion of a robust dispute settlement provision, eventually included in Chapter 19 of the agreement, in order to ensure United States compliance at a time when America's trade deficit had led its politicians to implement "administered protection," or trade protectionism through

must interpret "the terms of the treaty in their context and in light of its object and purpose," as well as "together with the context" of subsequent agreements, unless it leads to a "manifestly absurd or unreasonable" result).

27. NAFTA, *supra* note 7, at art. 102(2); *North American Free Trade Agreement: Notes of Interpretation of Certain Chapter 11 Provisions*, ORG. AM. STATES (July 31, 2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (setting out the minimum standards of treatment required for Chapter 11 to comply with international law).

28. *See* A.M. Apuzzo & W.A. Kerr, *International Arbitration—The Dispute Settlement Procedures Chosen for the Canada-U.S. Free Trade Agreement*, 5 J. INT'L ARB. 7, 7, 9 (1988) (highlighting the negotiation process that produced the Canada-U.S. Free Trade Agreement's ISDS).

29. This defect in the global trading system was later rectified through the robust dispute settlement process included in the World Trade Organization's Charter.

30. *See* Joseph A. McKinney, *Dispute Settlement Under the U.S.-Canada Free Trade Agreement*, 8 J. INT'L ARB. 89, 91, 96 (1991) (arguing that frustration with the slow pace of multi-lateral GATT, long delays in dispute settlement, and consensus-based dispute settlement all led the U.S. to begin negotiating free trade agreements in the 1980s). *Contra* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 286 (1993) (noting that GATT's dispute settlement mechanism led to binding decisions eighty-eight percent of the time).

loopholes in the GATT.[31] The Canada-United States Free Trade Agreement was also the first time that countries in North America gained guaranteed market access to each other.[32]

D. NORTH AMERICAN FREE TRADE AGREEMENT (1993)

NAFTA enlarged the Canada-United States Free Trade Agreement to include Mexico.[33] The market access concessions agreed to in the previous agreement were largely included in NAFTA.[34] The dispute settlement provisions included in the final draft of NAFTA were inspired by the existing systems in the GATT and the Canada-United States Free Trade Agreement.[35] The first half of NAFTA's Chapter 11, specifying the host country's obligations to foreign investors, was mostly taken from Chapter 18 of the Canada-United States Free Trade Agreement. However, NAFTA went further by including the second half of Chapter 11, which established the requirements for the new ISDS.[36]

31. *See* McKinney, *supra* note 30, at 93-94 (describing provisions that successfully deter protectionist changes in trade laws). *See also* ALAN M. RUGMAN & ANDREW D. M. ANDERSON, ADMINISTERED PROTECTION IN AMERICA 36-37 (1987) (identifying protectionist measures taken by the U.S. to include subsidies, countervailing duties, and anti-dumping).

32. *See generally* Andrew W. Shoyer, *Market Access and the North American Free Trade Agreement*, 4 TRANSNAT'L L. & COMTEMP. PROBS. 133, 134 (1994) (differentiating the negotiation objectives between Canada and the U.S. on one side and Mexico on the other).

33. NAFTA, *supra* note 7, at Preamble.

34. *See generally* Shoyer, *supra* note 32, at 141 (mentioning that Canada and the U.S. overpowered Mexico on the inclusion of this provision).

35. *See* O. Thomas Johnson, Jr., *General Dispute Settlement Under NAFTA*, *in* THE NORTH AMERICAN FREE TRADE AGREEMENT: ISSUES, OPTIONS, IMPLICATIONS 21, 32 (Stewart A. Baker & Jeffrey P. Bialos eds., 1992) (explaining that the U.S. insisted on keeping temporary tribunals rather than establishing a permanent dispute settlement panel, not only because it was unlikely there would be enough work to justify a permanent tribunal, but because a permanent tribunal "might be both long-lived and unfriendly"); Jeffrey P. Bialos & Deborah E. Siegel, *Dispute Resolution Under the NAFTA: The Newer and Improved Model*, 27 INT'L LAW. 603, 612-13 (1993) (emphasizing that the methods of NAFTA are familiar but applied with increased scope to more subjects). *But see* Patricia Isela Hansen, *Judicialization and Globalization in the North American Free Trade Agreement*, 38 TEX. INT'L L.J. 489, 492 (2003) [hereinafter Hansen, *Judicialization*] (arguing that despite attempts to prevent it, NAFTA panels ultimately became supra-judicial bodies).

36. NAFTA, *supra* note 7, at arts. 1115-38; E-mail from David Gantz, Professor, Univ. of Ariz. Faculty of Law, to author (Feb. 25, 2015, 14:40 EST) (on

The original intention behind including an ISDS in NAFTA was to create "a predictable environment for investment" across North America.[37] Specifically, Canadian and American negotiators wanted to ensure that Mexico would not subject their assets and investments to expropriations should that country choose to pursue nationalization of key industries as it often had in the past.[38] Furthermore, Canada and the United States did not trust the Mexican judiciary to impartially adjudicate claims because its independence from the government was too weak.[39] Whatever the political calculations behind the original push for an ISDS, it eventually became seen as an integral part of any comprehensive trade agreement.[40]

While the Canada-United States Free Trade Agreement was the first free trade agreement to include a list of protections for foreign investments, NAFTA became the first signed by the United States that permitted investors of one country to seek arbitration against the

file with author). *See* McKinney, *supra* note 30, at 89 (emphasizing how important this provision was to Canada during NAFTA negotiations). *See also* Patricia Isela Hansen, *Dispute Settlement in the NAFTA and Beyond*, 40 TEX. INT'L L.J. 417, 418 (2005) (stating that if a party to a dispute refuses to comply with a Tribunal decision, the other party is authorized to impose trade sanctions).

37. Matthew T. Simpson, Comment, *Chopping away at Chapter 11: The Softwood Lumber Agreement's Effect on the NAFTA Investor-State Dispute Resolution Mechanism*, 22 AM. U. INT'L L. REV. 479, 485 (2007) (referencing that Chapter 11 protects investors by providing access to dispute resolution if the other party breaches its obligations).

38. Article 1110 specifically lays out the grounds for governments to expropriate investments. HOWARD MANN, INT'L INST. FOR SUSTAINABLE DEV., PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA'S CONTROVERSIAL CHAPTER ON INVESTOR RIGHTS 5-8 (2001) (highlighting the significant concerns of U.S. negotiators regarding infringements of property rights in Mexico). *See generally* Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes*, 2 NAFTA L. & BUS. REV. AM. 82, 83-84, 88-90 (1996) (discussing various "issues that are likely to become central to investment dispute resolution under NAFTA").

39. MANN, *supra* note 38, at 7 (stating that investors did not trust the provisions in Mexico that had not treated foreign investors well in the past).

40. Simpson, *supra* note 37, at 488 (arguing that Chapter 11 protects investors' interests by providing them with a tool to enforce their rights under NAFTA, depoliticizing the dispute, and making investors an "active constraint" on potentially arbitrary government actions); *see also* Allen Z. Hertz, *Shaping the Trident: Intellectual Property Under NAFTA, Investment Protection Agreements and at the World Trade Organization*, 23 CAN.-U.S. L.J. 261, 295 (1997) (determining that Chapter 11 is the most essential part of NAFTA).

government of another country.[41] Negotiators were keenly aware of the dangers a weak dispute resolution mechanism would pose to the cohesiveness of the trading bloc.[42]

Chapter 11 is not the only dispute settlement mechanism contained in NAFTA, but it is the only one that gives private investors the ability to sue foreign governments directly regarding alleged rights violations.[43] Investments under the agreement, moreover, can come from a wide range of possibilities.[44] Investors gained the right to bring suit against foreign governments in three separate arbitration venues.[45]

Critics contend that powerful corporate interests hijacked ISDSs from the beginning.[46] They claim that private interests distorted

41. *See* Jennifer A. Heindl, *Toward a History of NAFTA's Chapter Eleven*, 24 BERKELEY J. INT'L L. 672, 672 (2006) (criticizing NAFTA's ISDS centers on its alleged infringement of sovereign immunity).

42. *See* Andrew Kayumi Rosa, *Old Wine, New Skins: NAFTA and the Evolution of International Trade Dispute Resolution*, 15 MICH. J. INT'L L. 255, 256-57 (1993) (arguing that ISDSs benefit smaller, weaker countries that would otherwise have to deal directly with more powerful nations that would use their economic and political leverage to extract better settlements, and that justice is better served by holding every country to the same set of established rules).

43. NAFTA, *supra* note 7, at arts. 1414-15 (laying out the mechanisms for investment disputes, but critically lacking an ability to sue foreign governments directly over alleged rights violations); Rosa, *supra* note 42, at 255, 262 (discussing that NAFTA's ISDS applies in three situations: (1) where there is a dispute over the interpretation or application of NAFTA; (2) where a measure is believed to be inconsistent with NAFTA; and (3) where a Party believes that a measure consistent with NAFTA essentially causes nullification or impairment).

44. For examples of such possibilities, see Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, Arbitral Award, § 1 (June 2, 2000), 40 I.L.M. 56, 57 (2001). For a Tribunal's broad interpretation of "investment" in article 1110 in compliance with the "ordinary meaning" rule contained in article 31 of the Vienna Convention, see Pope & Talbot v. Canada, Interim Award, 40 I.L.M. 258 (NAFTA Trib. 2000).

45. The ICSID, the ICSID Additional Facility, and the UNCITRAL. For an overview of each, see Frederick M. Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 HASTINGS INT'L & COMP. L. REV. 303, 305 (2000) (addressing each system's requirement that Parties comply with arbitral awards).

46. *See generally* David T. Gibbons, *NAFTA vs. the Environment: The Court's Mandate to Require the Preparation of Environmental Impact Statements for Trade Agreements*, 15 HAMLINE J. PUB. L. & POL'Y 101, 101-03 (1994) (noting that multinational corporations were able to stop an order from a federal judge that required that an environmental impact statement be conducted and submitted to Congress before voting on NAFTA could begin).

negotiators' intentions in drafting Chapter 11 in order to acquire rights that they lacked in their respective domestic judicial systems.[47] To help determine whether these criticisms are justified, the text of six relevant articles in Chapter 11, as well as jurisprudence highlighting their application, must be analyzed.[48]

i. Chapter 11 Text

There are six articles in Chapter 11 that are relevant to TransCanada's claim against the United States government for the way it has handled Keystone: (1) National Treatment doctrine; (2) Most-Favored-Nation Treatment; (3) fair and equitable treatment; (4) performance requirements; (5) statute of limitations; and (6) waiver of local remedies requirement.

First, the National Treatment doctrine, embedded in NAFTA through article 1102, is common to many trading blocs[49] and stipulates that a Party should give investors from another "Party treatment no less favorable than that it accords, in like circumstances, to its own investors."[50] If a Tribunal determines that the United States gave preferential treatment to American oil companies building projects similar to Keystone, TransCanada can be successful under this article.

Second, the Most-Favored-Nation Treatment included in article 1103 extends the National Treatment Doctrine to ensure that investments from one NAFTA Party receive the same treatment as

47. *See* Abbott, *supra* note 45, at 306 (arguing that Congress would not have agreed to, let alone required, the inclusion of Chapter 11 if it had known that investors intended to use the ISDSs to attack domestic regulations beyond review under the Technical Barriers to Trade, and Sanitary and Phytosanitary agreements); *see also* Dougherty, *supra* note 24, at 743 (arguing that flaws in Chapter 11, including ambiguous and overly broad language, minimal transparency, and a lack of binding precedent, enable private corporations to use it as a "sword" against environmental regulations that would otherwise be unassailable); Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 148 (2002) (providing an overview of why some critics have labeled Chapter 11 a "Bill of Rights" for corporations that do business across national boundaries).

48. NAFTA, *supra* note 7, at arts. 1102-03, 1105(1), 1106(1)(c).

49. *See, e.g.*, General Agreement on Tariffs and Trade, art. III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 188 [hereinafter GATT].

50. NAFTA, *supra* note 7, at art. 1102(1).

like investments from another Party.[51] Like the National Treatment doctrine, Most-Favored-Nation Treatment is also found in most trading blocs.[52] Therefore, if Mexican oil companies building cross-border pipelines were treated better than TransCanada, for instance, then the United States government could be liable under this article.

Third, article 1105 of NAFTA ties the expected minimum standard of treatment between Parties to the customary international law standard of fair and equitable treatment.[53] It seems as if this will form the crux of TransCanada's claim.[54] Depending on how broadly this article is interpreted, TransCanada could be successful in its assertion that the treatment "was arbitrary and unjustified."[55]

Fourth, the performance requirements agreed to by the three Parties prohibits measures that give "a preference to goods produced or services provided in its territory."[56] An important subsequent provision in article 1106 states that, so long as a measure is not applied arbitrarily or unjustifiably and does not amount to a disguised restriction on international investment, nothing in article 1106(1)(c)[57] prevents a Party from adopting environmental measures "necessary for the conservation of living or non-living exhaustible resources."[58] This article could prove useful to TransCanada if it is unable to gain relief under the three articles already mentioned.

Fifth, article 1116 sets the statute of limitations for bringing a claim under Chapter 11 of NAFTA.[59] It does so by requiring that claims be brought within three years of "the date on which the investor first acquired, or should have first acquired, knowledge of

51. *Id.* at art. 1103 (providing each party "no less favorable" treatment than any other party or non-party).

52. *See, e.g.*, GATT, *supra* note 49, at art. I (ensuring most-favored-nation treatment to all contracting parties).

53. NAFTA, *supra* note 7, at art. 1105(1).

54. Kelly Cryderman & Shawn McCarthy, *TransCanada to Launch NAFTA Claim over Keystone Rejection*, GLOBE & MAIL (Jan. 7, 2016, 4:55 AM), http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/transcanada-files-lawsuit-over-keystone-pipeline rejection/article28038526/ (citing a prominent Toronto trade lawyer stating that the "argument is that they were not given fair and equitable treatment as required under the NAFTA").

55. *Id.*

56. NAFTA, *supra* note 7, at art. 1106(1)(c).

57. *Id.* at art. 1106(6)(c).

58. *Id.*

59. *Id.* at art. 1116(2).

the alleged breach and knowledge that the investor has incurred loss or damage."[60] The timeline of TransCanada's application is necessary to determine whether this article applies or not.

Sixth, article 1121 waives the customary international legal requirement that parties exhaust all local remedies before appealing to supra-national dispute settlement.[61] Article 1121 instead allows investors to pursue arbitration right away by waiving their right to submit their claim to the Party's domestic legal system.[62] This could allow TransCanada to gain relief that it is otherwise not entitled to, and, as a result, article 1121 has come under controversy for serving corporate interests over the public interest.

ii. Chapter 11 Jurisprudence

To help determine whether the aforementioned articles are applicable in TransCanada's case, two Tribunal decisions are particularly helpful: *Metalclad Corp. v. United Mexican States*[63] and *Methanex Corp. v. United States*.[64] The decision in *Metalclad Corp.* includes guidance in determining what amounts to "fair and equitable treatment;"[65] the decision in *Methanex Corp.* elaborates on the scope of National Treatment and has led to two broad precedents relevant to TransCanada's likelihood of success.[66]

a. Metalclad Corp. v. United Mexican States

In 2000, a NAFTA Tribunal found that Mexico and the state of San Luis Potosi acted improperly in the way they tried to ban construction of a hazardous waste landfill.[67] Two key findings from

60. *Id.*
61. NAFTA, *supra* note 7, art. 1121(1)(b).
62. *Id.*
63. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB (AF)/97/1, Award (Aug. 30, 2000), 40 I.L.M. 36, 47-50 (2001).
64. *Methanex Corp.*, 44 I.L.M. at 1345.
65. *Metalclad Corp.*, 40 I.L.M. at 47-50 (concluding that Metalclad had a successful claim under article 1105 because it did not receive fair and equitable treatment under NAFTA).
66. Dougherty, *supra* note 24, at 735 (including *Methanex Corp.* as a sample case where jurisprudence attempted to repair the provision in Chapter 11 that dangerously protects foreign investors).
67. *Metalclad Corp.*, 40 I.L.M. at 49 (finding the continued denial of the construction permit improper due to the "procedural and substantive deficiencies"

the decision were that Mexico's environmental concerns were inadequate to justify the breadth of the regulatory response and that it failed in its obligation to provide a predictable framework for investment. The latter failure amounted to denying Metalclad "fair and equitable treatment" under article 1105.

b. Methanex Corp. v. United States

California banned the use or sale of methyl tertiary butyl ether ("MTBE"), a gasoline additive. Methanex, a Canadian corporation that produced the methanol used in manufacturing MTBE, sued under Chapter 11.[68] The corporation alleged that its rights under articles 1105 (fair and equitable treatment) and 1102 (National Treatment), among others, had been violated by the California measure. In 2005, a NAFTA Tribunal dismissed Methanex's claims against the United States. The Tribunal did not rule that the test for likeness is always whether the products are directly competitive, as the company claimed in its suit, but decided that even if that standard were used the United States would still win because the different products could not be directly substituted for each other. Although Methanex's claims were ultimately dismissed, the reasoning in the Tribunal's decision established two broad precedents that have concerned opponents of ISDSs ever since.[69]

The first precedent was that the Tribunal elevated the economic interests of private investors to an equivalent level of importance as the public interest that initiated the environmental protections in the first place.[70] The second was that private investors that were unable, or unwilling, to attack environmental regulations through domestic

of the denial). *See also* Todd Weiler, Metalclad v. Mexico: *A Play in Three Parts*, 2 J. WORLD INV. 685, 691-93 (2001) [hereinafter Weiler, Metalclad v. Mexico] (discussing the tribunal's inadequate explanation of the "fair and equitable treatment" standard).

68. *Methanex Corp.*, 44 I.L.M. at 1345 (describing the details of Methanex's claim against the U.S. under Chapter 11 of NAFTA).

69. *See* Dougherty, *supra* note 24, at 735 (explaining what concerns critics about each precedent and how private investors can choose from a variety of disparate rulings).

70. *Id.* (raising the concern that protecting economic investors should not carry the same importance as the public policy concerns behind protecting the environment).

courts could now do so in NAFTA Tribunals.[71] These are far more favorable to private interests since investors' rights are specifically protected in a way that they are not under the constitutions of Canada, Mexico, or even arguably the United States.

III. ANALYSIS

Attempting to predict the outcome of a NAFTA dispute can be more challenging than in domestic cases because, unlike domestic courts, NAFTA Tribunals are adjudicated by ad hoc arbitrators rather than judges.[72] As a result, decisions are not binding on future Tribunals. However, past decisions can be persuasive, and certain inferences can be drawn that lead to the conclusion that TransCanada will lose its Chapter 11 claim.[73] Although Chapter 11 has arguably become susceptible to abuse by private investors over the past decade,[74] TransCanada's application is unlikely to succeed before a Tribunal.

As the cases cited above demonstrate, claims under Chapter 11 generally attack laws and regulations passed by a NAFTA Party or one of its political subdivisions, like the Mexican state of San Luis Potosi in *Metalclad Corp.*[75] TransCanada, however, is alleging

71. *Id.* (recognizing that NAFTA Chapter 11 provides an accessible method for investors to attack regulations that they otherwise could not).

72. *Cf.* Rosa, *supra* note 42, at 261 (noting that panel composition results in lesser weight attributed to tribunal decisions than court decisions). *See generally* Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727, 733 (1993).

73. Tribunals are also able to draw from whichever non-binding domestic authorities they find appropriate. *See* Gus Van Harten, *Judicial Supervision of NAFTA Chapter 11 Arbitration: Public or Private Law?* 21 ARB. INT'L 493, 499-500 (2005) (commenting on *Metalclad Corp.*, citing *Quintette Coal Ltd v. Nippon Steel Corp.*, 50 B.C.L.R. 2d 207 (Can. B.C.C.A) a leading provincial authority in British Columbia, Canada, on international commercial arbitration).

74. *See* Matthew Nolan & Darin Lippoldt, *Obscure NAFTA Clause Empowers Private Parties: Investor-Protection Clause Lets Companies Haul Signatories Into Arbitration for Violation of Pact*, NAT'L L.J., Apr. 6, 1998, at B8 (arguing that Chapter 11 permits corporations to erroneously challenge legitimate government measures).

75. *Metalclad Corp.*, 40 I.L.M at 37. This decision has been criticized as too interventionist for just this reason. *See* Charles H. Brower, II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 70 (2001) (discussing the offensive uses of NAFTA Chapter 11 by investors and their chilling effect on local regulatory authorities).

discrimination on the basis of Obama rejecting its application. While a rejection of Keystone might appear discriminatory specifically against TransCanada, more than if Congress had passed a law banning all imports of oil sands bitumen, for example, it will likely be easier to defend before a NAFTA Tribunal because it will be difficult to argue that any other claimants are in "like" circumstances.[76] Regardless of the NAFTA article TransCanada uses to pursue its claim, it will in all likelihood fail because there is insufficient evidence that other companies in similar circumstances were treated comparatively better.

A. TRANSCANADA WILL NOT SUCCEED UNDER ARTICLE 1102 BECAUSE OIL SANDS BITUMEN IS NOT "LIKE" NATURAL GAS

To succeed on a complaint under article 1102, TransCanada would have to establish that United States companies producing like products received preferential treatment. The National Treatment doctrine states that imported products receive no less favorable treatment than domestically produced goods.[77] This is interpreted as being equivalent to the best treatment the host country would bestow on its own local investor.[78] While there is no single test for likeness used by Tribunals, the decision in Methanex used the complainant's preferred standard of "direct competition" to dismiss its case.[79]

76. *See* Raymond B. Ludwiszewski, *"Green" Language in the NAFTA: Reconciling Free Trade and Environmental Protection*, 27 INT'L LAW. 691, 694 (1993) (alleging that NAFTA includes broad language that countries can rely on to justify environmental protection policies). *But see* Jeffery Atik, *Environmental Standards Within NAFTA: Difference by Design and the Retreat from Harmonization*, 3 IND. J. GLOBAL LEGAL STUD. 81, 81 (1995) (arguing that, as 'green' as NAFTA's side agreement may be, its repudiation of standard harmonization represents a loss for environmental protection); Claire Vines, Comment, *'It's Not Easy Being Green' – The Illusion of 'Green' and Environmentally Protective Provisions Within the North American Free Trade Agreement (NAFTA)*, 1 MACQUARIE J. INT'L & COMP. ENVTL. L. 269, 280 (2004) (explaining that the tribunal only allowed the case to go forward due to its concern over Methanex's allegations of discrimination). *See generally* Patricia E. Perkins, *NAFTA and the Future of Environmental Regulation*, 5 CONST. F. 68 (1994).

77. NAFTA, *supra* note 7, at art. 1102.

78. *See* Alvarez, *supra* note 20, at 309-10.

79. *Methanex Corp.*, 44 I.L.M. at 1443, 1444 ("In ideal circumstances, the foreign investor or foreign-owned investment should be compared to a domestic investor or domestically-owned investment that is like it in all relevant respects, but for nationality of ownership.").

TransCanada will likely contend that the United States applied different standards for cross-border pipelines than for domestic ones.[80] Furthermore, it could point to the fact that there are numerous existing cross-border pipelines and that several pipelines already operating in the United States are owned by Canadian investors.[81] The United States would likely counter that cross-border pipelines are not "like" domestic pipelines, and according to the test for likeness used by the Tribunal in *Methanex Corp.*, the United States would be well positioned to win this argument because oil sands bitumen and natural gas require different facilities and treatment.

The Tribunal in *Methanex Corp.* found that methanol and ethanol are not competitive because methanol has limited use and cannot be used in gasoline engines without significant changes.[82] For the same reasons, if TransCanada were to argue that oil sands bitumen is like domestically-produced oil, it would likely lose its claim.[83]

In order for TransCanada to win this argument, it would have to convince a NAFTA Tribunal that oil sands bitumen is like American-produced natural gas that has received comparatively favorable treatment from the United States government.[84] It may also need to demonstrate that the United States has, in general, denied national treatment to foreign owned pipelines in the past.

TransCanada might highlight the quick permit approval pace for United States based oil and gas drilling as a stark contrast to the six

80. E-mail from David Gantz, *supra* note 36.

81. *Id.*

82. *Methanex Corp.*, 44 I.L.M. at 1446-47.

83. In order to understand TransCanada's likelihood of winning this argument, it is essential to understand the newly transformed landscape of American energy production. Over the past decade the U.S. has undergone an energy revolution as a result of fracking shale rock formations. After forty years of pledging to become energy independent, the U.S. is now the largest oil exporter in the world and, within a decade, could finally achieve that goal. *See The New Economics of Oil: Sheikhs v Shale*, ECONOMIST (Dec. 6, 2014), http://www.economist.com/news/leaders/21635472-economics-oil-have-changed-some-businesses-will-go-bust-market-will-be.

84. Considering the economic tumult caused by the 2008 financial collapse, the recent boom in energy production has been one of the few factors keeping the American economy strong relative to most other countries. *See generally* Richard J. Pierce, Jr., *Natural Gas Fracking Addresses All of Our Major Problems*, 4 J. ENERGY & ENVTL. L. 22, 22-23 (2013).

years of processing that TransCanada has endured.[85] However, Congress has always favored the oil and gas industry.[86] The favorable treatment natural gas receives from the government, such as retention of generous tax credits, despite slashing spending in almost every other sector, is merely a continuation of this practice.[87] No one has challenged this under Chapter 11 before because NAFTA does not prohibit subsidizing domestic industries.[88]

Furthermore, the United States government has a potentially potent counterargument that bitumen from the Canadian oil sands is not "like" the fossil fuels being treated favorably in the United States. This could be a strong argument because permits to frack for natural gas have received the most favorable treatment, and it is harder to argue that oil sands bitumen is more like natural gas than conventional crude oil because gas and bitumen are not even extracted in the same state of matter.[89] Therefore, should the United

85. Haggett, *supra* note 13 (highlighting the extended period of review that TransCanada's application went through since its initial proposal in 2008). *See also* Jennifer A. Dlouhy, *TransCanada Plans Another Cross-Border Pipeline*, FUELFIX (Feb. 13, 2015), http://fuelfix.com/blog/2015/02/13/transcanada-plans-another-cross-border-pipeline/ (pointing out that it generally takes around twenty-four months for border-crossing pipelines to receive permission to begin construction).

86. Brad Plumer, *Energy Subsidies are as Old as the Republic*, WASH. POST (Sept. 23, 2011), http://www.washingtonpost.com/blogs/wonkblog/post/energy-subsidies-are-as-old-as-the-republic/2011/09/23/gIQAob9sqK_blog.html (tracking subsidies "given to different forms of energy in their first 15 years of existence" and noting the preferential treatment Congress has given the energy industry for over a century).

87. *Id. See generally* William J. Brady & James P. Crannell, *Hydraulic Fracturing Regulation in the United States: The Laissez-Faire Approach of the Federal Government and Varying State Regulations*, 14 VT. J. ENVTL. L. 39, 53 (2012) (summarizing federal and state-specific hydraulic fracturing regulations); Jason Schumacher & Jennifer Morrissey, *The Legal Landscape of "Fracking": The Oil and Gas Industry's Game-Changing Technique Is Its Biggest Hurdle*, 17 TEX. REV. L. & POL. 239, 241-42 (2013) (providing an overview of the environmental, health, and policy issues raised by the processes and practices of the American natural gas industry).

88. NAFTA, *supra* note 7; Price, *supra* note 72, at 728 (emphasizing the policy flexibility that NAFTA Parties retained in order to encourage employment and economic growth domestically).

89. *See* Nathan Vanderklippe, *Amid Oil Sands Growth, a Boom for Natural Gas*, GLOBE & MAIL (Aug. 31, 2011, 7:20 PM), http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/amid-oil-sands-growth-a-boom-for-natural-gas/article592877/ (citing a new estimate by Ziff Energy Group

States pursue this line of argument, it would likely refute TransCanada's article 1102 violation claim.

B. TRANSCANADA WILL NOT SUCCEED UNDER ARTICLE 1103 BECAUSE LEGITIMATE LITIGATION, RATHER THAN DISCRIMINATION, CAUSED THE RELATIVE DELAY IN PERMIT APPROVAL

Article 1103 is interpreted as requiring countries to give equal treatment to all foreign investors, regardless of their country of origin.[90] Therefore, to succeed TransCanada must demonstrate that pipelines crossing the United States-Mexico border were given preferential treatment compared to Keystone. There are dozens of pipelines that cross the border between Canada and the United States, and each has been subjected to the State Department's environmental assessment.[91] What makes comparing Keystone to other pipelines difficult, however, is its heightened political profile. This has led to the largest environmental protests in United States history and massive displays of civil disobedience from a broad coalition, including environmentalists, the Canadian indigenous population, and farmers. For example, part of the reason that the approval process has dragged on so long is that lawsuits have been filed against Keystone along much of its proposed route, specifically in Nebraska where TransCanada attempted to route the pipeline through environmentally sensitive regions.[92] Moreover, TransCanada

claiming that oil sands extraction is so energy intensive that a barrel of natural gas is needed in order to produce seven barrels of oil sands bitumen).

90. *See* Alvarez, *supra* note 20, at 310.

91. The power to approve cross-national infrastructure projects originally laid with Congress, but that authority was eventually transferred to the Executive branch. The rationale behind this was, ironically, to streamline the approval process. For an overview on the Constitution's delegation of powers concerning cross-border infrastructure, see Amy Harder, *Pipeline Question: Does Congress Have Power to Approve Keystone?*, WALL ST. J. (Nov. 13, 2014, 2:05 PM), http://blogs.wsj.com/washwire/2014/11/13/pipeline-question-does-congress-have-power-to-approve-keystone/ (noticing that the State Department first received authority to handle cross-border infrastructure through an executive order in 1968, and President George W. Bush issued an executive order in 2004 that established the current procedure).

92. *See* Viswanatha & Rucker, *supra* note 22 (stating that litigation over Keystone in Nebraska state court was finally resolved at the end of 2014, paving the way for Obama to issue a final decision).

was not the only company waiting years for presidential approval to build its pipeline from oil sands.[93]

Environmentalists who view Keystone as a tipping point for North American carbon emissions support these lawsuits.[94] Although other pipelines may have equivalent environmental effects, Keystone's political profile increased its opposition and, as a result, opponents have worked furiously to fight it at every opportunity.[95] While TransCanada may rightly feel that its project has received harsher scrutiny than other pipelines, it cannot attribute this scrutiny to any governmental action.

Moreover, pipeline applications made by TransCanada within Canada have faced resistance from provincial governments, indigenous peoples, and environmental activists.[96] The Northern Gateway pipeline, intended to carry bitumen from the oil sands to the Pacific Coast, has stalled indefinitely over environmental concerns.[97] This makes it very difficult for TransCanada to argue that the United States government's environmental concerns are baseless.[98]

This conclusion is derived from a decade of Tribunal decisions. For instance, the Tribunal in *Methanex Corp.* found that, when interpreting Chapter 11 provisions, it could take "guidance from the way in which a similar phrase in the GATT has been interpreted in the past."[99] The Tribunal emphasized that such interpretations were

93. *See* Zoë Schlanger, *With All Eyes on Keystone, Another Tar Sands Pipeline Just Crossed the Border*, NEWSWEEK (Nov. 25, 2014, 8:44 AM), http://www.newsweek.com/2014/12/05/all-eyes-keystone-another-tar-sands-pipeline-just-crossed-border-286685.html (mentioning that Enbridge, Inc., a Canadian oil company, used a questionable legal loophole to circumvent the need for a presidential permit after becoming frustrated with the long approval process).

94. Juliet Eilperin & Steven Mufson, *Activists Arrested at White House Protesting Keystone Pipeline*, WASH. POST (Feb. 13, 2013), http://www.washingtonpost.com/national/health-science/activists-arrested-at-white-house-protesting-keystone-pipeline/2013/02/13/8f0f1066-75fa-11e2-aa12-e6cf1d31106b_story.html.

95. *Id.* (detailing the political protests that critics of the Keystone pipeline enacted).

96. The Canadian Press, *Northern Gateway Pipeline Project Likely Delayed Beyond 2018*, GLOBAL NEWS (Sept. 5, 2014, 3:00 AM), http://globalnews.ca/news/1543634/northern-gateway-pipeline-project-likely-delayed-beyond-2018/.

97. *Id.* (explaining that Enbridge, Inc. will spend the next three years trying to gain support from the indigenous population for the project).

98. E-mail from David Gantz, *supra* note 36.

99. *Methanex Corp.*, 44 I.L.M. at 1352.

not binding, but future Tribunals seeking to determine likeness are free to consult GATT jurisprudence.[100] As a result, it seems incredibly unlikely that a Tribunal Panel will find that the United States treated other foreign oil companies more favorably than TransCanada.

C. TRANSCANADA WILL NOT SUCCEED UNDER ARTICLE 1105 BECAUSE THE USUAL INTERPRETATION OF THE "FAIR AND EQUITABLE TREATMENT" STANDARD IS TOO NARROW

By claiming that Keystone's rejection "was arbitrary and unjustified," TransCanada's central argument seems to be that it was denied fair and equitable treatment.[101] This phrase of customary international law was embedded into NAFTA through article 1105,[102] and its international jurisprudence is more developed than it is for the Most-Favored-Nation and National Treatment doctrines.[103]

It is widely accepted that the foundational principle underlying NAFTA, and specifically Chapter 11, is equality of treatment between all North American investors.[104] Tribunals believe that

100. *Id.* (furthering that Tribunal decisions are not bound by WTO precedent, but Tribunals may look to such decisions as persuasive authority).

101. Cryderman & McCarthy, *supra* note 54.

102. NAFTA, *supra* note 7, at art.1105(1).

103. *See* Brower, *Fair and Equitable Treatment*, *supra* note 25, at 9 (stating that article 1105 is the "alpha and omega" of Chapter 11). *See also* Ignacio Pinto-Leon, *Fair and Equitable Treatment Under International Law: Analyzing the Interpretation of the NAFTA Article 1105.1 by NAFTA Chapter 11 Tribunals*, 15 CURRENTS: INT'L TRADE L.J. 3, 3-4 (2006) (noting the long history of the phrase "fair and equitable treatment" in international law). *Contra* Courtney N. Seymour, Comment, *The NAFTA Metalclad Appeal – Subsequent Impact or Inconsequential Error? . . . Only Time Will Tell*, 34 U. MIAMI INTER-AM. L. REV. 189, 207 (2002) (arguing that article 1105 must be read in conjunction with other provisions of the agreement, and, as a result, should be one of the most robust investor protections embedded in NAFTA). *See generally* Patrick Dumberry, *The Quest to Define "Fair and Equitable Treatment" for Investors Under International Law – The Case of the NAFTA Chapter 11 Pope & Talbot Awards*, 3 J. WORLD INV. 657, 658 (2002) (analyzing recent dispute settlements to discern the most common interpretation of "fair and equitable treatment").

104. *See* Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 77 (2003) (claiming that judicial deference to government positions on issues of international trade threatens the principle of equality of treatment between the Parties). *See also* Price, *supra* note 72, at 728 (explaining that NAFTA ensures the better of Most-Favored-Nation or National Treatment to foreign nations of each member state engaging in

article 1105 confers a legitimate expectation of fair and equitable treatment as defined under customary international law.[105] Governments can violate this expectation through a variety of measures.[106] However, all three NAFTA governments interpret it to constitute a very high standard.[107] In most cases, an action must be a blatant violation of due process for it to violate the customary international law standard embodied in article 1105.[108]

In *Methanex Corp.*, the claimant argued that it was denied fair and equitable treatment because the United States had intentionally discriminated against it and other foreign investors.[109] TransCanada will argue the same thing since its application, unlike so many other proposed pipeline projects, was subjected to intensified scrutiny, prolonged delays, and ultimately was rejected by Obama.

TransCanada will also argue that, like the claimant in *Metalclad Corp.*, it has been denied fair and equitable treatment on account of the United States' failure to provide a "transparent and predictable framework for [its] business planning and investment."[110] It will assert that, up until recently, there was a routine approval procedure that will now be mired in political uncertainty and arbitrary legal

investment activities in another member state).

105. *See* S.D. Myers, Inc. v. Canada, Partial Award, 40 I.L.M. 1408, 1422 (NAFTA Trib. 2001). *See also* Todd Weiler, *A First Look at the Interim Merits Award in* S.D. Myers, Inc. v. Canada: *It Is Possible to Balance Legitimate Environmental Concerns with Investment Protection*, 24 HASTINGS INT'L & COMP. L. REV. 173, 175-77 (2001) (alleging that environmental protections are used to shield arbitrary and discriminatory treatment of foreign investors).

106. *See* ADF Grp., Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award, ¶¶ 181-82 (Jan. 9, 2003), 6 ICSID Rep. 449, 529 (2004) (enumerating government actions that can contravene article 1105, including violating investors' legitimate expectations where there was reliance on a government's misrepresentation of previous judicial and administrative decisions).

107. E-mail from David Gantz, *supra* note 36.

108. *See* Neer v. United Mexican States, 4 R.I.A.A. 60, 61-62 (Gen. Cl. Comm'n 1926) (establishing the high threshold for "fair and equitable treatment").

109. *Methanex Corp.*, 44 I.L.M. at 1450-51. *See generally* Courtney C. Kirkman, Note, *Fair and Equitable Treatment:* Methanex v. United States *and the Narrowing Scope of NAFTA Article 1105*, 34 LAW & POL'Y INT'L BUS. 343, 366 (2002).

110. *See Metalclad Corp.*, 40 I.L.M. at 50. *See also* Weiler, Metalclad v. Mexico, *supra* note 67, at 690-91 (analyzing the rules of treaty interpretation set out in customary international law, as well as NAFTA articles to determine that "Metalclad's investment was not accorded fair and equitable treatment in accordance with international law").

obstacles.[111]

All treaties and international agreements, including NAFTA, must be interpreted in accordance with the VC.[112] Article 31(1) of the VC states that treaties are to be interpreted in accordance with customary international law.[113] In this context, "fair and equitable treatment" is a high standard that protects governments' flexibility in implementing public policy.[114]

TransCanada has publicly complained for years that it was being subjected to unfair and politicized scrutiny.[115] However, the State Department's environmental assessment is the primary reason that the process has taken so long, and article 1114 of NAFTA clearly states that a Party can take steps "to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns" so long as those measures are "otherwise consistent" with Chapter 11.[116] Unfortunately for TransCanada, the interpretations of protections outlined in article 1105 have increasingly narrowed over the past decade,[117] making its claim of unfair and inequitable treatment a long shot.

111. *Metalclad Corp.*, 40 I.L.M. at 49; *see also* Weiler, Metalclad v. Mexico, *supra* note 67, at 691 (typifying the absurd and unclear relationship in permitting practices between municipalities and federal or state permit offices).

112. *See* Loewen Grp., Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, ¶ 51 (Jan. 9, 2001), 7 ICSID Rep. 425, 434 (2012).

113. Vienna Convention, *supra* note 25, at art. 31(1).

114. E-mail from David Gantz, *supra* note 36.

115. This could potentially serve as the basis of a fallback argument for the U.S. should a Tribunal find that TransCanada has been discriminated against, because article 1116(2) of NAFTA stipulates that: "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." TransCanada would likely respond that the damage did not occur until its application was actually rejected, but this would seem to contradict public statements made by representatives of the company claiming that the delay itself caused economic loss.

116. NAFTA, *supra* note 7, at art. 1114(1).

117. *See* Kirkman, *supra* note 109, at 389-90 (noting the broad implications of the *Methanex Corp.* ruling in making recovery under article 1105 significantly more difficult).

D. TRANSCANADA WILL NOT SUCCEED UNDER ARTICLE 1106 BECAUSE IT GUARANTEES MARKET ACCESS FOR PRODUCTS, NOT INFRASTRUCTURE PROJECTS

While the unique political climate surrounding Keystone may have led to the appearance of differential treatment, past Tribunal decisions and plain meaning interpretation of NAFTA's provisions demonstrate that the United States has not violated any of its performance requirements.

i. Parties to NAFTA are Not Required to Permit the Construction of Transnational Infrastructure, Especially by Private Parties

This issue addresses the philosophical divide regarding the status of NAFTA: whether to construe its provisions as a list of rights or merely discretionary protections. This is an ongoing debate amongst academics and trade lawyers.[118] On one hand, the powers afforded to investors under Chapter 11 help ensure that governments do not act arbitrarily and unfairly or resort to the type of protectionist trade policy that NAFTA was intended to eliminate.[119] On the other hand, there is no basis for arguing that the guaranteed market access incorporated within NAFTA includes the right to build infrastructure that crosses national borders,[120] especially when that infrastructure carries significant environmental risks.[121]

118. *See* Donald M. McRae, *Introduction*, *in* WHOSE RIGHTS? THE NAFTA CHAPTER 11 DEBATE 1, 4-5 (Laura Ritchie Dawson ed., 2002). For examples of prominent arguments in favor and in opposition to classifying NAFTA protections as "rights" see Simpson, *supra* note 37, at 490 n.24.

119. *Cf.* J. Anthony VanDuzer, *NAFTA Chapter 11 to Date: The Progress of a Work in Progress*, *in* WHOSE RIGHTS? THE NAFTA CHAPTER 11 DEBATE, *supra* note 118, at 47, 47-48 (defending the inclusion of ISDSs in free trade agreements).

120. *See* Donald S. Macdonald, *Chapter 11 of NAFTA: What Are the Implications for Sovereignty?*, 24 CAN.-U.S. L.J. 281, 284 (1998) (noticing Canada's reluctance to agree to NAFTA provisions that infringed on provincial jurisdiction, such as property).

121. *Cf.* Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 381-84 (1994) (highlighting the integral nature of environmental protection within the spirit of NAFTA).

ii. The United States Will Not Restrict the Sale of Canadian Oil if it Rejects TransCanada's Application

As stated in Section II of this Comment, during negotiations over the Canada-United States Free Trade Agreement, the Canadian government agreed to grant the United States an unlimited supply of energy in exchange for unlimited access to United States markets.[122] Article 1106 explicitly bars Parties from imposing any measure which seeks to limit another Party from selling its goods in the territory of another Party.[123]

In deciding whether rejecting Keystone restricted Canadian oil exports, a relevant factor to consider is that during the United States' assessment, the Canadian government continued to export vast quantities of oil to the United States by both rail and existing pipelines.[124] Rejecting Keystone, therefore, was not equivalent to placing a cap on imports of Canadian oil, and, therefore, TransCanada will in all likelihood lose on this line of argument as well.

E. ARTICLE 1116 PREEMPTS TRANSCANADA'S CLAIM BECAUSE THREE YEARS HAVE ELAPSED SINCE IT FIRST ALLEGED UNFAIR TREATMENT

Even if TransCanada is able to establish its claim under one of the above provisions, article 1116(2) of NAFTA could theoretically preempt the claim.[125] While many experts believe that the clock begins to run once the application is actually rejected, there is

122. *See* Shoyer, *supra* note 32, at 141 (stating that Canada and the U.S. both fought hard during NAFTA negotiations to preserve the market access they had won in negotiations over the Canada-U.S. Free Trade Agreement).

123. NAFTA, *supra* note 7, at art. 1106(1)(c).

124. *See* Ben Lefebvre, *U.S. Refiners Don't Care if Keystone Gets Built*, WALL ST. J. (Sept. 5, 2013, 5:28 PM), http://www.wsj.com/articles/SB10001424127887324324404579045060424047346 (suggesting that for years U.S. oil companies, including Valero Energy Corp., were no longer principally invested in Keystone and shifted to railroads as the means of transferring Canadian crude oil to the Gulf Coast).

125. NAFTA, *supra* note 7, at art. 1116(2); *see also* Alvarez, *supra* note 20, at 309-10 (asserting that under articles 1116(2) and 1117(2) of NAFTA, "a claim may not be brought to arbitration if more than three years have elapsed from the date on which the investor or its investment first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor or its investment incurred loss or damage").

enough ambiguity in the interpretation of the provision that the United States could argue that it began running well before this year, such as when the company first publicly complained of unfair treatment. TransCanada would argue that it has three years from the moment Obama rejected the pipeline to file suit, but because it has been alleging unfair treatment and financial loss for well over three years, it might be difficult to argue that it did not have knowledge of the violation it is alleging.

Ultimately, unless TransCanada is able to demonstrate that it was targeted for discrimination by the Obama administration, it is unlikely to win its case. While the Canada-United States Free Trade Agreement, and subsequently NAFTA, ensured market access in exchange for unlimited access to supply,[126] NAFTA Tribunals have made it clear that the treaty does not include "blanket protections" for investors against every governmental action they find disagreeable.[127] Therefore, regardless of which NAFTA article TransCanada uses to pursue its discrimination claim, it is unlikely to be successful.

IV. RECOMMENDATIONS

While TransCanada is unlikely to succeed on its discrimination claim under any article of NAFTA, the fact that TransCanada is suing the United States government at all shows that Chapter 11 provides corporations with too much leverage over elected governments through the current model of ISDS. Aside from the legal issues this raises, the political opposition to free trade will grow as long as ISDSs are considered by large segments of the population to be a means for corporations to circumvent domestic courts and challenge otherwise lawful environmental regulations.[128]

126. *See* Shoyer, *supra* note 32, at 141 (reinforcing that Canada and the U.S. fought hard during negotiations to preserve this aspect of the Canada-U.S. Free Trade Agreement).

127. Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2, Award, ¶ 83 (Nov. 1, 1999), 39 I.L.M. 537, 549 (2000).

128. Elizabeth Warren, Opinion, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html (including the ISDS provision in the TPP will erode U.S. sovereignty and exclusively benefit multinational corporations by allowing

Consequently, the following reforms should be adopted in order to avoid these legal and political challenges from arising.

A. ARTICLE 1121 OF NAFTA SHOULD BE REMOVED SO THAT INVESTORS ARE REQUIRED TO EXHAUST ALL LOCAL REMEDIES BEFORE PURSUING ARBITRATION

Article 1121 permits investors to bypass the customary requirement to exhaust domestic remedies before turning to arbitration.[129] This has been criticized as a means for multinational corporations to circumvent domestic legal systems and acquire for themselves rights and privileges that they would not otherwise have under domestic law.

Naturally, this is used as a rallying cry for those opposed to free trade agreements, and shows the potential to erode public support for such agreements. Proponents of article 1121 point out that quick and efficient dispute settlement is essential in order to facilitate investment, and that requiring the exhaustion of domestic remedies would defeat this goal.[130] This is especially true in Mexico, where litigation can take even longer than in Canada and the United States.[131] However, there is growing concern that dispute settlement is occurring too quickly, and that these expedited decisions favor private corporations too frequently.[132]

One idea to rein in abuse of ISDSs that has gained traction among trade lawyers is to reform or remove article 1121 from NAFTA.[133] Article 1121 waives the customary international law principle that requires exhaustion of local remedies before pursuing arbitration. While investors have the option of pursuing their claims in domestic courts before turning to arbitration, article 1121 does not require them to do so. [134]

them to bypass U.S. courts when they are suing the U.S. government).

129. NAFTA, *supra* note 7, at art. 1121.

130. E-mail from David Gantz, *supra* note 36.

131. *Id.*

132. *Id.*

133. *See* William S. Dodge, *International Decisions, Arbitration—NAFTA Chapter 11*, 98 AM. J. INT'L L. 155, 161 n.56 (2004) (claiming that it would re-establish sovereignty and help prevent corporations from improperly using Chapter 11 to bypass legitimate environmental measures).

134. *Id.* at 162 (showing that under the system of Chapter 11, investors may decide whether to commence arbitration immediately, with the concomitant

Because the major concern over ISDSs, including in TransCanada's case, is that private investors are circumventing domestic judicial systems for more favorable and less accountable supra-national Tribunals, requiring private parties to pursue recourse through national courts first would re-establish domestic courts as guardians of the public interest.[135] Should the courts decide against the investors, the latter would then have the option of bringing their claim to a NAFTA Tribunal on the basis that the domestic court's decision constituted a denial of justice.[136] The Tribunal would not be required to defer to the domestic court's reasoning.[137]

While some argue that NAFTA tribunals are best equipped to deal with investment disputes and should therefore be the adjudicatory bodies of first instance,[138] the resulting loss of control over these issues leaves the public feeling powerless when it comes to free trade agreements. The way to remedy this is to reinforce the role of domestic courts, rather than to bypass them. So long as investors can appeal domestic court decisions that amount to denials of justice, in essence providing a safety valve to protect against biased or corrupt

requirement under article 1121 of a waiver of any further recourse to any local remedies in the host State, or whether initially to claim damages with respect to the measure before the local courts).

135. NAFTA Tribunals, in this case, would be available to hear specific types of claims but would not act as appellate courts; as the Tribunal in *Azinian* put it: "The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction." *See Azinian*, 39 I.L.M. at 552.

136. The Tribunal ruled the other way in *Azinian*. *See Azinian*, 39 I.L.M. at 537.

137. *See* Dodge, *supra* note 133, at 161 n.56 (insisting on exhausting local remedies prior to initiation of NAFTA tribunal proceedings, but allowing NAFTA Tribunals to come to their own conclusions without automatically deferring to domestic courts' holdings). *See also* Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Resubmitted Case, Award, ¶ 40 (June 5, 1990), 1 ICSID Rep. 413 (1993) (according to customary international law, decisions of national courts cannot bind international tribunals).

138. *See* Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law Under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 196 (2001) (suggesting that NAFTA levels the proverbial playing field by limiting bias that domestic courts show against aliens, and further that NAFTA tribunals possess a wealth of knowledge and expertise in investment and investor-state relations that few district or municipal courts can match). *See also* Van Harten, *supra* note 73, at 493 (noting that the principle of judicial deference to arbitration tribunals is at the heart of NAFTA).

judicial systems, this reform should be able to strike a balance between investors' concerns and public accountability.

B. ISDSS SHOULD BE AS TRANSPARENT AS POSSIBLE, INCLUDING THE USE OF OPEN HEARINGS AND THIRD-PARTY PARTICIPATION IN ALL BUT THE MOST SENSITIVE CASES

Another idea proposed in response to the growing public concern regarding the exploitation of ISDSs by powerful private interests is to significantly increase transparency throughout the arbitration process.[139] While arbitration is, by nature, supposed to be confidential, the public interest at stake in Chapter 11 claims tips the balance in favor of increased accountability. The insular nature of Chapter 11 has occasionally led to decisions that favor deep-pocketed industries even if the claims themselves were dubious.[140] What recent history has shown, however, is that increased transparency and accountability lead to more just decisions and do not undermine the arbitration process in investor-state disputes.[141] Therefore, the three NAFTA Parties should convene a commission to study, devise, and implement measures to increase transparency in Tribunal proceedings and decisions.

139. According to the Freedom of Investment Roundtable, opening up the ISDS system "enhances its legitimacy by ensuring that the public is aware of the claims made, how the State is responding, and the tribunal's decisions." *See* ORG. FOR ECON. CO-OPERATION & DEV., HARNESSING FREEDOM OF INVESTMENT FOR GREEN GROWTH: FREEDOM OF INVESTMENT ROUNDTABLE 14 3 (2011), http://www.oecd.org/investment/internationalinvestmentagreements/47721398.pdf.

140. *See* Mobil Inv. Canada Inc. v. Canada, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, ¶ 159 (May 22, 2012), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2933_En&caseId=C262 (ruling that a provincial regulation requiring oil companies to invest in research and development violated article 1105's prohibition on performance requirements).

141. *See* Hansen, *Judicialization*, *supra* note 35, at 501, 503 (highlighting the benefits that come from allowing amicus briefs, including broadening the perspectives that tribunals are exposed to during litigation and arriving at decisions that are more sensitive to social costs).

C. NEWLY DRAFTED ISDSS FOR UPCOMING FREE TRADE AGREEMENTS SHOULD INCORPORATE THESE REFORMS

ISDSs have become standard provisions in free trade agreements since NAFTA was passed over twenty years ago.[142] Since NAFTA is likely to become, for all intents and purposes, obsolete within the next couple years on account of the United States, Canada, and Mexico all joining the even more comprehensive TPP,[143] the new ISDS chapter must meet the needs of countries as economically diverse as Chile, Vietnam, and the United States.

The ISDS must be reformed and improved to decrease its vulnerability to manipulation by investors.[144] While TransCanada is unlikely to succeed on its claim, Chapter 11 remains a potent tool for private parties to challenge laws and regulations, especially those aimed at protecting the environment. It will be far more difficult to harmonize labor and environmental standards between the United States and Vietnam than it was to do between the United States and Mexico, and therefore there is greater potential for multinational corporations to use ISDSs to drastically subvert local labor and environmental protections.

Promisingly, the final draft of the TPP shows that the United States has insisted on taking steps to mitigate this risk, including the addition of broad environmental exceptions within the text of the agreement.[145] This development is in line with the general evolution

142. *See* Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 247-48 (2006) (mentioning the criticisms of investment arbitration activity that have complimented the rise in ISDSs; most notably, at least in the U.S., the non-transparent nature of negotiations, the broad swath of rights allotted to foreign entities, and the secrecy in which arbitrations are shrouded).

143. The TPP, consisting of twelve countries on both sides of the Pacific Ocean, includes all three NAFTA signatories. For an overview of the problems that resulted from not integrating the ISDSs in GATT and NAFTA, see Rosa, *supra* note 42, at 263 (discussing when both NAFTA and the GATT cover a dispute, the complainant must choose to pursue its claim under one or the other).

144. *See* Dora Marta Gruner, Note, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923, 924 (2003) (arguing that the essentially private nature of NAFTA arbitration poses a direct threat to governments that are obligated to abide by tribunal decisions).

145. *Trans-Pacific Partnership Treaty*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/trans-

of NAFTA ISDS jurisprudence;[146] however, this has not prevented opponents of the deal from labeling the TPP as an existential threat to environmental protections across the Pacific.[147] In order to assuage these concerns, the burden of proof in any claim must be placed on the private actor, rather than the government. It must be up to a business to show that its activities will not cause significant environmental harm, rather than to a government to show that it will.

It is imperative for the future of free trade that proponents of the TPP emphasize the strong new environmental protections included in the agreement as soon and transparently as possible, since the secrecy of the negotiations behind TPP, although standard practice in treaty negotiations, already drained significant public support for the agreement.[148] Furthermore, it will be incumbent on governments to ensure that the provision allowing investors to sue governments for legitimate environmental protections in "rare circumstances" is interpreted as narrowly as possible.[149]

V. CONCLUSION

It is unlikely that TransCanada will be successful in its discrimination claim under Chapter 11 of NAFTA.

TransCanada's claims under articles 1102 and 1103 of NAFTA would be promising were it not for the requirement that like products

pacific-partnership/tpp-full-text [hereinafter *Trans-Pacific Partnership Treaty*] (permitting non-discriminatory regulatory actions designed and applied to protect public health, safety, and the environment, except in "rare circumstances").

146. *See* David A. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. INT'L & COMP. L. REV. 331, 344-47 (2007) (highlighting the evolution of NAFTA's ISDS jurisprudence and the increasing favor Tribunals give host countries over investors, especially in indirect or regulatory takings).

147. Kevin Zeese, *Environmental TPP Chapter Leaked: Weaker Than Previous Agreements*, POPULAR RESISTANCE (Jan. 15, 2014), https://www.popularresistance.org/environmental-tpp-chapter-leaked-weaker-than-previous-agreements/ (arguing that TPP will be a step back in terms of trade and environmental protection).

148. *See* Siri Srinivas, *Democrats Oppose Obama's Demand for Fast-Tracking Pacific Trade Deal*, GUARDIAN (Jan. 21, 2015, 12:04 AM), http://www.theguardian.com/us-news/2015/jan/21/democrats-oppose-obama-fast-track-trade-agreement (highlighting the growing number of congressional Democrats that are opposed to TPP and the increasing likelihood that Obama will have to rely on Republican votes to pass the bill).

149. *Trans-Pacific Partnership Treaty*, *supra* note 145, at Annex II-B3(b).

receive the same treatment and the unlikelihood that the company could prove that pipelines crossing the United States-Mexico border received preferential treatment. Bitumen from the oil sands is arguably unlike conventional crude oil and is certainly unlike the natural gas whose treatment TransCanada would have to rely on in order to claim discrimination.

Furthermore, TransCanada cannot claim that the United States has treated it less favorably than other non-American companies because its application is unlike others that have come before the State Department. Mexico has not sought to build cross-border pipelines, and so the United States has not treated TransCanada any better or worse than any other similarly situated company. According to its definition in customary international law as articulated in the VC, fair and equitable treatment has an increasingly narrow interpretation that is unlikely to serve TransCanada's argument.[150]

While TransCanada is likely to lose on a discrimination claim, the fact that Chapter 11 allows it a venue to challenge a decision that, rightly or wrongly, would be made primarily as an effort to protect the environment is deeply troubling. Plaintiffs can always bring suit, of course, and as long as they are unlikely to win unjust claims, there is no need for reform.[151] However, if NAFTA and future trade agreements are to thrive in the twenty-first century, a reformed requirement for exhaustion of local remedies must be included, Tribunal hearings must be further opened up to the public, and trade agreements from here on out must adhere to these standards. The alternative is deteriorating public support for trade and, potentially, a return to isolationism that would serve none.

150. *Supra* Section III.C.

151. Over the past twenty years, Chapter 11 challenges to environmental protections have not seen much success except when host countries acted in a discriminatory manner towards investors. *See, e.g.*, *S.D. Myers, Inc.*, 40 I.L.M. 1408, 1408.