THE INVESTMENT-SUSTAINABILITY CONUNDRUM UNDER THE USMCA: AN EVOLUTION?

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INTRODUCTION

The field of international investment law (IIL) is in a state of flux. The previously held dominant view—that the purpose of treaties is to shield foreign investments and investors from state interference

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and state regulation—is increasingly being challenged.[1] Critics of IIL claim that both procedural and substantive investment rules have been designed to accommodate the interests of foreign private investors alone, leaving the general public's interests unprotected. These critical voices have not been ignored; rather, states are gradually adapting their treaties, incorporating a number of legal techniques aimed at increasing states' rights to regulate and protect their public's interests.[2] These changes represent no less than a paradigm shift in this field, characterized by an increasing alignment of the IIL regime with sustainable development objectives,[3] including recognizing that investment treaties affect a broad category of stakeholder.[4] It is within this context that IIL reforms have taken cognizance of the clamor for increased public participation and sustainability.

The developments described above have greatly impacted the re-negotiations of the North American Free Trade Agreement (NAFTA) and the consequent conclusion of the United States-Mexico-Canada Agreement (USMCA). As will be reviewed, this new agreement curtails not only the substantive rights of U.S., Canadian, and Mexican foreign investors, but also those investors' ability to enforce their rights, all in the name of ensuring sustainability and protecting states' right to regulate.

This Article will critically address these developments. It will commence with a brief review of the criticism against the field of investment law, which has led to substantial reforms and considerable changes in the USMCA's new Investment Chapter (Chapter 14). Next, this Article will address the relevant legal provisions that have been

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[1] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 80–87 (2007).

[2] *See* Avidan Kent & Markus Gehring, *Investment Law and the Environment: Evolving International Practice and Norms*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 386, 394–95 (Erika Techera et al. eds., 2d ed. 2021).

[3] U.N. Conference on Trade and Development, *Investment Policy Framework for Sustainable Development*, 18 (Dec. 23, 2015); *see generally*, LORENZO COTULA, FOREIGN INVESTMENT, LAW AND SUSTAINABLE DEVELOPMENT: A HANDBOOK ON AGRICULTURE AND EXTRACTIVE INDUSTRIES (James Mayers ed., 2nd ed. 2016).

[4] Nicolás M. Perrone, *The International Investment Regime and Local Populations: Are The Weakest Voices Unheard?*, 7 TRANSNAT'L LEGAL THEORY 287, 383–405, (2016).

placed in Chapter 14 to ensure sustainability and protect states' right to regulate. Finally, this Article provides a short commentary questioning the usefulness of some of these changes and claims that while the intentions behind these reforms may have been admirable, their execution—and outcome—could be counter-productive for the attainment of the Sustainable Development Goals (SDGs).

I. FROM NAFTA TO USMCA

A. Background and Context: The Backlash Against Investment Law

To address the changes made to the text of NAFTA, it is important to first understand the context in which such changes have been made. These changes illustrate a strong backlash against the field of investment law. It is increasingly argued that the protection provided to foreign investors through investment treaties does not lead to sustainable development.[5] Rather, the contention is that investment treaties merely protect the interests of rich, foreign (often Western) multinationals, providing them with rights that local communities do not have. The Sierra Club, a powerful Non-Governmental Organization (NGO) and one of the IIL's main critics, released a document entitled "NAFTA's Corporate Rights vs. People and Planet: How Corporations Use Trade Deals to Challenge Our Protections in Private Tribunals" whose title alone is indicative of this spirit.[6] Other NGOs have called on member states to "eliminate NAFTA's corporate

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[5] *See* Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation Versus Causation* 31 (Univ. Cal. Berkley, CUDARE, Working Paper No. 1032R, 2007) (concluding that countries continue to ratify bilateral investment treaties even though some countries that are renowned for their investor protections may be subject to suits by investors); Lauge Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2009–2010 1, 2 (2010) (discussing how adjudicatory investment treaties do not benefit the public welfare).

[6] *NAFTA's Corporate Rights vs. People and Planet: How Corporations Use Trade Deals to Challenge Our Protections in Private Tribunals*, SIERRA CLUB, https://www.sierraclub.org/sites/www.sierraclub.org/files/ISDS-summary.pdf (last visited Dec. 1, 2021).

power grab" (referring to NAFTA's Chapter 11),[7] as well as to "[end] the corporate power grab of Investor-State Dispute Settlement."[8]

The critics of IIL argue that International Investment Agreements' (IIAs) substantive provisions could potentially result in a chilling effect on public-oriented law-making in host states.[9] For example, it has been argued that common investment treaty provisions, such as the prohibition on expropriation or the obligation to provide fair and equitable treatment, could be (and in fact have been) interpreted too broadly.[10] Such broad interpretation of treaty provisions could potentially lead to a situation where domestic laws and policies (e.g., new social or environmental restrictions) that are deemed costly to investors and are adjudged as a breach of investment treaties' obligations, thereby occasioning a chilling effect on policy makers.

At the procedural level, there is an allegation of bias in favor of investors, extending to the reported tendency for investment arbitration to undermine democratic institutions by party-appointed

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7 *Negotiators Should Eliminate NAFTA's Corporate Power Grab*, CIEL BLOG POST (Sept. 6, 2017), https://www.ciel.org/negotiators-eliminate-naftas-corporate-power-grab/.

8 *Ending the Corporate Power Grab of Investor-State Dispute Settlement*, PUBLIC CITIZEN, https://www.citizen.org/topic/globalization-trade/corporate-power-expanded-isds/ (last visited Dec. 1, 2021).

9 *See generally* Jennifer L. Tobin, *The Social Cost of International Investment Agreements: The Case of Cigarette Packaging*, 32 ETHICS & INT'L AFFAIRS 153, 153–64 (2018); Richard C. Chen, *Bilateral Investment Treaties and Domestic Institutional Reform*, 55 COLUM. J. TRANSNAT'L L. 547, 560–62 (2017); Maryam Malakotipour, *The Chilling Effect of Indirect Expropriation Clauses on Host States' Public Policies: A Call for a Legislative Response*, 22 INT'L CMTY. L. 235, 235–70 (2020).

10 *See, e.g.*, Gus Van Harten et al., Public Statement on the International Investment Regime (Aug. 31, 2010) (on file with Osgoode Hall Law School) [hereinafter Public Statement] (discussing overbroad interpretations in a public statement made by a group of academics and initiated by two academics located in Ontario, Canada) ("Awards issued by international arbitrators against states have in numerous cases incorporated overly expansive interpretations of language in investment treaties. These interpretations have prioritized the protection of the property and economic interests of transnational corporations over the right to regulate of states and the right to self-determination of peoples. This is especially evident in the approach adopted by many arbitration tribunals to investment treaty concepts of corporate nationality."); *see also* Enrique Boone Barrera, *The Case for Removing the Fair and Equitable Treatment Standard from NAFTA*, CIGI PAPERS No. 128 Apr. 2017, at 3.

arbitrators subjecting host-state laws and regulations to scrutiny.[11] Financially, the cost of State parties defending investment claims is regarded as having adverse implications for tax payers;[12] further, the process itself (often equated with private commercial arbitration) is frequently criticized as being secretive and closed to public interest groups. Pulitzer Prize winner, Chris Hamby, described investment arbitration as a:

> [P]rivate, global super court that empowers corporations to bend countries to their will . . . operates unconstrained by precedent or any significant public oversight, often keeping its proceedings and sometimes even its decisions secret.[13]
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> Hamby further noted:
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> [T]he people who decide its cases are largely elite Western corporate attorneys who have a vested interest in expanding the court's authority because they profit from it directly, arguing cases one day and then sitting in judgment another.[14]

Canadian academics led, and more than 70 academics (surprisingly, most of whom are not investment law scholars) signed,

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[11] Barnali Choudhury, *Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights*, 46 ALTA. L. REV. 863, 983–1008, (2009); Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, VAND. J. TRANSNAT'L L. 775, 786–87 (2008).

[12] *See* Letter from Several Civil Society Organizations to Michael Froman, U.S. Trade Representative, and Karel De Gucht, Comm'r for Trade (Dec. 16, 2013) (on file with Corporate Europe Observatory) (claiming that investor-state dispute settlement "forces governments to use taxpayer funds to compensate corporations for public health, environmental, labor and other public interest policies and government actions").

[13] Chris Hamby, *Inside the Global "Club" That Helps Executives Escape Their Crimes*, BUZZFEED NEWS (Aug. 28, 2016), https://www.buzzfeednews.com/article/chrishamby/super-court#.mnvxdLAQX.

[14] *Id.*

a 2010 Public Statement on the International Investment Regime—that concluded with a call that States should:

> [R]eview their investment treaties with a view to withdrawing from or renegotiating them in light of the concerns expressed above; should take steps to replace or curtail the use of investment treaty arbitration; and should strengthen their domestic justice system for the benefit of all citizens and communities, including investors.[15]

The above-discussed criticisms against IIL persisted in the years between the mid-1990s and 2020 when NAFTA held sway.[16] This was in spite of changes aimed at alleviating these concerns (notably, the improvement of NAFTA's investment arbitration rules, making them far more liberal, open, and inclusive),[17] and despite academics' attempts to bring more nuance to the debate.[18] Ultimately, the discontent gave rise to Chapter 14 of the USMCA.

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[15] Public Statement, *supra* note 10.

[16] *See generally* Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT'L L. 1147, 1168 (2015); *see* Michael Waibel et al., *The Backlash Against Investment Arbitration: Perceptions and Reality*, KLUWER L. INT'L 1, 3 (2010) (discussing how concerns have arose over NAFTA's procedural safeguards).

[17] Avidan Kent, *The Principle of Public Participation in NAFTA Chapter 11 Disputes*, *in* NAFTA AND SUSTAINABLE DEVELOPMENT: THE HISTORY, EXPERIENCE AND PROSPECTS FOR REFORM 267, 289–90, 298–301 (Hoi Kong & Kinvin Wroth eds., 2015).

[18] *See* STEPHEN SCHILL, *In Defense of International Investment Law*, in 7 EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 309 (Marc Bungenberg et al. eds., 2016) (calling for reform of the international investment regime through arbitration that aims to determine the boundaries of legitimate government and investor conduct based on legal principle); Freya Baetens, *Transatlantic Investment Treaty Protection – A Response to Poulsen, Bonnitcha and Yackee*, CTR. FOR EUR. POL'Y STUD. (2015), https://www.ceps.eu/ceps-publications/transatlantic-investment-treaty-protection-response-poulsen-bonnitcha-and-yackee/.

B. Changes to Investment Protection Rules

Initially, authors commented that Chapter 14 of the USMCA mostly replicates the provisions of other agreements—notably the Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP)[19] and the older NAFTA Chapter 11.[20] Indeed, a recent study indicates that the USMCA copied 57% of its text from the CPTPP.[21] But while the CPTPP and NAFTA both adopted a fairly balanced and sensitive approach to the link between investment and sustainable development, it would seem that the USMCA has gone further, almost to the extreme. Below, this Article presents a closer analysis of key legal provisions from Chapter 14 of the USMCA, notably those aimed at protecting sustainable development by addressing the criticism expressed against the field of IIL.

1. The Host States' Right to Regulate

As explained above, one of the main points the IIL critics stressed is that investment treaties stiffen States' right to regulate. The USMCA addresses this concern, *inter alia*, by providing certain general acknowledgements that concern a member state's right to regulate. The preamble to the USMCA declares that the member states:

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[19] *See* LAW OFF. OF STEWART AND STEWART, THE UNITED STATES-MEXICO-CANADA AGREEMENT, THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE TRANS-PACIFIC PARTNERSHIP: SIDE-BY-SIDE COMPARISON: USMCA CHAPTER 14-INVESTMENT (2019), https://currentthoughtsontrade.com/wp-content/uploads/2019/11/USMCA-Side-by-Side-Chapter-14-Investment.pdf (highlighting identical wording between NAFTA, USMCA, and CPTPP).

[20] *See* Rachael D. Kent & Danielle Morris, *NAFTA 2.0: Investment Protection and Dispute Settlement Under Chapter 14 of the United States-Mexico-Canada Agreement*, WILMERHALE: INSIGHTS & NEWS (Oct. 9, 2018), https://www.wilmerhale.com/en/insights/client-alerts/20181009-nafta-2-0-investment-protection-and-dispute-settlement-under-chapter-14-of-the-united-states-mexico-canada-agreement (noting foreign investment protection sections of NAFTA used in new USMCA text).

[21] Wolfgang Alschner & Rama Panford-Walsh, *How Much of the Transpacific Partnership is in the United States-Mexico-Canada Agreement?*, UNIV. OTTAWA, 1 (June 26, 2019), https://www.amchamvietnam.com/wp-content/uploads/2019/08/SSRN-TPP-USMCA.pdf.

> Recognize their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, and protect legitimate public welfare objectives, such as health, safety, environmental protection, conservation of living or non-living exhaustible natural resources, integrity and stability of the financial system, and public morals, in accordance with the rights and obligations provided in this Agreement.[22]

More specifically in the context of investment, Article 14.16 adds that:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives.[23]

At first glance, it seems questionable whether this type of general language can have a significant impact. The clarification found in Chapter 14 is subject to other treaty provisions ("any measure *otherwise consistent with this Chapter*").[24] At least on its face, the clarification does not solve any of the problems raised by the critics of IIL (e.g., the too-wide interpretation of treaty provisions). Furthermore, this language is not new; it is taken directly from the older Article 1114(1) of NAFTA,[25] which itself did not prevent Canada

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[22] *The United States-Mexico-Canada Agreement*, OFF. U.S. TRADE REP. pmbl, *ratified* Jun. 1, 2020, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [hereinafter USMCA].

[23] *Id.* art. 14.16.

[24] *Id*. (emphasis added).

[25] *Compare* USMCA art. 24.4(3), *with* North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M 289 (1993) (noting the USMCA incorporated only part of NAFTA Article 1114 into its text, though USMCA Article 24.4(3) is

from losing cases such as *SD Myers, Inc. v. Government of Canada* or *Bilcon of Delaware, Inc. v. Government of Canada*,[26] or Mexico from losing a case like *Metalclad Corp. v. United Mexican States*.[27]

At the same time, such clarifications may still have some use, should lawyers and arbitrators rely on them in light of the general rules on treaty interpretation. More specifically, Article 31 of the Vienna Convention on the Law of Treaties (VCLT) dictates that treaty provisions should be interpreted and understood "in their context and in the light of its object and purpose."[28] There is no doubt that these clarifications are relevant for explaining the treaty's context, object, and purpose. One may argue that this is exactly why the member states have written them into NAFTA (and the USMCA) in the first place—to indicate wider treaty objectives. These provisions could therefore be

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similar to NAFTA Article 1114(2)).

[26] Bryan P. Schwartz et al., *S.D. Myers, Inc. (Claimant) v. Government of Canada (Respondent) (Final Award concerning costs)*, 4 ASPER REV. INT'L BUS. & TRADE L. 385, 398 (2004). The Tribunal found that Canada's Order prohibiting the export of PCB waste to the U.S. was not driven by environmental concerns, as asserted by Canada, but intended primarily to protect the Canadian PCB disposal industry from U.S. competition and favored Canadian nationals over non-nationals; Bilcon of Del. Inc., v. Government of Canada, [2015] P.C.A. 2009-04 ¶ 742.The Tribunal found Canada liable for breach of National Treatment Standard (Article 1102) and Minimum Standard of Treatment (Article 1105). *C.f.* North American Free Trade Agreement art. 1105, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M 289 (1993) (describing the minimum standard of treatment) [hereinafter NAFTA]. S.D. Myers Inc., v. Government of Canada, [2004] F.C. 38, ¶ 30 (holding NAFTA Article 1114 "allows Canada to adopt a legitimate environmental measure without regard to Chapter 11" but that Article was not in issue because "the Tribunal found that the Canadian law banning exports of PCBs was not a measure for a legitimate environmental purpose, but was for the purpose of protecting Canadian industry from U.S. competition").

[27] Metalclad Corp. v. United Mexican States, 11 Arb. Trib. North American Free Trade Agreement (2000). The Tribunal held that in denying the construction permit the Municipality acted outside its authority and effectively and unlawfully prevented the Claimant's operation of the landfill which, together with the representations of the Mexican federal authorities and the absence of a timely, orderly, or substantive basis for the denial of the construction permit, amounted to the indirect expropriation. Further, the Tribunal held Mexico liable for indirect expropriation and denial of minimum standard of treatment.

[28] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S 331.

relevant to the interpretation of other investment rules (e.g., the above-discussed fair and equitable treatment), to ensure their narrow interpretation as well as a State's right to regulate.

2. Performance Requirements

More interesting language is found in Article 14.10 of the USMCA and concerns prohibiting performance requirements. The obligation embedded in this Article is to avoid the imposition of certain conditions on investment, including, *inter alia*, requirements to export a certain percentage of goods, to include a domestic content requirement, to transfer technology, and more. Performance requirements are of direct relevance to this Article as they can also be used to attain social and environmental benefits (e.g., to use specific green technologies or to achieve a certain environmental outcome).[29] Unsurprisingly, the prohibition of performance requirements is therefore regarded as a cause for concern.

To address these concerns, carve out sufficient policy space, and allow the use of performance requirements in environmental regulation, the Member States kept the older NAFTA Article 1106(6) in place (now USMCA Article 14.10(3)(c)). This Article offers an Article XX GATT-like exception, protecting a host state's right to protect, *inter alia*, human, animal, or plant life and health, as well as living or non-living exhaustible natural resources.[30] Just like the clarifications discussed in Part II.2.a of this Article, this carve-out also remains subject to whether the State party has behaved fairly and in a

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[29] *See* 18th Meeting of the Inter-Govt'l Comm. of Experts, *Bilateral Investment Treaties, Mining and National Champions: Making it Work* (June 2014), https://www.iisd.org/system/files/publications/bilateral_investment_treaties_mining_national_uneca.pdf (identifying examples of requirements aiming to "improve the environmental and social conditions" of affected communities); Suzy Nikiema, *Performance Requirements in Investment Treaties: Best Practices*, INT'L INST. FOR SUSTAINABLE DEV. 2–4 (2014).

[30] *See* USMCA *supra* note 22, art. 14.10(3)(g) (describing additional prohibited requirements: "Paragraphs 1(h), 1(i), and 2(e) shall not be construed to prevent a Party from adopting or maintaining measures to protect legitimate public welfare objectives, provided that such measures are not applied in an arbitrary or unjustifiable manner, or in a manner that constitutes a disguised restriction on international trade or investment.").

non-discriminatory manner.[31]

This mechanism is also not new: as stated above, it is directly copied from the older NAFTA. However, the Member States did not stop here. In Annex 14-D (paragraph 3), they decided to exclude investors' claims concerning a breach of Article 14.10 from investment arbitration.[32] In other words, the ability to enforce the prohibition on performance requirements under the USMCA has been significantly curtailed.

3. Minimum Standard of Treatment (Including the Provision of Fair and Equitable Treatment)

Another oft-repeated criticism concerns the too-wide interpretation of the instruction to provide foreign investors with "fair and equitable treatment." While the content of the obligation to provide fair and equitable treatment is rather vague, most will agree that it shields investors' legitimate expectations at the time of making their investment, as well as investors' right to "due process, transparency, freedom from coercion and harassment, stability, predictability and a general duty of due diligence."[33] The most contentious part of this instruction is without a doubt protecting investors' legitimate expectations when they invest. The critics of IIL warn that such an instruction could be, and has been,[34] interpreted too widely—meaning that investors could legitimately expect the regulatory environment

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[31] *See* USMCA *supra* note 22, art. 14.10(3)–(5) (noting these exceptions are subjected to an Article XX General Agreement on Tarriffs and Trade (GATT)-like chapeau, i.e. the measure must not be discriminatory or a disguised restriction on international trade or investment, and referring to the 1947 GATT signed by 23 countries for the purpose of reducing barriers to trade). General Agreement on Tariffs and Trade, pmbl, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194.

[32] *See* USMCA *supra* note 22, Annex 14-D, ¶ 3.

[33] Eric De Brabandere, *Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties between Generality and Contextual Specificity*, 18 J. WORLD INV. & TRADE 530, 533 (2017).

[34] *See* Barrera, *supra* note 10, at 6; Public Statement, *supra* note 10 (discussing overly expansive interpretations); *see generally* Howard Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, 17 LEWIS & CLARK L. REV. 521, 529–30, 533 (2013) (discussing arguments for and against limiting the scope of fair and equitable treatment (FET) clauses).

existing at the time the investment was made to remain forever frozen. According to this perception, any new form of legislation could add cost to investors, diminishing the value of the investment, and therefore be regarded as contrary to what investors could have "legitimately" expected.

Whether this criticism is fair, and whether this type of wide interpretation is indeed widespread in practice, is debated elsewhere.[35] But for the purpose of this Article, it is sufficient to say that this criticism has not been ignored. The newly introduced USMCA Article 14.6 delineates far more narrowly the scope of fair and equitable treatment and significantly reduces the protection that it once provided. Under this Article, fair and equitable treatment (FET) shall include "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[36] Importantly for this Article, Article 14.6 also explicitly notes that "[f]or greater certainty," a Party's action or inaction that could be "inconsistent with an investor's expectations" for the purposes of Article 14.6 "does not constitute a breach . . . even if there is loss or damage to the covered investment as a result."[37]

In other words, the once "all-inclusive" FET standard now ensures that investors are entitled to very basic due-process standards. Further, the keen reader will note that this due-process standard refers to "principal legal systems of the world," and not even those accepted in "liberal democratic nations."[38] Perhaps even more importantly, investors' legitimate expectations are no longer protected. This last point is important and will be discussed further in Part III of this Article.

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[35] *See, e.g.*, TEERAWAT WONGKAEW, PROTECTION OF LEGITIMATE EXPECTATIONS IN INVESTMENT TREATY ARBITRATION: A THEORY OF DETRIMENTAL RELIANCE 81–82, 95–96 (2019).
[36] USMCA, *supra* note 22, art. 14.6(2)(a).
[37] *Id*.
[38] *Id.*

4. The Non-Discrimination Rule

Another popular criticism regarding the link between investment law and sustainable development concerns investment treaties' prohibition on nationality-based discrimination. This rule was expressed in NAFTA via articles 1102 ("National Treatment") and 1103 ("Most Favoured Nation") and reincorporated into the USMCA via articles 14.4 and 14.5. The critics of IIL have also not spared this rule.[39] In a nutshell, it was feared that some investors would argue that distinguishing between investors based on purely environmental considerations would be regarded as discriminatory. This is because foreign investors that follow lower environmental standards may argue that the better treatment provided to "greener" local investors is discriminatory against them.[40]

As others noted,[41] in practice, investment tribunals do tend to consider in their assessment of the non-discrimination rule (notably via the "like circumstances" assessment) also the wider context and circumstances and are therefore unlikely to opt for such a narrow interpretation of the law. But once again, the practice of tribunals is entirely irrelevant as the Member States decided to add a specific clarification to ensure that tribunals would not accept such expansive arguments.

The relevant clarification can be found inArticle 9, which again clarifies that states are indeed allowed to distinguish between investors based on legitimate public welfare objectives:

> For greater certainty, whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation

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[39] *Cf.* Public Statement, *supra* note 10 (asserting that "regardless of nationality," international investors "should have access to an open and independent judicial system").

[40] *See* Kate Miles, *Sustainable Development, National Treatment and Like Circumstances in Investment Law*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 266, 267–69 (Marie-Claire Cordonier Segger et al. eds., 2011).

[41] Todd J. Weiler, *Treatment No Less Favourable Provisions Within the Context of International Investment Law: "Kindly Please Check Your International Trade Law Conceptions at the Door,"* 12 SANTA CLARA J. INT'L L. 77, 106–108 (2013).

> Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.[42]

5. Expropriation

Another highly contested legal provision concerns the prohibition on expropriatory measures. Article 14.8 of the USMCA repeats Article 1110 of NAFTA, prescribing that "[n]o Party shall expropriate or nationalize a covered investment either *directly* or *indirectly* through measures equivalent to expropriation or nationalization (expropriation)."[43] While legal challenges concerning *direct* expropriation are relatively straightforward and increasingly rare,[44] claims addressing *indirect* expropriation have been far more complex and frequent.

The *Tippets v. Iran* Tribunal defined the term *indirect* expropriation in the following words: "[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected."[45] Defined in such general terms, it is unsurprising that claims regarding indirect expropriation have become investors' favorites; often being raised whenever legislative reforms are costly and impose financial burdens on investors. Predictably, the critics of IIL have targeted this prohibition, fearing (whether rightfully or not)[46] that "[m]easures taken

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42 *See* USMCA, *supra* note 22, arts. 9.4–9.5; Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 9.4, Feb. 4, 2016, M.F.A.T. No. B2018-08 [hereinafter CPTPP].
43 USMCA, *supra* note 22, art. 14.8(1) (emphasis added).
44 Rudolf Dolzer & Felix Bloch, *Indirect Expropriation: Conceptual Realignments?*, 5 INT'L L.F. DROIT INT'L 155, 155 (2003) (writing, "the era of straightforward formal expropriations of alien property seems to have come to an end").
45 Tippets v. Iran, 7 Iran-U.S. Cl. Trib. Rep., 10–11 (1984).
46 *See* Martins Paparinskis, *Regulatory Expropriation and Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 299 (Marie-Claire Cordonier Segger et al. eds., 2011).

for a public purpose, such as health or environmental protection, could be considered an indirect expropriation, since they may affect the value of an investment."[47]

To address this issue, Chapter 14 added a new clarification to exclude this type of argument.[48] Annex 14-B provides that "[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances."[49] Elsewhere, this Annex further clarifies that "the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred."[50]

6. Corporate Social Responsibility

Another relevant provision related to sustainable development is the language on Corporate Social Responsibility (CSR). Article 14.17 states:

> The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social

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[47] IISD, *Indirect Expropriation*, A SUSTAINABILITY TOOLKIT FOR TRADE NEGOTIATORS 5.4.4 (Dec. 1, 2021), https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-4-safeguarding-policy-space/5-4-4-indirect-expropriation-regulatory-taking/; *see generally* Ying Zhu, *Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?*, 60 HARV. INT'L L. J. 377 (2019) (evaluating inconsistencies in tribunal decisions balancing legitimate environmental and public policy interests with investment value when discerning what is and is not expropriation and proposing a solution to resolve those ambiguities).

[48] This clarification did not exist in the older NAFTA. It is taken from other agreements, *inter alia* other investment agreements concluded by the United States, particularly the CPTPP. *See* CPTPP, *supra* note 42, art. 9 annex 9-B § 3(b) (Mar. 8, 2018).

[49] USMCA, *supra* note 22, art. 14 annex 14-B § (3)(b).

[50] *Id.* annex 14-B § 3(a)(i).

> responsibility that have been endorsed or are supported by that Party, which may include the [Organisation for Economic Cooperation and Development] OECD Guidelines for Multinational Enterprises. These standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples' rights, and corruption.[51]

This addition also did not exist in the older NAFTA, and neither did it appear in full within the CPTPP.[52] The addition of language on CSR to investment treaties is a fairly recent trend in investment treaty-making.[53] As Laurence Dubin commented, "These provisions do not change the corporate or ethical duties of companies into enforceable legal obligations in the context of dispute settlement proceedings. They merely reaffirm the voluntary nature of CSR, which remains a form of self-responsibility for companies that can, at most, be encouraged by states."[54] The wording of the CSR provision in the USMCA is indeed very soft and it is doubtful whether it adds much (or anything at all) in terms of rights and obligations.

7. Interim Conclusion

The above review exemplifies the reaction of member states to criticisms against IIL. Whether or not one agrees with the critics of IIL and their arguments concerning the impact of investment treaties on sustainable development, it is clear that the Parties were fully persuaded by the arguments. The Parties adopted a text that most critics

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[51] USMCA, *supra* note 22, art. 14.17.

[52] *See* CPTPP, supra note 42, art. 9.17, The CPTPP's text includes only the first half of this paragraph. The rest of this text has likely been inspired (even if not copied) from Chapter 22 of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), Comprehensive Economic and Trade Agreement, Can.-E.U., ch. 22, Jan. 14, 2017, OJ L 11.

[53] Kent & Gehring, *supra* note 2, at 399–400.

[54] Laurence Dubin, *Corporate social responsibility clauses in investment treaties*, IISD (Dec. 21, 2018), https://www.iisd.org/itn/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/.

could consider as a successful outcome of years of advocacy and campaigning. The member states have managed to include quite meaningful changes to the text, notably the curtailment of two of the most important investment protection standards—the obligation to provide FET and the prohibition on expropriation.

As reviewed next, the Member States were not satisfied with the changes made to the rules regarding the protection of foreign investment. A second front was fought, and won, with respect to investors' ability to enforce whatever rights they had left—the dispute settlement provisions, or the Investor-State-Dispute Settlement (ISDS) mechanism.

C. Changes to the ISDS

Just like most other investment treaties, NAFTA also adopted an ISDS mechanism. This enabled foreign investors to take host governments to binding arbitration over alleged violations of investment treaty commitments. The ISDS is based on the private investment arbitration model, the main rationale for which is distancing the resolution of a dispute from the control of the host state (who is a party to the dispute), as well as ensuring the non-politicization and quick resolution of the dispute to ensure independence and efficiency.

The recourse to ISDS is perhaps the most criticized, and even vilified, element of investment law. The critics of IIL claim *inter alia*, that resolving disputes away from States' official courts is somewhat undemocratic and undermines the sovereignty of host States' institutions. Further, the argument has been made that the commercial arbitration model ensures that disputes are held in secret, without any meaningful public participation. The arbitrators themselves have not escaped from campaigners' scrutiny, claimed to be "largely elite Western corporate attorneys who have a vested interest in expanding the court's authority because they profit from it directly, arguing cases one day and then sitting in judgment another."[55] A public statement that more than 70 academics signed summarizes: "Investment treaty arbitration as currently constituted is not a fair, independent, and

[55] Hamby, *supra* note 13.

balanced method for the resolution of investment disputes and therefore should not be relied on for this purpose."[56]

Once again, whether these arguments against the ISDS are accurate and fair is not debated in this Article. What matters is that these arguments convinced the three Member States and that this element has also been significantly undermined. With this development, investors will potentially have a harder time enforcing their grossly reduced protection under the USMCA.

1. A Limited Enforcement of Rights

The main change made to the ISDS under the USMCA is as follows: Canadian investors, as well as U.S./Mexican investors in Canada, are excluded from the submission of disputes to ISDS under the USMCA, except for legacy investments which can still trigger ISDS until July 2023.[57] Canada's position on ISDS is hardly surprising, given its dire history with investment claims.[58] Canada has been remarkably vocal in its aversion to the ISDS. Canada has demonstrated this aversion with respect to its trade and investment agreement with the European Union (EU), with the creation of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) investment court,[59] and in its declaration with New Zealand and Chile regarding

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[56] Public Statement, *supra* note 10.

[57] *See* USMCA, *supra* note 22, art. 14 annex 14-C (noting *legacy claims* will survive three years after the termination of NAFTA on July 1, 2020).

[58] Maude Barlow, *Fighting TTIP, CETA and ISDS: Lessons from Canada*, COUNCIL CANADIANS 9 (Oct. 2015), https://www.globaljustice.org.uk/sites/default/files/files/resources/fighting-ttip-ceta-isds-lessons-from-canada-maude-barlow.pdf (citing data indicating that "Canada is now the most sued developed country in the world," having been sued at least 35 times and "paid American corporations more than $200 million (approximately €135 million) in the seven cases it has lost and foreign investors are now seeking over $2.6 billion (approximately €1.75 billion) from the Canadian government in new cases").

[59] *See generally* Jin Woo Kim & Lucy M. Winnington-Ingram, *Investment Court System Under EU Trade and Investment Agreements: Addressing Criticisms of ISDS and Creating New Challenges Global*, 16 GLOB. TRADE AND CUSTOMS J. 181–82, 186–88, 191–92 (2021) (citing criticisms of ISDS and ways in which the ICS, adopted in the E.U.-Canada Comprehensive Economic and Trade Agreement (CETA), avoids them).

the future of ISDS under the CPTPP.[60]

An important point to mention concerning Canadian investors (and investment in Canada) is that, at least with respect to Mexico, the exclusion from the ISDS is mostly illusionary. Canada and Mexico are both members of the CPTPP and are therefore both subject to the ISDS under this agreement. Given that the CPTPP provides similar (if not improved) investment protection, the impact of Canada's withdrawal from the ISDS under the USMCA is somewhat limited.

Further, under the USMCA, U.S. and Mexican investors must first exhaust local proceedings before seeking recourse to ISDS.[61] That is, they must first attempt to obtain a remedy via local courts. One of the original rationales for the ISDS was to allow investors a quick remedy, fearing that the operation of local domestic courts is too slow, with appeals over legal proceedings taking years. This rationale or concern was not entirely neglected: to avoid the burial of cases in overly clogged domestic courts, the Member States added a time limit. The court of last resort in either of the States must deal with the case within 30 months.[62] While the usefulness of the 30-month time-cap is certainly clear, this period of time is still significant and could impose a very expensive delay for investors.

Another novelty included in the USMCA is that U.S. investors in Mexico are also subjected to a fork-in-the-road requirement with respect to treaty-based claims. In other words, if a treaty-based claim is submitted in a Mexican court, the investor cannot initiate ISDS proceedings at all.[63]

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[60] Joint Declaration, Gov'ts of New Zealand, Canada, and Chile, Joint Declaration on Investor State Dispute Settlement (Mar. 2, 2018), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/declaration_isds-rdie.aspx?lang=eng.

[61] USMCA, *supra* note 22, art. 14.D.5(1)(a).

[62] *Id.* art. 14.D.5(1)(b).

[63] Alexander Bedrosyan, *The Asymmetrical Fork-in-the-Road Clause in the USMCA: Helpful and Unique*, WOLTERS KLUWER: KLUWER ARBITRATION BLOG (Oct. 29, 2018), http://arbitrationblog.kluwerarbitration.com/2018/10/29/usmca/ (highlighting Appendix 3 to Annex 14-D: on the face of it, if US investors *must* exhaust local proceedings *and* comply with a fork-in-the-road requirement. This means that they cannot rely on ISDS almost at all (i.e. only cases that are not concluded before the 30 months deadline could be directed to ISDS). But as explained by several commentators, the drafters probably took the view that if local

Finally, the option of state-to-state dispute resolution is also now mostly barred. Article 31.2 of the USMCA prescribes the chapters that fall within the scope of state-to-state dispute settlement. Unsurprisingly, and corresponding with the harsh line presented against IIL, Chapter 14 was not included.

Additional significant limitations on the use of the ISDS under the USMCA can be found in Article 14.D.3. This Article provides that claims are still allowed concerning alleged breach of "National Treatment", "Most Favoured Nation", and direct expropriation, whereas allegations concerning indirect expropriation and the breach of FET standards are excluded.[64] As can be seen, the Member States were not satisfied with the significant undermining of these two key legal provisions. Thus, the ability to enforce whatever little protection is still provided by them is now also gone.

However, one interesting thing to note here is that the two legal guarantees—the FET and indirect expropriation—are not excluded in respect of claims arising from "covered government contracts,"[65] i.e., agreements between investors and national authorities regarding "covered investment[s]." As will be discussed in Part III of this Article, this development is important for certain investors in specific environmentally sensitive sectors, for example renewable energies.

2. Transparency and Public Participation

Another development that is worthy of discussion concerns transparency and public participation. Despite notable improvements

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proceedings are based entirely on domestic law, and no claims based on the USMCA are made, investors will not be barred from moving forward with ISDS); Daniel Garcia-Barragan et al., *The New NAFTA: Scaled-Back Arbitration in the USMCA*, 36 J. INT'L ARBITRATION 739, 745 (2019) ("While Mexican judicial courts and administrative tribunals do not have jurisdiction to decide on a breach of USMCA obligations, it remains to be seen how tribunals will interpret Appendix 3 when a similar or identical protection is provided for under Mexican domestic law, as well as the USMCA (such as expropriation protections), to determine if the plaintiff alleged a breach of the international treaty in domestic proceedings and thus would be prevented from initiating an arbitration.").

[64] USMCA, *supra* note 22, art. 14.D.3(1)(b)(i).

[65] *See id.* art. 14.D.3.1, annex 14-E, § 2(a)(i)(A)(1).

towards increased transparency and public participation,[66] the reputation of the ISDS as a secretive, private, and closed process remained unchanged. With respect to sustainable development, it is claimed that public interest groups are unable to engage with investment tribunals to present the public's interest in cases that affect issues such as environmental protection or human rights. In this respect, it is interesting to examine new developments in this area to ask whether in fact the new legal framework is an improvement on the previous NAFTA.

i. Public Participation and Transparency: The Legal Frameworks

Contrary to what could be understood from the campaign against the ISDS in NAFTA, the NAFTA rules (and practice), with respect to transparency and public participation, were in fact quite liberal, especially when compared with most other procedural rules governing international tribunals in other international law fields.[67] In essence, the NAFTA rules were based on two documents: the North American Free Trade Commission (FTC) Statement of the Free Trade Commission on Non-Disputing Party Participation, issued in 2003 (FTC Statement),[68] and the FTC's Notes of Interpretation of Certain Chapter 11 Provisions, issued in 2001 (Notes of Interpretation).[69]

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[66] *See* AVIDAN KENT, THE PRINCIPLE OF PUBLIC PARTICIPATION IN ICSID ARBITRATIONS, *in* SUSTAINABLE DEVELOPMENT IN THE DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS 1992-2012 554 (Marie-Claire Cordonier Segger & C. G. Weeramantry eds., 2017); Kent & Gehring, *supra* note 2, at 391–94; ERIC DE BRABANDERE, TARCISIO GAZZINI, & AVIDAN KENT, PUBLIC PARTICIPATION IN FOREIGN INVESTMENT LAW 3–6 (Brill 2021).

[67] *See* AVIDAN KENT & JAMIE TRINIDAD, AMICUS CURIAE PARTICIPATION IN INTERNATIONAL PROCEEDINGS: FOREVER FRIENDS? *in* THE FUTURE OF INTERNATIONAL COURTS: REGIONAL, INSTITUTIONAL AND PROCEDURAL CHALLENGES 235 (Avidan Kent et al. eds. 2019) (explaining, for example, that the rules on amicus curiae submissions are far more generous in many investment law frameworks (including NAFTA) than almost all other types of international tribunals).

[68] *See Statement of the Free Trade Commission on non-disputing party participation*, NAFTA FREE TRADE COMM'N (2003), http://www.sice.oas.org/tpd/nafta/commission/nondispute_e.pdf [hereinafter FTC Statement] (listing generally NAFTA's arbitration rules for non-disputing parties).

[69] *North American Free Trade Agreement Notes of Interpretation of Certain Chapter*

The new legal framework regulating the relationship between the three Member States is, at least on its face, far more fragmented. Disputes on the Canada-Mexico axis (i.e. between Canadian investors and Mexico, and Mexican investors and Canada) are excluded from the USMCA. Nevertheless, they are covered by the parallel universe of the CPTPP and are therefore subject to the rules on transparency and public participation adopted in this agreement. Disputes on the U.S.-Mexico axis are based on the USMCA, and therefore are subject to the rules on public participation and transparency offered here. As stated above, investment disputes on the U.S.-Canada axis are no longer covered. Despite this fragmented initial picture, the reader should be aware that the USMCA's rules on public participation in ISDS are exactly the same as those found in the CPTPP—directly copied in fact. In practice, this similarity somewhat mitigated this problem.[70]

A comparison between the previous NAFTA rules and the new CPTPP/USMCA rules could potentially shed light on whether abolishing NAFTA was indeed a positive step. To begin with, the new legal framework offers a slight relaxation with respect to the conditions to submit amicus curiae briefs.[71]

Notably, the previous NAFTA rules explicitly demanded that there should be "a public interest in the subject-matter of the arbitration,"[72] and that the *amici* should present a unique perspective, or a "particular knowledge or insight that is different from that of the disputing parties."[73] Both of these requirements are no longer included in the new rules, allowing a wider scope for *amici* interventions.

Also important, the old NAFTA rules did not include access to arbitration hearings as a default, and the parties had the right to refuse to allow public access to hearings.[74] This is no longer the case under

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11 Provisions, NAFTA FREE TRADE COMM'N (July 31, 2001), http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp.

[70] *See* USMCA, *supra* note 22, art. 14.D.7(2)(3); CPTPP, *supra* note 42, art. 9.23(3) (Mar. 8, 2018).

[71] *See* USMCA, *supra* note 22, art. 14.D.7(3); CPTPP, *supra* note 42.

[72] FTC Statement, *supra* note 68, § 6(d).

[73] *Id.* § 6(a).

[74] *See Minutes for the 14th Meeting / Santa Fe, New Mexico*, NAFTA 2022 ADVISORY COMM. INT'L PRIV. COM. DISP. (Sept. 26, 2004), https://can-mex-usa-sec.org/secretariat/assets/pdfs/Minutes14thmeetingSantaFe.pdf (referencing

both the CPTPP and the USMCA frameworks, where access to hearings is now the default position.[75]

A related development with respect to the public's access to hearings concerns the option of webcasting hearings, a practice that has become popular in many international tribunals in recent years.[76] The only requirement listed in the current rules is that the tribunal "shall determine, in consultation with the disputing parties, the appropriate logistical arrangements."[77] This gives investment tribunals the flexibility to allow access to the public via webcasting. In a post-COVID era, whereby webcasting is almost the norm, it is expected that tribunals will make more use of this option for reasons of public health and transparency alike.

Another interesting development the new rules facilitated relates to the novel and very liberal United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration (Rules on Transparency), which are the gold standard when it comes to public participation and access to information in investment arbitrations.[78] The old NAFTA did not include any reference to these rules, and they were not part of the legal framework. The USMCA also does not mention the UNCITRAL Rules on Transparency. However, Article 14.D.3(3) presents the parties with several options in terms of the applicable arbitration rules,

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clarifying comments made soon after the issuing of the joint statement in NAFTA Advisory Committee on International Private Commercial Disputes minutes for the 14th meeting (The Secretariat 2004); *see also* Transcript of Record at 11–12, Canfor Corp. v. United States of America (2004), http://www.naftaclaims.com/Disputes/USA/Canfor/Canfor-Jurisdiction-Transcript-DayOne.pdf (noting the Tribunal's statement: "Finally, as you know, the parties have agreed to make the hearing open to the public. The hearing is thus broadcast live in a separate room within the ICSID premises.").

[75] USMCA, *supra* note 22, art. 14.D.8(2); CPTPP, *supra* note 42, art. 9.24(2).

[76] *See* WEBCASTING AS A TOOL TO INCREASE TRANSPARENCY IN DISPUTE SETTLEMENT PROCEEDINGS, CTR. FOR INT'L ENV'T L. 1–2 (2010), http://www.ciel.org/Publications/Webcasting_21Jun10.pdf (noting that the first live publicly webcasted hearings were broadcasted in an ICSID case—the *Pac Rim Cayman LLC v. Republic of El Salvador* case on May 31 and June 1, 2010; webcasting hearings have become an increasingly common practice in international courts).

[77] USMCA, *supra* note 22, art. 14.D.8(2).

[78] *See* Commission on International Trade Law Res. 68/109 (Apr. 1, 2014).

ranging from the International Centre for Settlement of Investment Disputes (ICSID) Rules, the "regular" UNCITRAL Arbitration Rules, and, importantly, "if the claimant and respondent agree, any other arbitral institution or any other arbitration rules."[79] Facially, this provision opens the possibility for the parties to agree on the UNCITRAL Rules on Transparency alongside other arbitration rules.

At the same time, it could be that the option to rely on the UNCITRAL Rules is not particularly important because the standards reflected in these rules are also expressed in the CPTPP and the USMCA. Notwithstanding this fact, the UNCITRAL rules on Transparency are far more detailed, so they could be more useful in some cases.

II. CHAPTER 14 AND SUSTAINABILITY: A CRITICAL ASSESSMENT

The above discussion depicts the changes made to the international investment regime in North America. Clearly, these changes are a reaction to the criticisms made against IIL during the past 20 years or so. These criticisms reflect, almost one-to-one, the same commonplace comments that have been (and are being) repeatedly made by academics and NGOs alike concerning the nature and impact of IIL. Interestingly, the criticism against IIL is reflected in academia as a *debate*, where many scholars challenge and even dispute critics' assumptions of IIL, and where a far more balanced approach is often reflected. However, when it comes to the negotiations of Chapter 14 of the USMCA, only one side of the debate—notably the most extreme part of it—has penetrated the surface and made an incredibly strong impact.

Furthermore, the text of Chapter 14 of the USMCA is far from reflecting trends in investment treaty-making around the world. Treaty-making during the past 10 years or so reveals that much emphasis has been placed on the addition of constructive, balancing, sustainable language, and an increased flexibility for policy makers.[80]

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[79] USMCA, *supra* note 22, art. 14.D.3(3)(d).

[80] One of the authors of this Article has called for this approach on more than one occasion. *See* Marie-Claire Cordonier Segger & Avidan Kent, *Promoting Sustainable Investment through International Law*, *in* SUSTAINABLE DEVELOPMENT IN WORLD

Even so, while many states have revised their treaties, very few have followed the extreme steps of the USMCA Member States by notably reducing the most significant standards of protection and curtailing meaningful enforcement measures.[81]

A. The Ground Is Still Moving

Before commenting in more detail on the changes that have been made to the investment legal framework in North America, it is important to emphasize that the current legal state of affairs is far from static. Notably, the full impact of the competing, overlapping legal framework of the USMCA and the CPTPP is not yet known. The CPTPP could dramatically change the legal environment for the three USMCA Member States and their investors. Most importantly, there are talks concerning the United States joining the CPTPP. While this scenario is far from certain, if it eventually occurs, it will most likely signal the end of Chapter 14 of the USMCA, which would probably become marginal or even moot. In this scenario, investors will likely launch claims almost exclusively under the CPTPP because it allows higher standards of protection and an easier enforcement pathway. Perhaps ironically, if this does happen, the radical reforms aimed at improving NAFTA will lead to its demise.

At the same time, the CPTPP itself is not immune to changes. In a joint declaration issued by Canada, New Zealand, and Chile on the ISDS (2018), these three States expressed their intent to push towards modifying the ISDS under the CPTPP.[82] Interestingly, these three States have not expressed the will to go as far as the USMCA did. They

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INVESTMENT LAW 771 (Marie-Claire Cordonier Segger et al. eds., 2011); Markus W. Gehring & Avidan Kent, *Sustainable Development and IIAs: From Objective to Practice*, *in* IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 284 (Armand. de Mestral & Celine Lévesque eds., 2013); Kent & Gehring, *supra* note 2, at 398–99, 402.

[81] Rachel Jackson, *A Credible Commitment: Reducing Deforestation in the Brazilian Amazon, 2003–2012*, INNOVATIONS FOR SUCCESSFUL SOCIETIES 1, 9–10 (2015), https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/RJ_NORAD_BrazilFederal.pdf. The practice of Brazil, commenced and established during the years of Lula da Silva's Workers Party, is the most commonplace example.

[82] *See* Joint Declaration on Investor State Dispute Settlement, *supra* note 60.

have rightfully addressed the need to improve elements such as transparency, arbitrators' conflict of interest, and the availability of ISDS to small and medium-sized enterprises (SMEs) so as to ensure the availability of this system for *all* investors and not just for rich multilateral corporations. This declaration could be viewed as a call for the *expansion* of the ISDS, a very different direction to that taken by the USMCA, and as a genuine attempt to *improve* the system rather than breaking it altogether.

B. For Optic's Sake?

As for the changes themselves, at least some of them seem optic in nature, made mostly to appease the critics of IIL. For example, the value of vague, non-binding declarations on the importance of a state's right to regulate, has not proven in the past to be of much use. This type of declaratory language *could* be useful, for example, as explained above, through the rules on treaty interpretation and notably Article 31 of the VCLT. According to this legal provision, non-binding declaratory language could affect the interpretation granted to certain treaty provisions, notably those that are vague and subject to different interpretations. At the same time, given all the clarifications and exclusions made in Chapter 14, it is questionable whether this type of an interpretive instrument is even necessary. The "usual suspects," i.e. FET and indirect expropriation, have been emptied from most of their "vagueness" (and some would say meaning).

Another, possibly optic, addition discussed above concerns the addition of language on CSR. This language *could perhaps* also be useful, either via Article 31 of the VCLT (e.g., when interpreting the definition of *investment*) or in other ways.[83] For example, one of us wrote elsewhere that the incorporation of CSR language into investment treaties "could be useful for signaling to investors exactly what kind of standards or behavior are expected of them."[84] At the same time, to date, there is no evidence that the addition of CSR language to investment treaties has indeed made any such impact, especially when drafted in such a weak and voluntary manner, as seen

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[83] *See* Kent & Gehring, *supra* note 2, at 395, 399–400.
[84] *Id.* at 399–400.

in Chapter 14 of the USMCA.

Other changes that have been made in the USMCA, which may not be as important or dramatic as one may think, include a few of the interpretation guidelines provided in Chapter 14. Some of these guidelines are without a doubt impactful (e.g., regarding the FET provision), but others less so. For example, the clarification regarding the term "like circumstances" is clearly correct—that the National Treatment and MFN provisions should never be interpreted as meaning that different treatment based solely on environmental considerations is a breach of investment treaty provisions. At the same time, it is questionable whether the more recent practice of investment tribunals justifies this clarification: a review of the jurisprudence suggests that tribunals do not apply the more expansive (and feared) interpretation. Adding this clarification may seem harmless, but is nevertheless redundant and far from making a real impact in terms of sustainability.

Other changes made in Chapter 14 of the USMCA have been far more dramatic and deserve further assessment. The below discussion highlights several points regarding the changes made in the transition from NAFTA Chapter 11 to USMCA Chapter 14, and the potential impact that these changes may have on elements that are related to sustainability.

C. The Canadian Trade-off

Chapter 14 of the USMCA has significantly reduced the protections of foreign investors, and these changes will have some impact on certain investors. Notably, both entities investing in Canada and Canadian investors can no longer rely on the USMCA's ISDS. Similarly, these investors cannot rely on their home state to bring cases on their behalf under the state-to-state mechanism. This is not to say that these investors are left entirely unprotected. Like other investors, they can use domestic courts and domestic laws. And as explained above, the ISDS system is also not entirely beyond the reach of Canadian investors and their Mexican counterparts—as long as the CPTPP remains unchanged, it provides them with access to ISDS[85] as

[85] USMCA, *supra* note 22, art. 9.19.

well as increased protection.[86]

The most dramatic change, therefore, is the trade-off made by Canada. On the one hand, it removes the threat of litigious U.S. investors. In exchange, it removes the threat of its own investors to do the same in the U.S. A paper written by Maude Barlow—a former National Chairperson of the Council of Canadians and one of the organization's most prominent voices[87]—indicates the rationale behind this trade-off. Barlow stresses that roughly half of all NAFTA claims have targeted the Canadian government, and that "Canada has paid American corporations more than $200 million . . . and foreign investors are now seeking over $2.6 billion . . . from the Canadian government in new cases," while "[t]he U.S. government has won 11 of its cases and never lost a NAFTA investor-state case or paid any compensation to Canadian or Mexican companies."[88] In this context, this trade-off and its perceived implications (whether one identifies real causation in this presentation of data) may have played a significant role in the decision to sever the Canada-U.S. link.

Canada's move—to effectively terminate the ISDS via the U.S.—took place in a wider context. It seems that Canada does not know what it wants from the IIL regime. It pushed to create an Investment Court in its relations with the E.U., terminated ISDS with the U.S., and seems willing to expand ISDS under the CPTPP (by calling for the system to be made more accessible to SMEs). Only time will tell whether any of these moves will have any real impact and whether this impact will in fact be positive.

D. Reduced Protection to Investors and Possible Outcomes

The analysis of the changes made in Chapter 14 must include a discussion regarding potential externalities. In other words, if

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[86] *See* Peter O'Donahoo & Hilary Birks, *The Investment Chapter of the Trans-Pacific Partnership*, ALLENS LINKLATERS (Dec. 14, 2015), https://www.allens.com.au/insights-news/insights/2015/12/the-investment-chapter-of-the-trans-pacific-partnership/ (stating that notably provisions on fair and equitable treatment and indirect expropriation are not excluded from the CPTPP).

[87] Barlow, *supra* note 58. The Council of Canadians is one of the most vocal critics of IIL and the ISDS.

[88] *See id.*

Chapter 14 offers such a low level of protection for foreign investors, as well as very limited options for enforcing their rights, what then, are the alternatives available to investors? And will these alternatives be any better than the previous Chapter 11 of NAFTA?

There is little doubt that investors will hardly ever invest without sufficient guarantees. This leads to the question of what kind of guarantees will be enough. It certainly could be that, as the critics of IIL argue (or hope), foreign investors will be satisfied with relying solely on host States' regulation and court systems. If this is the case in North America (and surely in many cases it will be), then it is doubtful whether the changes made in Chapter 14 will have an adverse impact on the levels of incoming investment and sustainable development. But what if domestic laws and courts are not enough?[89] What if some investors look for further assurances in private law, and, importantly, also in *private arbitration*? It could very well be that in these cases the changes made in Chapter 14 might backfire.

For example, unlike the relative public nature of the NAFTA and USMCA negotiations and outcomes,[90] the negotiation of private investment contracts, as well as their execution, is often confidential and lacks public scrutiny.[91] There is also no guarantee that the sustainability-oriented policy safeguards, clarifications, statements, and carve-outs found in the USMCA's Chapter 14 (or NAFTA's

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[89] *See* Lisbeth Colen et al., *Bilateral Investment Treaties and FDI: Does The Sector Matter?*, 83 WORLD DEV. 193 (2016) (showing, "FDI in those sectors with higher sunk costs responds more strongly to the signing of BITs."); *id.* at 194 (explaining—most worriedly—therefore, reduced investment treaty protection will affect investors in key sectors such as infrastructure).

[90] *See* Avidan Kent et al., *Public Participation in International Investment Law: Setting the Scene*, *in* 16 PUB. PARTICIPATION & FOREIGN INV. L. 3, 12 (Brill ed., 2021) (following a review of practices engaged for the purpose of securing public participation in the NAFTA/USMCA context); Maria Laura Marceddu, *How to Ensure Public Participation in FTA Negotiations? A Critical Analysis of the Instruments Used in the FTA-Making Process*, *in* 16 PUB. PARTICIPATION & FOREIGN INV. L. 102 (Brill ed., 2021).

[91] Youseph Farah & Valentine Kunuji, *Contractualisation of Human Rights and Public Participation: Challenges and Prospects*, *in* 16 PUB. PARTICIPATION & FOREIGN INV. L. 122, 123 (2021); Lorenzo Cotula & Kyla Tienhaara, *Reconfiguring Investment Contracts to Promote Sustainable Development*, *in* Y.B. ON INT'L INV. L. & POL'Y 281, 286 (Karl P. Sauvant ed., 2012).

Chapter 11 before it), will find their way into private contracts. Lastly, as ISDS is no longer on the table, enforcing those private contracts might be secured through commercial arbitration. A resort to commercial arbitration is a significant step back, effectively erasing years of progress and improvement in ensuring transparency and public participation in investment arbitration.[92]

Another important point concerns the effective elimination of the protection of investors' "legitimate expectations" (as part of the obligation to provide FET) and from indirect expropriation. It is hardly surprising that these two safeguards did not survive the culling process, given the dedication with which the Member States have followed the hard line the critics of IIL prescribed. As explained above, no other legal terms have attracted more public attention and criticism. However, a closer look at the decisions of investment tribunals concerning these two legal provisions casts doubt on the logic behind this development. As explained below, the result here could also backfire.

Notably, the critics of IIL often claim that the vagueness of these two legal terms opened a door for manipulation and abuse. However, one could argue that a certain "vagueness" is not necessarily a bad thing. The number of creative ways in which states have and continue to abuse foreign nationals is almost limitless. A too-narrow definition (such as the one provided to the FET principle in Chapter 14 of the USMCA) will deny tribunals the necessary flexibility to address this variety of unforeseen state measures that could be used against foreign nationals. While the problems with broad definitions are understood, tribunals have found ways to refine these definitions and ensure that certain safeguards are in place. For example, the term *legitimate expectation* has been mostly interpreted more narrowly than the critics of IIL have complained about, as only protecting against *specific and explicit* promises host States made to foreign investors.[93] Equally, the term *indirect expropriation* has mostly been interpreted as reflecting only the most extreme cases, where an investor is able "to establish the substantial, radical, severe, devastating or fundamental

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[92] *See* CPTPP, *supra* note 42, art. 9.23(3).

[93] *See* AVIDAN KENT, INTERNATIONAL LAW AND RENEWABLE ENERGY INVESTMENT IN THE GLOBAL SOUTH 84 (Routledge 2022).

deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment."[94]

A closer look at these two definitions, as interpreted narrowly by tribunals, raises many questions. To begin with, is it really so wrong to protect investors in these cases? Are these narrow interpretations so unreasonable so as to justify the effective elimination of these legal terms from the protection of the USMCA? Would it really be so difficult to instead (as has been done with respect to other legal terms) add clarifications, confirming the *narrow* meaning of these terms? In short, was there really a case for making such drastic changes? If one accepts the assumption according to which foreign investment is positive and necessary, and foreign investors are not inherently evil, then perhaps these terms could have been addressed with more nuance and sensitivity.

As discussed elsewhere, these "vague" terms can be used to promote sustainability. For example, numerous investors in the renewable energy sector in Europe successfully relied on the FET provision.[95] There is no doubt that private investment in this specific sectors is necessary for achieving a variety of SDGs and promotes the public's interest. Protecting these investments from states' unilateral changes to previously agreed-to terms and conditions ensures investors' confidence in this sector, as well as the long-term sustainability of these investments. These renewable energy disputes also demonstrated that the other "too vague" provision—the protection from indirect expropriation—was in fact utilized by investment tribunals very reasonably, with deference to states' regulatory flexibility. By and large tribunals did not accept that changes to investments' agreed-to terms and conditions could be regarded as indirect expropriation.

In short, the choice to remove some of the most effective investment protection standards could adversely affect sustainable development. These standards are relied on by "green" investors facing policies that are harmful for the attainment of the SDGs. These

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[94] InfraRed Environmental Infrastructure GP Limited et al. v. Kingdom of Spain, ICSID Case No. ARB/14/12, Certificate, ¶ 505 (Aug. 2, 2019).
[95] *See* Kent, *supra* note 92, at 75–104 (discussing these cases in detail).

investment-protection standards created a positive chilling that is in fact positive in nature where states are "chilled" from revoking green policies, the planet wins.

CONCLUSION

This critical assessment should not be understood as implying that the criticism of IIL is wrong or entirely misdirected. For far too long, investment treaties have been designed in isolation, with very little regard to public interests such as environmental protection or human rights. Indeed, one of us on several occasions has expressed this criticism. Furthermore, this critical assessment should not be understood to mean that the USMCA negotiators did not achieve much: the improved standards on public participation, for example, are commendable.[96]

The main criticism delivered through this Article is that unfortunately, in addressing the very real problems posed by investment law, the USMCA negotiators have chosen the easy, popular, and simplistic way out. Negotiators fed from the hands of the most extreme branch of the critics of the IIL regime, without paying much attention to the complexity and nuance that is inherent in the debate about IIL.

Unfortunately, the USMCA negotiators did not think outside and beyond the all-to-familiar box of available tools. For example, they could have explored the possibility of using a variety of home-country measures (HCMs) to create mechanisms to actively encourage the flow of targeted, desirable outward green investment, as recommended elsewhere.[97]

The imperative embedded in terms such as "sustainable development" and "green economy" means *inter alia* engaging the private sector in the promotion of environmental and social goals. This imperative implies a constant, careful balancing act and a good amount

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[96] Although one must accept that with a reduced role for the ISDS, the importance of transparency in ISDS diminishes as well.

[97] *See* Kent, *supra* note 88, at 72–104 (explaining the comprehensive study of this option, including the role that different types of HCMs could play in the promotion of green foreign direct investment).

of nuance. It is questionable whether Chapter 14 represents a development in this respect, or, whether it is a result of crude treaty-making by the three Member States.