

## NAFTA CHAPTER 11, REGULATORY EXPROPRIATION, AND DOMESTIC COUNTER-ADVERTISING LAW

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### I. INTRODUCTION

Trade agreements are believed to both facilitate the expansion of the international economy and contribute to national growth. Sometimes that comes at the expense of curtailing the ability of governments to regulate their economies to achieve national policy goals. This may be the case when, for instance, governments promote healthy eating to fight obesity and hunger. To this end, governments may restrict corporate food advertising or ban trans fat in response to expensive corporate marketing campaigns that promote the consumption of high-calorie, low-nutrient food. Furthermore, governments may engage in social marketing or impose counter-advertising duties, such as health warnings to be incorporated in food advertising. These possible national regulatory initiatives may, however, collide with trade agreements. Such regulatory policies may be deemed technical barriers to trade or constitute an indirect expropriation of foreign investors' property rights. This essay focuses on the latter and explores whether food health warning regulations may be challenged on expropriation grounds.<sup>2</sup> In Canada, pro-healthy eating policies may conflict with the NAFTA

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1. This article grew out of an early short draft presented at the Consumer Protection and Regional Trade Agreement Conference organized by the Research Group on International and Comparative Consumer Law (GREDICC), Université du Québec à Montréal (UQAM), held in Montreal, Canada in October 2007. I would like to thank Professor Thierry Bourgoignie and the participants of this conference for their comments and questions. I am also grateful for helpful comments provided by J.J. McMurtry, Mark Peacock, and John Simoulidis from the Business and Society program at York University, Toronto, on an early draft of this paper. I am entirely responsible for any mistakes.

2. The tension between domestic regulation of advertising and regulatory expropriation is of real significance and has received some attention. *See, e.g.*, Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. 1 (2005) (discussing the applicability of regulatory expropriation principles in the case of indirect prohibition of billboard advertising involving the ban of highway billboard that destroys foreign investor's billboard advertising on highways). More generally, some authors have noted that consumer protection measures may be expropriatory. *See* MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 283 (1994) ("Non-discriminatory measures related to anti-trust, consumer protection, securities, environmental protection, land planning are non-compensable takings since they are regarded as essential to the functioning of the state."); Ursula Kriebaum, *Privatizing*

agreement, particularly Chapter 11. This problem raises important concerns about how to strike a balance between trade and national health policies.

This paper discusses the extent to which NAFTA Chapter 11 deprives the Canadian government of its ability to introduce legislation to impose counter-advertising duties on international food corporations such as food-related health warnings aimed at reducing obesity and hunger in Canada. Recent NAFTA tribunal decisions appear to confirm that a non-discriminatory regulation that may affect foreign investors' property rights, but advance a public purpose may not constitute expropriation. It will be argued, however, that the number of loopholes and inconsistencies of NAFTA Chapter 11 jurisprudence creates significant uncertainty as to whether a governmental regulation of imposing counter-advertising duties, such as food warnings to promote healthy eating, amounts to a regulatory expropriation. This uncertainty recreates a regulatory chill that may prevent Canada's government from engaging in an active regulation of food counter-advertising on the fear of a NAFTA lawsuit and the possibility of paying expensive compensation. In adopting an institutional approach,<sup>3</sup> NAFTA Chapter 11 is taken as a legal institution forming part of the broader institutional environment and, as such, is viewed as embedded in its social, political, and economic context. Thus, this work will also show that the possible influence of the food industry on the making and enforcement of domestic food regulation seems to reinforce such uncertainty, regulatory chill, and government inaction.

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*Human Rights—The Interface Between International Investment Protection and Human Rights*, in *THE LAW OF INTERNATIONAL RELATIONS* 165, 168 (August Reinisch & Ursula Kriebaum eds., 2007) (stating that there could be a “potential conflict between the consumers’ right of access to water and the investor’s right to property,” although these two rights have not been brought into conflict in arbitral proceedings). The conflict between consumer protection policies and foreign investors’ property rights was somewhat addressed in *Sempra Energy Int’l v. Argentine Republic*, Case No. ARB/02/16 (ICSID (W. Bank) 2007) (Here, a U.S. investor complained of emergency measures, including the compulsory “pesification” of utility tariffs, which were previously calculated in U.S. dollars, and the abandonment of a policy of adjusting gas tariffs in line with U.S. inflation indices. The tribunal held that Argentina was not entitled to a necessity defense, which could have justified such measures.). See also *Azurix Corp. v. Argentine Republic*, Case No. ARB/01/12, ¶ 261 (ICSID (W. Bank) 2006)), available at <http://www.worldbank.org/icsid/cases/pdf/ARB0112/Azurix-Award-en.pdf> (discussing the conflict between measures to protect consumers' rights and U.S.-Argentina BIT obligations).

3. See generally Kenneth L. Avio, *Three Problems of Social Organisation: Institutional Law and Economics Meets Habermasian Law and Democracy*, 26 *CAMBRIDGE J. ECON.* 501, 517 (2002); Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 *AM. J. INT’L L.* 475, 486 (2008) (“The institution’s composition, decision-making processes, political and legal constraints (including control mechanisms), and other attributes drive the outcomes of regulatory takings decisions.”).

One central consequence of this problem is that it facilitates the corporate control of consumer food information. In this context, consumer-citizenship activism becomes desirable to balance corporate influence and to help legitimize bona fide, non-discriminatory regulatory measures for pressing public purposes.

Given these institutional insights, it will also be suggested that, in addition to taking more seriously the public purpose exemption in NAFTA Article 1110, the analysis of regulatory expropriation should be more sensitive to the actual ability of foreign investors to influence a domestic regulatory process. NAFTA Chapter 11 tribunals should also give serious consideration to the element of public pressure, particularly when it comes to measures seeking to protect a public interest such as public health.

The paper is organized as follows: the first section provides a brief legal background of food counter-advertising regulation in Canada. It briefly presents a proposed legal reform concerning food warning regulation seeking to reduce obesity in Canada and shows the potential conflict between such regulation and NAFTA Chapter 11. The second section details the notion of regulatory expropriation as set out by NAFTA Article 1110 and tribunal decisions, and discusses its relationship to domestic food advertising regulation. The final section is central and argues that the NAFTA Article 1110 jurisprudence is largely inconsistent, thereby chilling a potentially active role of the Canadian government in regulating food advertising to tackle the problems of obesity and unhealthy eating. Taking an institutional view, this section also raises concerns about the possible influence of foreign food corporations on the domestic regulatory process and shows the significance of encouraging consumer-citizenship activism. It concludes with some normative ideas about the need to rethink the analysis of regulatory expropriation in light of these institutional insights.

## II. ADVERTISING LAW, COUNTER-ADVERTISING, AND OBESITY IN CANADA<sup>4</sup>

Counter-advertising policies have received some important legal attention in Canada. In particular, legally imposed anti-smoking health warnings have been made consistent with the Charter of Rights and Freedoms. In *Canada (Attorney General) v. JTI-Macdonald Corp.*, the Supreme Court of Canada recently held that requiring health warnings generally infringes on freedom of expression as set out in section 2(b) of the Charter because such warnings

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4. This section is based on an earlier short paper: Alberto R. Salazar Valle, *Trading our Freedom: Does NAFTA Chill Counter-advertising Law Aiming at Reducing Obesity and Hunger in Canada?* in REGIONAL ECONOMIC INTEGRATION AND CONSUMER PROTECTION 431 (Thierry Bourgoignie ed., 2009).

interfere with how manufacturers choose to express themselves.<sup>5</sup> However, the Court also concluded that even a requirement that fifty percent of the principal display surface of a package be devoted to a warning of the health hazards of a product is “a reasonable measure demonstrably justified in our society and is constitutional under [section] 1 of the Charter.”<sup>6</sup>

In light of the social and legal success of anti-smoking warnings, it is conceivable that food-related health warnings may become an important regulatory option to promote healthy eating in Canada. In fact, the House of Commons’ Standing Committee on Health has recently recommended “[i]mplement[ing] a mandatory, standardized, simple, front of package labelling requirement on pre-packaged foods for easy identification of nutritional value.”<sup>7</sup> In France, for instance, the government has passed a law requiring that all advertisements for food and drink must now carry healthy eating messages or companies will face fines.<sup>8</sup>

The possibility that food-related health warnings might be consistent with the Charter may further attract the interest of regulatory agencies. While this

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5. Canada (Attorney General) v. JTI-Macdonald Corp., [2007] 2 S.C.R. 610, 2007 SCC 30 (Can.).

6. *JTI-Macdonald*, [2007] 2 S.C.R. ¶ 140 (holding this view with respect to tobacco advertising). It is important to note that this decision has departed from a previous Supreme Court of Canada decision holding that health warnings violate the freedom of expression. See *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199 (Can.) (referring to Quebec’s Tobacco Products Control Act, 1988 S.C. ch. 20, the court ruled that s. 9 (relating to unattributed health warnings) of the Act are “inconsistent with the right of freedom of expression as set out in 2(b) of the Charter and do not constitute a reasonable limit on that right as can be demonstrably justified pursuant to s. 1 thereof.”) *JTI-Macdonald* also affirmed the constitutionality of the Tobacco Act, 1997 S.C. ch. 13 s. 15 (1), which reads as follows:

15(1) Information required on packages

No manufacturer or retailer shall sell a tobacco product unless the package containing it displays, in the prescribed form and manner, the information required by the regulations about the product and its emissions, and about the health hazards and health effects arising from the use of the product or from its emissions.

[2007] 2 S.C.R. ¶ 142.

7. CANADA HOUSE OF COMMONS, STANDING COMMITTEE ON HEALTH, HEALTHY WEIGHTS FOR HEALTHY KIDS 22 (2007), available at <http://www2.parl.gc.ca/content/hoc/Committee/391/HESA/Reports/RP2795145/hesarp07/hesarp07-e.pdf> [hereinafter HEALTHY WEIGHTS].

8. Chris Mercer, *France Launches ‘Healthy’ Advert Rules*, DAIRYREPORTER.COM, Mar. 5, 2007, <http://www.dairyreporter.com/Industry-markets/France-launches-healthy-advert-rules>.

is not the occasion to elaborate on the constitutionality of these warnings, the *JTI-Macdonald* decision provides important bases for building a constitutional argument for food-related health warnings.<sup>9</sup> It illustrates how legally required warnings of the health hazards or low-nutritional value of some food products incorporated in the packages and corporate advertisements might be in accordance with the Charter.<sup>10</sup> Whereas nutrition-related health warnings can be viewed as an infringement on food companies' freedom of expression,<sup>11</sup> they might be constitutional under section 1 of the Charter if they meet the requirements of the *Oakes* test. As known, to justify an intrusion on free expression, the government must demonstrate that a statute or regulation associated with a form of counter-advertising, such as a health warning, meets the *Oakes* test.<sup>12</sup> The latter involves an evaluation of whether the objectives the statutory restrictions seek to promote or respond to represent pressing and substantial concerns in a democratic society. It should then be established whether the means chosen by the government are proportional to that objective. In determining the proportionality of the means, the court should follow three steps, namely:

[T]he restrictive measures chosen must be rationally connected to the objective, they must constitute a minimal impairment of the violated right or freedom and there must be proportionality both between the objective and the deleterious effects of the statutory restrictions and between the deleterious and salutary effects of those restrictions.<sup>13</sup>

Food-related health warnings to combat obesity in Canada have the potential of meeting the *Oakes* test requirements and may thus attract some regulatory attention in the near future.

In the event that food-related health warnings are used to reduce obesity and hunger in Canada, such warning requirements may conflict with trade agreements. The imposition of warnings may be viewed as a barrier to trade and thus be challenged on the grounds of breaching trade agreements. An attempt by

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9. *JTI-Macdonald*, [2007] 2 S.C.R. 610.

10. *Id.*

11. This criticism is expected to arise as some authors have held this view even with respect to more traditional restrictions on food advertising such as limitations on corporate health claims. See Elizabeth L. McNaughton & Christopher M. Goodridge, *The Canadian Approach to Freedom of Expression and the Regulation of Food and Drug Advertising*, 58 *FOOD & DRUG L.J.* 52 (2003).

12. *Guignard v. City of Saint-Hyacinthe*, [2002] 1 S.C.R. 472, 2002 SCC 14, ¶ 28 (Can).

13. *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, ¶ 38 (Can.); see *R. v. Oakes* [1986] 1 S.C.R. 103 (Can.); see also Richard Moon, *Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights*, 40 *OSGOODE HALL L.J.* 337, 345–46 (2002).

the government to impose health warnings or similar counter-advertising measures on food corporations is likely to affect American food investors. The latter may claim that such measures violate their property rights and breach the expropriation provisions of NAFTA. It is also important to note that similar NAFTA arguments can be made to challenge misleading advertising and trans-fat-banning regulations affecting a foreign food corporation. Therefore, an exploration of the merits of this potential NAFTA challenge to advertising regulation is very important. This is explored in the next section.

### III. CHAPTER 11 OF NAFTA AND DOMESTIC REGULATION OF ADVERTISING

Chapter 11 of NAFTA<sup>14</sup> guarantees a comprehensive protection of the investments of one party's investors in the territory of another. Chapter 11 applies to measures adopted or maintained by a party relating to investors of another party, investments of investors of another party in the territory of the party and, with respect to Articles 1106 and 1114, all investments in the territory of the party.<sup>15</sup> NAFTA defines "measure" in general as including "any law, regulation, procedure, requirement, or practice."<sup>16</sup> Article 1139 defines "investment" in broad terms that cover almost every type of direct or indirect financial interest (except certain claims to money) and encompass any enterprise and all forms of property.<sup>17</sup> For instance, investor's access to a market is a property interest subject to protection under Article 1110.<sup>18</sup> Market share may also be subject to such protection.<sup>19</sup>

Central to the protection of foreign investors in Chapter 11 is the prohibition of expropriation. Article 1110 of NAFTA sets out the protection against expropriation as follows:

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14. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

15. *Id.* art. 1101. *See* Canadian Cattlemen for Fair Trade v. United States, (2008) (explaining that the tribunal does not have jurisdiction to consider NAFTA claims where all of the claimants' investment are located in Canada and claimants do not seek to make, are not making or have not made any investment in USA), *available at* <http://www.state.gov/documents/organization/99954.pdf>.

16. NAFTA, *supra* note 14, art. 201. *See also* Ethyl Corp. v. Canada, 38 I.L.M. 708, 726 (NAFTA/UNCITRAL 1998).

17. NAFTA, *supra* note 14, art. 1139. *See also* Feldman v. Mexico, Case No. ARB(AF)/99/1 (ICSID (W. Bank) 2002).

18. *See* Pope & Talbot Inc. v. Canada, 40 I.L.M. 258, ¶ 96 (NAFTA Ch. 11 Arb. Trib. 2000).

19. *See* Methanex Corp. v. United States, 44 I.L.M. 1345, ¶ 17 (NAFTA/UNCITRAL Arb. Trib. 2005).

ARTICLE 1110: EXPROPRIATION AND COMPENSATION

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:
  - (a) for a public purpose;
  - (b) on a non-discriminatory basis;
  - (c) in accordance with due process of law and Article 1105(1); and
  - (d) on payment of compensation in accordance with paragraphs 2 through 6.
2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.<sup>20</sup>

Article 1110 thus creates an exception to the protection against expropriation. Some forms of expropriation may be permitted. A lawful expropriation must pursue a public purpose, be effected on a non-discriminatory basis, and be accomplished with due process of law and on payment of compensation.<sup>21</sup> To establish how this exception to expropriation affects the enactment and enforcement of domestic counter-advertising law, the first important step is to determine the scope of the concept of expropriation as set out in Article 1110.

Although the NAFTA agreement does not provide a detailed definition of expropriation, recent Chapter 11 jurisprudence has laid out some contours of the expropriation regime. While the protection against physical and direct expropriation seems clear, the concept of ‘a measure tantamount to expropriation,’ often referred to as regulatory expropriation or indirect expropriation, is not clearly set out. Recent tribunal decisions have shed some light in this respect. A

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20. NAFTA, *supra* note 14, art. 1110.

21. See RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 97 (1995) (noting that similar requirements are found in the relevant rules of international law).

measure tantamount to nationalization or expropriation in Article 1110 means nothing more than “a measure equivalent to nationalization or expropriation.”<sup>22</sup> In *Metalclad Corporation v. United Mexican States*,<sup>23</sup> a tribunal held that the denial of a construction permit by a Mexican municipal authority, on an unsubstantiated basis, amounted to an indirect expropriation. Likewise, an ecological decree setting aside an area, encompassing the one sought by that permit, as a reserve and thus preventing the land from being used as provided for in the agreement, was considered an act tantamount to expropriation.<sup>24</sup> On appeal, the Supreme Court of British Columbia, *inter alia*, upheld the tribunal’s decision that the ecological decree was an expropriation.<sup>25</sup> The court found that this ecological decree constituted a form of regulatory expropriation; in part, the Court relied on the tribunal’s finding that such decree barred forever the operation of the landfill.<sup>26</sup> Metalclad Corp. was an American investor in Mexico and the NAFTA tribunal awarded it nearly seventeen million dollars in compensation for regulatory expropriation.<sup>27</sup> The tribunal defined expropriation even in broader terms than the United States’ expansive property rights protection against governmental takings.<sup>28</sup> The *Metalclad* tribunal, summarizing the scope of Article 1110, defined expropriation as follows:

[E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.<sup>29</sup>

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22. *Pope & Talbot*, 40 I.L.M. ¶¶ 96, 104; *Feldman v. Mexico*, Case No. ARB(AF)/99/1, ¶ 100 (ICSID (W. Bank) 2002); *S.D. Myers, Inc. v. Canada*, 40 I.L.M. 1408, ¶¶ 285–86 (NAFTA/UNCITRAL 2000), available at <http://www.naftaclaims.com/Disputes/Canada/SDMyers/SDMyersMeritsAward.pdf>.

23. *Metalclad Corp. v. Mexico*, Case No. ARB(AF)/97/1, ¶ 107 (ICSID (W. Bank) 2000).

24. *Id.* ¶ 111.

25. *Mexico v. Metalclad Corp.*, [2001] 89 B.C.L.R.3d 359, 2001 BCSC 664 ¶¶ 100, 105 (Can.) [hereinafter *Metalclad II*].

26. *Id.*

27. *Metalclad*, Case No. ARB(AF)/97/1, ¶ 131.

28. John B. Fowles, *Swords into Plowshares: Softening the Edge of NAFTA’s Chapter 11 Regulatory Expropriations Provisions*, 36 CUMB. L. REV. 83, 85 (2006).

29. *Metalclad*, Case No. ARB(AF)/97/1, ¶ 103. See also *Waste Mgmt. Inc. v. Mexico*, Case No. ARB(AF)/98/2, ¶ 153 (ICSID (W. Bank) 2004) (referring to and quoting the *Metalclad* definition of expropriation). The Supreme Court of British Columbia also



This notion of expropriation contains an important definition of regulatory expropriation. The latter is defined as an interference with the *use* of property.<sup>30</sup> This is to be distinguished from the idea of *control* or *taking* of property that could alternatively define regulatory expropriation. Such interference with the use of property amounts to expropriation when foreign investors are unable to use or reap reasonable economic benefits of their property.<sup>31</sup> So, frustrating foreign investors' reasonable economic *expectations* is also an important consideration in establishing whether there exists an interference with the use of property and thus a regulatory expropriation. In sum, in the view of the *Metalclad* tribunal, a regulation that interferes with the use of foreign investors' property so that they cannot use it or reap expected benefits thereof may constitute a regulatory expropriation under Article 1110 of NAFTA. So defined, the concept of regulatory expropriation, characterized by a focus on the *use* of property and the *expectations* of foreign investors, broadens the protection granted to the latter. Investors will only need to prove that a regulation somehow interferes with the use of their property even without the occurrence of a taking, control or possession of that property.

Under the *use* concept of expropriation, a government regulation is more likely to become a regulatory expropriation because it is much easier for a regulation to be seen as interfering with the use of property rather than as controlling or possessing it. In contrast, a *control* standard of regulatory expropriation would narrow the protection conferred to investors and broaden the scope of lawful government regulation. Under the control standard, only a regulation that results in a loss of *control* or *possession* would constitute a regulatory expropriation, not just any interference with the *use* of property.

Other Chapter 11 tribunals have also held a similarly broad definition of expropriation. Some tribunals have held the view that the NAFTA expropriation provision was intended to have a broad meaning.<sup>32</sup> "[I]t is clear that the protection afforded by the prohibition against expropriation or equivalent treatment in Article 1110 can extend to intangible property interests . . . ."<sup>33</sup> In tandem with the expansive definition of investment and measure, all these tribunal decisions, notably *Metalclad*, appear to widen the scope of NAFTA protection granted to foreign investors.<sup>34</sup>

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asserted that the tribunal's broad definition of expropriation concerning Article 1110 was not a reviewable issue under Canadian law. See *Metalclad II*, [2001] 89 B.C.L.R.3d ¶ 99.

30. *Metalclad*, Case No. ARB(AF)/97/1, ¶ 103.

31. *Id.*

32. *Waste Mgmt., Inc.*, Case No. ARB(AF)/98/2, ¶ 144.

33. *Mondev Int'l Ltd. v. United States*, Case No. ARB(AF)/99/2, ¶ 98 (ICSID (W. Bank) 2002).

34. See *Metalclad*, Case No. ARB(AF)/97/1, ¶ 103.

However, in subsequent cases, Chapter 11 tribunals have curbed the extreme implications of the *Metalclad* definition of expropriation. In particular, the concept of “a measure tantamount to expropriation” as set out in Article 1110 of NAFTA has been defined conservatively by recent tribunal decisions. NAFTA tribunals have acknowledged a more expansive theory of both property and a “measure tantamount to expropriation” and thus an increased potential for state-party liability to foreign investors.<sup>35</sup> The tribunals have, nevertheless, interpreted Article 1110 in a somewhat conservative manner and simultaneously placed significant limitations on the scope of government regulations subject to that regime.<sup>36</sup> A measure tantamount to an expropriation involves no actual transfer, taking or loss of property, but rather an effect on property.<sup>37</sup> Measures that do not bring a clear benefit to the regulating government or others cannot constitute measures tantamount to expropriation. In *S.D. Myers, Inc. v. Government of Canada*,<sup>38</sup> a NAFTA tribunal dealt with a complaint by an American company against the orders of the Canadian government to ban the export of polychlorinated biphenyl (“PCB”)<sup>39</sup> out of Canada. After discussing the distinction between regulation and expropriation, the tribunal held that the temporary closure of the border to PCB transports could not be characterized as a measure tantamount to expropriation.<sup>40</sup> Canada realized no benefit from the measure and there was no evidence of a transfer of property or benefit directly to others.<sup>41</sup> In a departure from the *Metalclad*<sup>42</sup> decision, the *S.D. Myers* tribunal also expressed scepticism about whether a regulatory action could become a regulatory expropriation.<sup>43</sup>

The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of NAFTA, although the Tribunal does not rule out that possibility.

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35. Fowles, *supra* note 28, at 8.

36. Joel C. Beauvais, Note, *Regulatory Expropriations under NAFTA: Emerging Principles and Lingering Doubts*, 10 N.Y.U. ENVTL. L.J. 245, 248 (2002).

37. *Waste Mgmt.*, 43 I.L.M. ¶ 143.

38. *S.D. Myers, Inc. v. Canada*, 40 I.L.M. 1408 (NAFTA/UNCITRAL 2000).

39. PCB stands for polychlorinated biphenyl.

40. *S.D. Myers*, 40 I.L.M. ¶ 288.

41. *Id.* ¶ 287.

42. *See generally* *Metalclad Corp. v. Mexico*, Case No. ARB(AF)/97/1 (ICSID (W. Bank) 2000).

43. Some non-NAFTA tribunals have, however, rejected the *S.D. Myers* approach. *See* *Azurix Corp. v. Argentine Republic*, Case No. ARB/01/12, ¶ 261 (ICSID (W. Bank) 2006)), available at [http://www.worldbank.org/icsid/cases/pdf/ARB0112\\_Azurix-Award-en.pdf](http://www.worldbank.org/icsid/cases/pdf/ARB0112_Azurix-Award-en.pdf).

Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.<sup>44</sup>

The tribunal also stated that the phrase “tantamount to expropriation” was intended to cover the concept of “creeping expropriation,”<sup>45</sup> not to expand the definition of expropriation, which the tribunal defined as “a lasting removal of the ability of an owner to make use of its economic rights.”<sup>46</sup> This definition further reinforces the *use* standard of regulatory expropriation, whereby interference with an investor’s ability to make expected use of its property and thus reap the benefits of its investment is a central indicator of regulatory expropriation. Non-NAFTA decisions have also emphasized this *use* criterion to define regulatory expropriation.<sup>47</sup>

In contrast to the *use* standard, other NAFTA tribunals have adopted a narrow definition of regulatory expropriation that places greater emphasis on the loss of *control* over a property or enterprise. In *Pope & Talbot, Inc. v. Canada*,<sup>48</sup> an American company alleged that the government of Canada had engaged in expropriation by establishing a fee-quota system to limit the export of lumber to the United States from a Canadian province where that company operated. Finding no expropriation, the tribunal acknowledged that a regulatory “interference with the Investment’s ability to carry on its business” can be a taking, but only when “that interference is sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner.”<sup>49</sup> Such interference did not occur as the company remained in control of its investment, continued to direct the day-to-day operations, was free of government interference

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44. *S.D. Myers*, 40 I.L.M. ¶¶ 281–82.

45. *Id.* ¶ 286.

46. *Id.* ¶ 283.

47. *See, e.g.*, *Middle East Cement Shipping & Handling Co. v. Arab Republic of Egypt*, Case No. ARB/99/6, ¶ 107 (ICSID (W. Bank) 2002), (describing an “indirect taking” as “measures . . . taken by a State . . . which . . . deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights . . .”); *see also* *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (a taking occurs when regulation removes “all economically beneficial uses”).

48. *Pope & Talbot Inc. v. Canada*, 40 I.L.M. 258, ¶ 96 (NAFTA Ch. 11 Arb. Trib. 2000).

49. *Id.* ¶¶ 101–02; Justin R. Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law*, 16 J. TRANSNAT’L L. & POL’Y 275, 287 (2007).

with officers and employees, and continued to export and earn substantial profits.<sup>50</sup> Thus, under *Pope & Talbot*, a regulatory expropriation occurs when a regulation causes an almost direct physical taking.<sup>51</sup>

Similarly, in *Feldman v. Mexico*,<sup>52</sup> an American company alleged that the Mexican government provided rebates for exports undertaken by domestic cigarette producers, but denied rebates for exports by resellers of cigarettes. The American company was one of the resellers affected by the alleged discriminatory rebates.<sup>53</sup> The complainant claimed the denial of rebates resulted in an indirect expropriation of its investment and constituted measures tantamount to expropriation.<sup>54</sup> In holding that there was no expropriation, the tribunal asserted that a regulatory intervention may become expropriatory if it seriously affects the control of a company:

[T]he regulatory action (enforcement of long-standing provisions of Mexican law) has not deprived the Claimant of control of the investment, CEMSA, interfered directly in the internal operations of CEMSA or displaced the Claimant as the controlling shareholder. The Claimant is free to pursue other continuing lines of export trading, such as exporting alcoholic beverages, photographic suppliers, or other products for which he can obtain from Mexico the invoices required under Article 4, although he is effectively precluded from exporting cigarettes. Thus, this Tribunal believes there has been no “taking” under this standard articulated in *Pope & Talbot*, in the present case.<sup>55</sup>

More recently, in *Methanex v. United States*,<sup>56</sup> a Canadian firm alleged, *inter alia*, that California’s regulatory ban on the gasoline additive MTBE<sup>57</sup> was both discriminatory and tantamount to an expropriation since it prohibited the sales of the corporation’s product in California. Dismissing the case against the

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50. *Pope & Talbot*, 40 I.L.M. ¶ 100.

51. This *Pope & Talbot* notion of control has been followed by non-NAFTA tribunals. See *CMS Gas Transmission Co. v. Argentine Republic*, 44 I.L.M. 1205, ¶ 263, at 1234 (2005) (holding that the Argentinean Government did not manage the day-to-day operations of the company and the investor had full ownership and control of the investment).

52. *Feldman v. Mexico*, Case No. ARB(AF)/99/1, ¶ 100 (ICSID (W. Bank) 2002).

53. *Id.* ¶ 10.

54. *Id.* ¶¶ 1, 24.

55. *Id.* ¶ 152.

56. *Methanex Corp. v. United States*, 44 I.L.M. 1345 (NAFTA/UNCITRAL, Arb. Trib., 2005).

57. MTBE stands for methyl tertiary-butyl ether.

United States, the tribunal held that Methanex failed to establish that “the California ban manifested any of the features associated with expropriation.”<sup>58</sup> Following *Feldman v. Mexico*,<sup>59</sup> the *Methanex* tribunal reaffirmed the *control* standard of regulatory expropriation—that is to say, in order to be considered expropriatory, the regulatory action must deprive the claimant of control of his company, interfere directly in the internal operations, or displace the claimant as the controlling shareholder.<sup>60</sup> Recent non-NAFTA tribunal decisions have also held that expropriation cannot be found if the investor still has full ownership and control of its investment despite significant losses due to a State measure.<sup>61</sup>

In sum, this review of the NAFTA Chapter 11 jurisprudence indicates that the tribunals have adopted two alternative ideas of regulatory expropriation, namely the *use* and *control* criteria.<sup>62</sup> While the distinction between these two criteria may be purely semantic and a state acquisition of either *control* or *use* of property may constitute regulatory expropriation,<sup>63</sup> the presence of these two lines of jurisprudence may arguably provide some basis for developing two standards for establishing when a regulatory measure constitutes an expropriation.

While a regulation can be, in principle, expropriatory under either the *use* or *control* standard of regulatory expropriation, it may be a lawful regulation if it pursues the public interest. Pursuant to Article 1110, a regulatory measure that appears to be an expropriation but pursues a public purpose should be permitted under NAFTA expropriation provisions.<sup>64</sup> For instance, according to a literal reading of the article, a governmental regulatory measure aimed at protecting public health should be exempted and should not constitute a case of regulatory expropriation.<sup>65</sup> In *Methanex v. United States*,<sup>66</sup> the tribunal held that California’s

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58. *Methanex*, 44 I.L.M. at pt. IV, ¶ 16.

59. *Feldman*, Case No. ARB(AF)/99/1.

60. *Methanex*, 44 I.L.M. at pt. IV, ¶ 16.

61. *CMS Gas Transmission Co. v. Argentine Republic*, 44 I.L.M. 1205, ¶¶ 263, 264 (2005).

62. Marlles, *supra* note 49, at 292 (He argues the same: “It is the position of this analysis that control and use constitute two separate standards by which NAFTA regulatory expropriation can be determined and that each standard has a ‘continuum’ or spectrum on which government acts may be measured to determine if they are expropriations.”).

63. Newcombe, *supra* note 2, at 17 (making this claim on the basis of NAFTA and non-NAFTA authorities).

64. NAFTA, *supra* note 14, art. 1110 ¶ 1(a).

65. This interpretation of the NAFTA public purpose exception is also consistent with the recent trend in trade agreements that indicate that, except in rare circumstances, non-discriminatory regulatory actions aimed at protecting legitimate public welfare objectives, such as public health, do not constitute indirect expropriations. See *infra* note 97 (discussing the proportionality analysis for determining whether a regulation is a legitimate aim of the State, or whether it deprives a property owner of its rights).

66. *Methanex Corp. v. United States*, 44 I.L.M. 1345 (NAFTA/UNCITRAL, Arb. Trib., 2005).

law banning the gasoline additive MTBE “was made for a public purpose, was non-discriminatory and was accomplished with due process” and was thus “a lawful regulation and not an expropriation.”<sup>67</sup> This marked an important departure from the *Metalclad* decision.<sup>68</sup>

If a government had previously committed to not enacting a certain regulation, however, and an investor acted upon this commitment, the consequent adoption of such regulation would render it expropriatory. The tribunal reasoned that, as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and affects foreign investors, “is not deemed expropriatory and compensable unless specific commitment had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.”<sup>69</sup> It is also important to note that in *Methanex* the tribunal indicated that no compensation is due for a measure for the public purpose.<sup>70</sup> In sum, the *Methanex* tribunal confirmed a conservative and narrow approach to expropriation.

Thus, the *Methanex* decision corroborates that a non-discriminatory regulation for the public purpose that appears to be an expropriation but promotes the public interest does not constitute an expropriation under NAFTA Chapter 11.<sup>71</sup> Clearly, this illustrates the application of NAFTA Article 1110 in permitting expropriation for a public purpose. What constitutes “a public purpose” is still unclear, however. Defining the concept of public purpose is important for establishing whether a collision between trade and domestic regulation exists, whether a governmental measure is permitted under NAFTA, and the extent of the regulatory power of a Party’s government. Some provisions of Chapter 11 shed important light on a possible definition of public purpose. Article 1101 section 4 indicates that a government should not be prevented from providing public education and protecting public health, among other things:

4. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.<sup>72</sup>

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67. *Id.* at pt. IV, ¶ 15. The tribunal also ordered Methanex to pay approximately four million dollars in legal costs to the United States. *See id.* at pt. V, ¶ 13.

68. *Metalclad Corp. v. Mexico*, Case No. ARB(AF)/97/1 (ICSID (W. Bank) 2000).

69. *Methanex*, 44 I.L.M. at pt. IV, ¶ 7.

70. *Id.* at pt. IV, ¶¶ 7, 15, 18.

71. *Id.*

72. NAFTA, *supra* note 14, art. 1101 ¶ 4.

It must be noted, however, that while this NAFTA provision permits governments to provide essential public services, it largely limits or negates the public purpose exception to trade rules due to its NAFTA compatibility requirement.<sup>73</sup> The provision of public services must be consistent with NAFTA Chapter 11.<sup>74</sup> Specifically, public health policies must be consistent with Chapter 11 and such policies should conform to the objective of facilitating trade and granting significant protection to foreign investors.<sup>75</sup> In this framework, government discretion to introduce measures to protect public health is extremely limited and should not interfere with trade.

In addition to ascertaining the meaning of public purpose, such exception to the expropriation protection requires a clear understanding of how, specifically, a measure for a public purpose is to be balanced against the interest of foreign investors. This issue has been addressed in some detail by more recent NAFTA decisions. In *Fireman's Fund Insurance Co. v. Mexico*,<sup>76</sup> Fireman's Fund Insurance Company ("FFIC") claimed that the Government of Mexico expropriated the use and value of its investment, i.e. the fifty million U.S. dollars in debentures, in Grupo Financiero BanCrecer, S.A., and did so in a discriminatory and arbitrary manner, thereby violating Article 1110 of NAFTA. FFIC alleged that several measures that the Government of Mexico took to deal with the serious financial crisis that broke out in Mexico beginning in 1994 deprived it of its investment.<sup>77</sup> The tribunal rejected FFIC's claim of expropriation as the demonstrated loss of the claimant's investment did not satisfy the concept of expropriation as understood in NAFTA and in international law in general.<sup>78</sup> The tribunal concluded that:

FFIC undertook an investment that was risky both in terms of the economic conditions in Mexico at the time, and in terms of the specific financial institution that issued the Dollar Debentures that FFIC purchased. The NAFTA, like other free trade agreements and bilateral investment treaties, does not

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73. A similar claim has been made with respect to a comparable trade provision of TRIPS. Donald W. Zeigler, *International Trade Agreements Challenge Tobacco and Alcohol Control Policies*, 25 DRUG & ALCOHOL REV. 567, 575 (2006) (stating that "the health exception in TRIPS is largely negated by the qualification that public health and nutrition measures 'be consistent with the agreement'").

74. NAFTA, *supra* note 14, art. 1101 ¶ 4.

75. *Id.*

76. *Fireman's Fund Ins. Co. v. Mexico*, Case No. ARB(AF)/02/1 (ICSID (W. Bank) 2006), available at <http://ita.law.uvic.ca/documents/FiremansFinalAwardRedacted.pdf>.

77. *Id.* ¶¶ 5, 103.

78. *Id.* ¶ 218.

provide insurance against the kinds of risks that FFIC assumed . . . .<sup>79</sup>

To define the concept of expropriation, the *Fireman* tribunal reviewed NAFTA cases and customary international law in general and retained a number of elements.<sup>80</sup> Among them, many of the following factors attempt to close the perceived gaping loophole of a blanket exception for regulatory measures.<sup>81</sup>

(j) To distinguish between a compensable expropriation and a noncompensable regulation by a host State, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure.<sup>82</sup>

(k) The investor's reasonable "investment-backed expectations" may be a relevant factor whether (indirect) expropriation has occurred.<sup>83</sup>

Following the reasoning set out in some non-NAFTA cases,<sup>84</sup> the *Fireman* tribunal interestingly introduced the element of *proportionality* as one important criterion for determining a lawful expropriation and particularly a valid regulatory expropriation.<sup>85</sup> An analysis of the means and aims of governmental measures is extremely important for balancing the public interest and foreign

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79. *Id.*

80. *Id.* ¶ 176.

81. *Id.* ¶ 176 n.162.

82. *Id.* ¶ 176 (footnotes omitted). These requirements for a reasonable regulatory measure reflect generally accepted principles of international law concerning regulatory expropriation. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 712 cmt. g (1987) (suggesting that a 'reasonable' regulation must be at least bona fide, non-discriminatory, and within the scope of the state police power); *Sedco, Inc. v. Nat'l Iranian Oil Co.*, 10 Iran-U.S. Cl. Trib. Rep. 180, 195 n.15, 25 I.L.M. 629, 640 n.10 (1986) (Brower, J., concurring) (The state is not responsible for bona fide regulation that falls within the scope of a generally recognized police power.).

83. *Fireman's Fund*, Case No. ARB(AF)/02/1, ¶ 176.

84. See *Técnicas Medioambientales Tecmed S.A. v. Mexico*, Case No. ARB(AF)/00/2, ¶ 122 (ICSID (W. Bank) 2004) (adopting a proportionality analysis and noting that such analysis was used by the European Court of Human Rights). The *Fireman* tribunal, however, questioned whether it is a viable source for interpreting Article 1110 of the NAFTA. *Fireman's Fund*, Case No. ARB(AF)/02/1, ¶ 176 n.161.

85. *Id.* ¶ 176(j).



investors' interests in an expropriation context.<sup>86</sup> While the above factors along with the specific circumstances of each case provide guidance for determining legitimate regulations,<sup>87</sup> the *Fireman* tribunal neither explained, nor applied, the *proportionality* principle beyond the statement thereof. It would be important, for instance, to know whether a proportionality analysis includes an examination of alternative measures that are less intrusive of trade.

Pursuant to Article 1131(1) of NAFTA, tribunals must decide disputes in accordance with international law.<sup>88</sup> Consequently, customary international law, in particular non-NAFTA cases, constitutes persuasive authority and should inform the analysis of NAFTA expropriation provisions.<sup>89</sup> *Técnicas*

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86. See Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8:5 J. WORLD INV. & TRADE 717, 732 (2007) ("Once it is established that the expropriation is lawful, the next step should be the proportionality test. Its purpose is to weigh the public interest in the expropriation against the interest of the investor in the protection of its property.")

87. See also Jack Coe, Jr. & Noah Rubins, *Regulatory Expropriation and the Tecmed Case: Context and Contributions*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 597, 635 (Todd Weiler ed., 2005) (claiming that "the allure of [a] multi-factor, fact dependent balancing test remains powerful" as seen in the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES regarding regulatory expropriation).

88. See NAFTA, *supra* note 14, art. 1131 ¶ 1 ("A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.").

89. *Fireman's Fund Ins. Co. v. Mexico*, Case No. ARB(AF)/02/1 (ICSID (W. Bank) 2006), available at <http://ita.law.uvic.ca/documents/FiremansFinalAwardRedacted.pdf>. International law encompasses customary international law, international agreements and common general principles derived from major legal systems in the world. See RESTATEMENT (THIRD): FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) §§ 102, 103(2).

In determining whether a rule has become international law, substantial weight is accorded to (a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals; (c) the writings of scholars; [and] (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.

*Id.* § 103(2). The use of non-NAFTA cases pursuant to the applicability of international law also includes the decisions of the European Court of Human Rights. See *Mondev Int'l Ltd. v. United States*, Case No. ARB(AF)/99/2, ¶ 144 (ICSID (W. Bank) 2002). The tribunal, in dealing with a NAFTA claim, stated that the decisions of the ECHR concerning the immunity of certain state agencies before their own courts

*Medioambientales Tecmed S.A. v. Mexico*,<sup>90</sup> a non-NAFTA decision followed three years later by *Fireman*,<sup>91</sup> offers an important insight into the definition and application of the *proportionality* test in expropriation cases. Tecmed claimed that the government of Mexico's refusal to renew a permit to operate a landfill constituted an expropriation of its investment pursuant to Article 5(1) of the Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and Mexico, which includes measures tantamount to expropriation.<sup>92</sup> Mexico responded stating that the denial of the permit is a control measure in a highly regulated sector and one very closely linked to public interests.<sup>93</sup> The tribunal found that the non-renewal and its effects amounted to an expropriation and ordered the payment of compensation.<sup>94</sup>

The *Tecmed* tribunal held the view that, in addition to an analysis of the public interest purpose of regulation, an analysis of the *proportionality* of the regulatory measures is required in order to establish whether such measures are expropriatory.<sup>95</sup> Such an analysis involves an examination of "whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality."<sup>96</sup> The deference owed to the policy goals of the state and the

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emanate from a different region, and are not concerned, as article 1105(1) of NAFTA is concerned, specifically with investment protection. At most, they provide guidance by analogy as to the possible scope of NAFTA's guarantee of "treatment in accordance with international law, including fair and equitable treatment and full protection and security."

*Id.* Non-NAFTA tribunals have also interpreted the applicability of international law to include ECHR decisions. See *Técnicas Medioambientales Tecmed S.A. v. Mexico*, Case No. ARB(AF)/00/2, ¶ 122 (ICSID (W. Bank) 2004). It is desirable that NAFTA tribunals use non-NAFTA cases to contribute to jurisprudential consistency. See Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 73 (2002) (arguing that entirely ignoring international arbitration decisions "raises questions regarding whether there was a proper effort on the part of the deciding tribunal to place a judgment into the appropriate context" and "does not contribute to an organic growth of foreign investment law or to legal security based on jurisprudential consistency").

90. See generally *Técnicas Medioambientales Tecmed S.A. v. Mexico*, Case No. ARB(AF)/00/2, ¶ 122 (ICSID (W. Bank) 2004).

91. *Id.*

92. *Id.* ¶¶ 41, 115, 121.

93. *Id.* ¶ 46.

94. *Id.* ¶¶ 151, 201.

95. *Id.* ¶ 122.

96. *Tecmed*, Case No. ARB(AF)/00/2, ¶ 122.

actions taken to implement them does not prevent an examination of the reasonableness of such goals and actions with respect to the goals, the deprivation of economic rights and foreign investors' expectations:

122. . . . Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State in light of Article 5(1) of the Agreement to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not . . . .<sup>97</sup>

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97. The *Tecmed* tribunal also drew on a similar *proportionality* analysis adopted by the European Court of Human Rights. The ECHR articulated the *proportionality* principle as follows:

Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest," but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised . . . . The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden"

. . . .  
The Court considers that a measure must be both appropriate for achieving its aim and not disproportionate thereto.

James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) at 19-20 (1986), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695384&portal=hbk m&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. Other non-NAFTA tribunals have welcomed the proportionality test adopted in *Tecmed*. See, e.g., *Azurix Corp. v. Argentine Republic*, Case No. ARB/01/12, ¶ 261 (ICSID (W. Bank) 2006)), available at [http://www.worldbank.org/icsid/cases/pdf/ARB0112\\_Azurix-Award-en.pdf](http://www.worldbank.org/icsid/cases/pdf/ARB0112_Azurix-Award-en.pdf); *LG&E Energy Corp. v. Argentine Republic*, Case No. ARB/02/1 (ICSID (W. Bank) 2006).

Further, the *Tecmed* tribunal reasoned that foreign investors' inability to participate in the government's decision-making process<sup>98</sup> and the social and political circumstances that surround a regulatory decision<sup>99</sup> are also important factors in both assessing the *proportionality* of the measure and establishing unlawful expropriation. In particular, the tribunal suggests that an otherwise expropriatory regulation will not be categorized as expropriation where it is implemented as a proportional response to a serious urgent situation or social emergency.<sup>100</sup>

In sum, having established whether a measure is expropriatory, such a measure may be permitted under the exception to the protection against expropriation. That is to say, it may be lawful if it is for a public purpose, non-discriminatory, accomplished with due process of law, and usually made on payment of compensation.<sup>101</sup> Moreover, not only must a measure depriving an investor of his property interest pursue a legitimate public interest, but there must also be a reasonable relationship of *proportionality* between the means employed and the aim sought to be realized.<sup>102</sup>

Although the above decisions do not set binding precedents and the principles of *stare decisis* do not apply,<sup>103</sup> decisions such as *Methanex*,<sup>104</sup> *Fireman*,<sup>105</sup> and *Tecmed*<sup>106</sup> may become influential in narrowing the definition of expropriation and setting out the scope of a government's regulatory power under NAFTA. Chapter 11 tribunals often cite and follow previous decisions<sup>107</sup> and those decisions will probably inform future expropriation decisions. Such a conservative view of regulatory expropriation, as exemplified in the *Methanex* ruling, is consistent with the apparent trend in the general NAFTA jurisprudence that indicates that expropriation provisions are interpreted conservatively. Hence, no government has been forced to pay high compensation awards for broadly

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98. *Tecmed*, Case No. ARB(AF)/00/2, ¶ 122.

99. *Id.* ¶¶ 132–33.

100. See Coe & Rubins, *supra* note 87, at 656.

101. NAFTA, *supra* note 14, art. 1110, § 1.

102. *Tecmed*, Case No. ARB(AF)/00/2, ¶ 122.

103. NAFTA, *supra* note 14, art. 1136, § 1; Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 46 (2003).

104. *Methanex Corp. v. United States*, 44 I.L.M. 1345 (NAFTA/UNCITRAL Arb. Trib. 2005).

105. *Fireman's Fund Ins. Co. v. Mexico*, Case No. ARB(AF)/02/1 (ICSID (W. Bank) 2006), available at <http://ita.law.uvic.ca/documents/FiremansFinalAwardRedacted.pdf>.

106. *Técnicas Medioambientales Tecmed S.A. v. Mexico*, Case No. ARB(AF)/00/2, ¶ 122 (ICSID (W. Bank) 2004).

107. For instance, the tribunal in *Waste Management* cited *Metalclad* extensively. See *Waste Mgmt. Inc. v. Mexico*, Case No. ARB(AF)/98/2, ¶ 153 (ICSID (W. Bank) 2004).

understood regulatory expropriations. Only in one case, the *Metalclad* decision,<sup>108</sup> has a Chapter 11 arbitration tribunal awarded compensation for an expropriation claim under NAFTA.

The above interpretation of the NAFTA expropriation provision has important implications for establishing the legality of a domestic regulation of advertising affecting foreign investors. It may be argued that governmental regulatory measures involving the regulation of commercial transactions such as non-discriminatory advertising legislation for a public purpose and enacted in accordance with due process are unlikely to constitute expropriation in the future under the NAFTA expropriation regime. In particular, non-discriminatory counter-advertising legislation and regulations enacted in accordance with due process and aiming at protecting public health, such as legally imposed food warnings, should arguably be consistent with the NAFTA expropriation provisions and thus permitted under this trade agreement.<sup>109</sup> Pursuant to Article 1110, that proposition requires an analysis of whether health warning measures are expropriatory, permitted under the public purpose exception, non-discriminatory, accomplished with due process of law, and made on payment of compensation.

Food warning measures may be expropriatory. Counter-advertising measures, such as food-related health warnings, legally imposed on foreign food corporations can be deemed a measure tantamount to expropriation. While food warning measures are unlikely to be expropriatory under the *control* standard of regulatory expropriation, they may constitute an expropriation under the *use* standard. Legally imposed warnings affect food corporations' ability to profit from the use of their physical and intellectual property rights. Such measures limit the freedom of corporations to utilize the space and content of food advertising. This may result in a cost or economic loss and thereby make the access to the market more expensive. Warnings also discourage consumption of certain foods that in turn may cause a loss of market share<sup>110</sup> and customer base.

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108. *Metalclad Corp. v. Mexico*, Case No. ARB(AF)/97/1, ¶ 107 (ICSID (W. Bank) 2000).

109. Even extreme measures, such as banning commercial advertising, have been held consistent with trade agreements in other jurisdictions, especially when such measures were needed to protect public health. For example, the GATT tribunal declared that Thailand could ban tobacco advertising because it was non-discriminatory. Similarly, in 2004, the European Court ruled that although the French Loi Evin alcohol advertising ban constituted a restriction on services, it was justified to protect public health. See Zeigler, *supra* note 73 at 574; Press Release No. 56/04, Court of Justice of the European Communities, Judgment of the Court of Justice in Cases C-262/02 and C-429/02 (July 13, 2004), available at [http://curia.europa.eu/jcms/jcms/Jo2\\_16799/?annee=2004](http://curia.europa.eu/jcms/jcms/Jo2_16799/?annee=2004). Therefore, food-related health warnings introduced to promote public health should not attract major NAFTA challenges.

110. NAFTA tribunals have recognised that market share is an investment capable of supporting an expropriation claim under Article 1110 NAFTA. See *Pope & Talbot, Inc. v.*

This affects foreign investors' ability to profit from their investments as they see a reduced return on their capital investments made in developing a product and marketing it, an increased cost of capital, and a reduced value of their investments. All these can be considered investments in accordance with Article 1139 of NAFTA and, therefore, health warning measures could cause a detriment to such investments.

While food-related health warning measures may be expropriatory, Article 1110 permits such measures if they intend to serve a public purpose. As shown above, a public purpose includes the protection of public health.<sup>111</sup> As Article 1101 section 4 indicates, NAFTA's Chapter 11 does not, and should not, interfere with a government's ability to enact regulations that protect labor, public health, the environment,<sup>112</sup> and human rights.<sup>113</sup> On that basis, legally required health warnings on some food products can promote healthy eating and protect public health. Warnings inform and remind consumers of the health hazards<sup>114</sup> or the nutritional impact of consuming food products and may discourage the consumption of high-calorie, low-nutrient foods and beverages. As such, food warnings can clearly be part of the larger goal of promoting healthy eating and the health of Canadians in response to the obesity crisis and growing concern over hunger.<sup>115</sup> In fact, to fight obesity in Canada, the House of Commons' Standing Committee on Health has recently recommended "[i]mplement[ing] a mandatory, standardized, simple, front of package labelling requirement on pre-packaged foods for easy identification of nutritional value."<sup>116</sup> Elaborating on this recommendation, the Committee referred to examples of food warning systems such as the UK's traffic light approach and the Health Check™ developed by the Heart and Stroke Foundation of Canada.<sup>117</sup>

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Canada, 40 I.L.M. 258, ¶ 96 (NAFTA Ch. 11 Arb. Trib. 2000); *S.D. Myers, Inc. v. Canada*, 40 I.L.M. 1408, ¶ 281 (NAFTA/UNCITRAL 2000).

111. NAFTA, *supra* note 14, art. 1101, § 4.

112. NAFTA, *supra* note 14, art. 1114 (A Party is permitted to enact measures "it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns," provided that such measures are consistent with Chapter 11.).

113. Lawrence Herman, *The Methanex Case and the Future of NAFTA Chapter 11*, TRADE L. MEMO (Cassels Brock & Blackwell LLP, Toronto, Ont.) 2005, <http://www.casselsbrock.com/publicationdetail.asp?aid=829>.

114. *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, 2007 SCC 30, ¶ 134 (Can.).

115. The Supreme Court of Canada has applied similar reasoning to justify the constitutionality of the requirement of warnings of health hazards associated with tobacco consumption while recognizing that the protection of the health of Canadians is pressing and substantial. See *JTI-Macdonald*, [2007] 2 S.C.R. ¶ 134.

116. *Healthy Weights*, *supra* note 7, at 22.

117. *Id.*

Furthermore, health warnings are also important because they have the ability to correct the power differential between the expensive marketing campaigns of corporations and consumers' expressions and the public interest.<sup>118</sup> This ultimately enhances the diversity of views and the democratic nature of food choices. Warnings may then be particularly helpful for consumers who are in vulnerable situations, such as children<sup>119</sup> and low-income consumers, who are often the target of corporate food advertising. Thus, warnings about the nutritional value of food serve the public purpose of promoting public health and, hence, should be exempted from NAFTA expropriation provisions.<sup>120</sup>

In addition, health-warning measures must not be discriminatory. They must be imposed on all corporations engaged in food advertising and must not favor national food companies over foreign ones.<sup>121</sup> That measure should also be enacted in accordance with the due process of law. Following *Methanex*,<sup>122</sup> the payment of compensation should not be required as health warning measures seek to advance a public purpose, namely public health, and as such are not deemed expropriatory and compensable.<sup>123</sup> While this is a significant departure from previous decisions and may be controversial,<sup>124</sup> it has been widely argued that health legislation is an exception to the compensation rule.<sup>125</sup>

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118. This argument has also been made in the context of tobacco advertising. See *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199, ¶ 76 (Can.) (stating that “[t]he sophistication of the advertising campaigns employed by these corporations . . . undermines their claim to freedom of expression protection because it creates an enormous power differential between these companies and tobacco consumers in the ‘marketplace of ideas’”).

119. *Id.* (noting that “[t]he power differential between advertiser and consumer is even more pronounced with respect to children who, as this Court observed in *Irwin Toy*, at p. 987, are ‘particularly vulnerable to the techniques of seduction and manipulation abundant in advertising’”).

120. A similar conclusion has been reached with respect to nutrition labeling. Mandatory nutrition labeling regulations have been adopted worldwide and are widely believed to be consistent with trade agreements as such regulations can be justified by the legitimate objectives of consumer information and/or public health. In addition, the costs of adding a different label are probably less than the costs of bringing a trade dispute. See CORINNA HAWKES, WORLD HEALTH ORGANIZATION, NUTRITION LABELS AND HEALTH CLAIMS: THE GLOBAL REGULATORY ENVIRONMENT 54 (2004), available at <http://whqlibdoc.who.int/publications/2004/9241591714.pdf>.

121. A state measure will be discriminatory if it results in an actual injury to the alien with the intention to harm the aggrieved alien so as to favor national companies. DOLZER & STEVENS, *supra* note 17, at 62.

122. *Methanex Corp. v. United States*, 44 I.L.M. 1345 (NAFTA/UNCITRAL Arb. Trib. 2005).

123. *Id.* at pt. IV, ¶ 7.

124. For the view that compensation is nevertheless required, see *Feldman v. Mexico*, Case No. ARB(AF)/99/1, ¶ 98 (ICSID (W. Bank) 2002). Non-NAFTA decisions have also

In conclusion, non-discriminatory food warning regulations seeking to promote healthy eating and public health more generally should not constitute regulatory expropriation under NAFTA Chapter 11.<sup>126</sup> This interpretation also finds support in the increasingly common provisions of other trade agreements that explicitly indicate that, except in rare circumstances, non-discriminatory regulatory actions aiming at protecting legitimate public welfare objectives such as public health do not constitute indirect expropriations.<sup>127</sup>

It must be noticed that even if the above requirements are met, a Party's investor may successfully challenge a regulation if Canada's government makes a commitment to refrain from any regulatory intervention, including advertising regulation. A government's commitment to refrain from regulatory intervention can defeat a potential food-related health warning measure.<sup>128</sup> In *Methanex*, the tribunal held that the public purpose exception does not apply if "specific commitment had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from

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held the same. See, e.g., *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, Case No. ARB/96/1, ¶ 72 (ICSID (W. Bank) 2000) ("[W]here property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains."). This latter decision was cited with approval by the tribunal in *Tecmed. Técnicas Medioambientales Tecmed S.A. v. Mexico*, Case No. ARB(AF)/00/2, ¶ 121 (ICSID (W. Bank) 2004).

125. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 511–12 n.11 (6th ed. 2003); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 712 cmt. g; Lois B. Sohn & R.R. Baxter, *The Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* (1961), art. 10(5), reprinted in Lois B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 554 (1961) (proposing that state action to maintain public health is a non-compensable taking).

126. Some support for this general proposition can be found in the separate opinion of Arbitrator Schwarz in *S.D. Myers. S.D. Myers, Inc. v. Canada*, 40 I.L.M. 1408, ¶ 214 (NAFTA/UNCITRAL 2000) ("Looking at Article 1110 in context, it is not possible to see it as a generous invitation for tribunals to impose liability on governments that are engaged in the ordinary course of protecting health, safety, the environment and other public welfare concerns.").

127. These provisions also refer to the environment and public safety. See 2004 U.S. Model BIT, Annex B and subsequent Free Trade Agreements; Chile-United States Free Trade Agreement, June 6, 2003, 117 Stat. 909, Annex 10-D; Singapore-United States Free Trade Agreement, May 6, 2003, 117 Stat. 948. See also David Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States–Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 728, 745-56 (2004) (mentioning that an exchange of diplomatic letters could create a presumption against regulatory takings, potentially including the field of public health).

128. See also NAFTA, *supra* note 14, art. 1101 ¶ 4 (requiring that public health policies must be consistent with Chapter 11 and thus conform to the objective of facilitating trade and granting significant protection to foreign investors).



such regulation.”<sup>129</sup> Although this type of unanticipated regulation is more likely to be subject to a breach of contract action and not to an expropriation suit,<sup>130</sup> it brings back the consideration of foreign investors’ expectations in determining a regulatory expropriation that was raised in the *Metalclad*<sup>131</sup> and *Fireman*<sup>132</sup> decisions. Pursuant to *Methanex*,<sup>133</sup> where the regulating government has made representations regarding the state of regulation affecting investors’ investment, the disappointment of investors’ expectations associated with such representations may become a relevant factor. While intending to serve a public purpose, a regulation may then constitute an expropriation if it is inconsistent with representations and commitments previously made by the government to foreign investors.

It is important to note that, in general, the element of investors’ expectations is a widely accepted consideration in the analysis of regulatory expropriation claims. In tandem with the *Metalclad*, *Methanex*, and *Fireman* decisions, the BIT models of Canada and the United States now refer to the legitimate expectations of investors as one of the criteria that must be considered in determining whether an indirect expropriation has occurred.<sup>134</sup> It is, however, unclear whether investors’ expectations must be confined to specific assurances from the host government or be more broadly defined so as to simply require government actions to be outside the expectations that a reasonable investor would have held.<sup>135</sup>

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129. *Methanex Corp. v. United States*, 44 I.L.M. 1345, pt. IV, ¶ 7 (NAFTA/UNCITRAL Arb. Trib. 2005).

130. HOWARD MANN, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, THE FINAL DECISION IN METHANEX V. UNITED STATES: SOME NEW WINE IN SOME NEW BOTTLES 7–9 (2005), available at [http://www.iisd.org/pdf/2005/commentary\\_methanex.pdf](http://www.iisd.org/pdf/2005/commentary_methanex.pdf).

131. *Metalclad Corp. v. Mexico*, Case No. ARB(AF)/97/1 (ICSID (W. Bank) 2000).

132. *Fireman’s Fund Ins. Co. v. Mexico*, Case No. ARB(AF)/02/1 (ICSID (W. Bank) 2006), available at <http://ita.law.uvic.ca/documents/FiremansFinalAwardRedacted.pdf>.

133. *Methanex*, 144 I.L.M. 1345.

134. 2004 Canada Model BIT, Annex B.13(1) and 2004 U.S. Model BIT, Annex B. See also Dolzer, *Indirect Expropriations*, *supra* note 89, at 83 n.64; Alexei Barbuk, *The NAFTA Chapter 11 Arbitration and Protection of Legitimate Expectations*, OIL, GAS & ENERGY L. INTELLIGENCE, July 2004, at 1; Elizabeth Snodgrass, *Protecting Investor’s Legitimate Expectations: Recognizing and Delimiting a General Principle*, 21 ICSID REV., FOREIGN INVESTMENT L.J. 1 (2006).

135. For recent discussions of these different approaches to expectations, see Allan Ingelson & Lincoln Mitchell, *The Glamis Regulatory Takings Claim and Compensation under NAFTA*, 2 J. WORLD ENERGY L. & BUS. 68, 86 (2009); Jordan C. Kahn, *A Golden Opportunity for NAFTA*, 16 N.Y.U. ENVTL. L.J. 380 (2008).

#### IV. REGULATORY CHILL OF CHAPTER 11 AND HEALTHY EATING POLICIES IN INSTITUTIONAL CONTEXT

While NAFTA Chapter 11 provides foreign investors with a legal protection against arbitrary and capricious government action, it has also resulted in chilling legitimate public policy, that is to say, the uncertainty and unpredictability associated with the application of NAFTA Chapter 11 discourage regulatory intervention. The ambiguity of the Chapter 11 jurisprudence has added to the uncertainty already created by the lack of clear definition of expropriation in NAFTA. This has chilled regulatory intervention by a Party's government in the fear of a Chapter 11 lawsuit and the possibility of having to pay extremely expensive compensation. This regulatory chill has reinforced the distribution of legal powers in favor of foreign investors by protecting their property rights through NAFTA expropriation provisions. Nevertheless, the *Methanex*<sup>136</sup> decision has, to some extent, reduced the ambiguity and uncertainty associated with Chapter 11 of NAFTA and the definition of expropriation in particular. In *Methanex*, expropriation was narrowly defined and a regulatory intervention with a public purpose was not deemed expropriatory.<sup>137</sup>

However, recent NAFTA jurisprudence, including *Methanex*, has not fully solved the ambiguity and uncertainty associated with the NAFTA expropriation provisions. Our review of the NAFTA Chapter 11 jurisprudence indicates that the tribunals have adopted two non-binding alternative standards of regulatory expropriation, namely the *use* and *control* criteria, thereby increasing uncertainty and the chilling effects. Whereas under the *use* standard a measure may be deemed expropriatory if it interferes with the use and expected benefits of an investment, the *control* standard indicates that for a measure to constitute an expropriation an effect on the control, management, or ownership of investment must occur. While the distinction between these two criteria may be purely semantic and a state acquisition of either *control* or *use* of property may constitute regulatory expropriation,<sup>138</sup> it may be utilized as a ground for developing two artificial standards of regulatory expropriation. It is clear that the *control* or *use* standard essentially suggests that a regulatory expropriation occurs when a government measure has some form of significant negative effect on foreign investment. However, it might be argued, for instance, that whereas the *use* standard provides greater protection to foreign investors' investments and significantly limits the regulatory power of the government as a regulation would easily constitute an expropriation, the *control* standard narrows the protection

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136. *Methanex Corp. v. United States*, 44 I.L.M. 1345 (NAFTA/UNCITRAL Arb. Trib. 2005).

137. *Id.* at pt. IV, ¶¶ 7, 15, 18.

138. Newcombe, *supra* note 2, at 17 (making this claim on the basis of NAFTA and non-NAFTA authorities).

granted to foreign investors and broadens the scope of legitimate government regulation. These two standards may arguably serve as alternative criteria to determine whether, for instance, a domestic advertising regulation amounts to a regulatory expropriation. The possibility of making arguments for two alternative standards of regulatory expropriation illustrates the uncertainty that may arise from the inconsistency in NAFTA Chapter 11 jurisprudence.

Moreover, the divergent treatment of the public purpose exception in the NAFTA Chapter 11 jurisprudence creates more uncertainty. In *Metalclad*, not only was regulatory expropriation broadly defined, thereby limiting government regulation, but the public purpose was also not a determinant factor in establishing a regulatory expropriation.<sup>139</sup> Instead, the significant negative effects on foreign investment were the critical considerations.<sup>140</sup> Non-NAFTA tribunal decisions have also adopted the same “sole effects” approach,<sup>141</sup> that is to say, the presence of substantial negative effects on investment is the determinant factor in finding regulatory expropriation regardless of the purpose or motive of the measure.<sup>142</sup> It is obvious that this “sole effects” doctrine favors the interest of investors over considerations of public interest, thereby chilling government regulation and public policy. By contrast, in *Methanex*, the public purpose behind the regulatory measure trumped all, making the regulation a lawful one and thus permitted under NAFTA.<sup>143</sup> The needs of the host state were paramount and the public purpose

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139. *Metalclad Corp. v. Mexico*, Case No. ARB(AF)/97/1, ¶ 111 (ICSID (W. Bank) 2000) (finding that the decree creating an ecological preserve was expropriatory in violation of Art. 1110 of NAFTA, the tribunal stated that “the Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree . . . [h]owever, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation.”).

140. *Id.*

141. See *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, Case No. ARB/97/3 (ICSID (W. Bank) 2007), available at <http://ita.law.uvic.ca/documents/VivendiAwardEnglish.pdf> [hereinafter *Vivendi*]; *S. Pac. Props. (Middle East) Ltd. v. Egypt*, Case No. ARB/84/3 (ICSID (W. Bank) 1992); *Biloune v. Ghana Investments Centre*, Award, 27 October 1989, 95 I.L.R. 183 (UNCITRAL); *Phelps Dodge Int’l Corp. v. Iran*, 10 Iran-US CTR 157 (1986); *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Eng’rs of Iran*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225–26 (1984) (“The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.”). The *Metalclad* decision, along with other non-NAFTA decisions, has given rise to a line of jurisprudence termed the ‘sole effects’ doctrine. See Dolzer, *Indirect Expropriations*, *supra* note 89, at 83 n.64.

142. Rudolf Dolzer & Felix Bloch, *Indirect Expropriation: Conceptual Realignment?*, 5 INT’L L. FORUM DU DROIT INT’L 155, 158 (2003) (outlining the sole-effects and police-power doctrines).

143. *Methanex Corp. v. United States*, 44 I.L.M. 1345, pt IV, ¶ 15 (NAFTA/UNCITRAL Arb. Trib. 2005).

was decisive, finding no expropriation and no obligation to compensate.<sup>144</sup> Outside NAFTA, other investment tribunals have taken the same “police powers” approach.<sup>145</sup> This enables governments to regulate for the public interest, but, at the same time, immunizes government regulations regardless of their consequences as most regulatory measures can arguably fall under the category of public purpose. As a result, indirect expropriation provisions may become practically ineffective.<sup>146</sup> A moderate version of the “police powers” approach adopted in *Methanex* can be found in *S.D. Myers*<sup>147</sup> and *Feldman*.<sup>148</sup> In these cases, the purpose and effects of the measure were relevant in the analysis of regulatory expropriation.<sup>149</sup> In *Tecmed*, a non-NAFTA decision, the tribunal also took into account the purpose and effects of the regulatory interference and more importantly used a proportionality test to balance them.<sup>150</sup> These different conclusions of the tribunals clearly create greater uncertainty regarding the outcome of a regulatory takings claim under NAFTA.<sup>151</sup>

Similarly, the concept of *public purpose* as an exception to expropriation is still problematic as it can be broadly or narrowly defined which, in turn, will determine the extent of the regulatory power of Canada’s government. In particular, while the public purpose includes the protection of public health, it is not quite clear what test should be applied to resolve the collision between

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144. *Id.*

145. *See, e.g.*, *Saluka Investments BV. v. Czech Republic*, Partial Award, (Perm. Ct. Arb./UNCITRAL March 17, 2006), <http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf> (holding that States are not liable to pay compensation when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner, bona fide regulations that are aimed at general welfare); *Sedco, Inc. v. National Iranian Oil Co.*, 10 Iran-U.S. Cl. Trib. Rep. 180, 25 I.L.M. 629 (1986) (explaining that the state is not responsible for bona fide regulation that falls within the scope of a generally recognized police power).

146. *Vivendi, supra* note 141, ¶ 7.5.21. (“If public purpose automatically immunizes a measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose.”). *See also* Kriebaum, *Regulatory Takings, supra* note 86, at 717, 727.

147. *S.D. Myers, Inc. v. Canada*, 40 I.L.M. 1408, ¶ 285 (NAFTA/UNCITRAL 2000) (holding that the tribunal “must look at the real interests involved and the purpose and effect of the government measure”).

148. *Feldman v. Mexico*, Case No. ARB(AF)/99/1, ¶ 98 (ICSID (W. Bank) 2002) (“If there is a finding of expropriation, compensation is required, *even if* the taking is for a public purpose, non-discriminatory and in accordance with due process of law and Article 1105(1).”) (emphasis in original).

149. *See supra* notes 147, 148.

150. *Técnicas Medioambientales Tecmed S.A. v. Mexico*, Case No. ARB(AF)/00/2, ¶ 122 (ICSID (W. Bank) 2004).

151. *See, e.g.*, *Ingelson & Mitchell, supra* note 135, at 85–86 (referring to the uncertainty arising from the different views in *Metalclad* and *Methanex*).

advertising regulation aiming at promoting public health and expropriation. This is important because, even if there is a legitimate public health objective, lawmakers or regulators can act in a manner that is arbitrary and disproportional. On the other hand, foreign investors may question the public health content of a regulatory measure or its effectiveness in advancing a public health objective. In the *Methanex* decision, the NAFTA tribunal did not elaborate on a more specific test or rule on what may guide the resolution of such collision.<sup>152</sup> This reveals an important gap in NAFTA, namely, the lack of a provision that clearly prescribes how private interest and public policy are to be balanced.<sup>153</sup> All of this increases uncertainty and the possibility of a lawsuit, which is likely to chill regulatory action by the government.<sup>154</sup>

True, *Fireman* and *Tecmed* have suggested the use of a *proportionality* analysis to balance public interest regulation and the protection against expropriation.<sup>155</sup> In *Tecmed*, the tribunal stated that there must be a “reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.”<sup>156</sup> Under this *proportionality* principle, a regulation that would otherwise constitute a regulatory expropriation will not be considered expropriatory if it is a proportional response to a legitimate public concern.<sup>157</sup>

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152. In an even more recent and relevant case, a NAFTA tribunal, dealing with allegations of the United States’ unfair banning of Canadian cattle, beef, beef-based products, and animal feed, declined to rule on the matter due to lack of jurisdiction. *Canadian Cattlemen for Fair Trade v. United States*, Award on Jurisdiction (NAFTA/UNCITRAL 2008), <http://www.state.gov/documents/organization/99954.pdf> (holding that the tribunal does not have jurisdiction to consider NAFTA claims where all of the claimants’ investment are located in Canada and claimants do not seek to make, are not making or have not made any investment in the United States).

153. Chris Tollefson, *NAFTA’s Chapter 11: The Case for Reform*, in SUSTAINABILITY, CIVIL SOCIETY AND INTERNATIONAL GOVERNANCE: LOCAL, NORTH AMERICAN AND GLOBAL CONTRIBUTIONS 179 (John J. Kirton & Peter I. Hajnal, eds., 2006).

154. This specific analysis of the loopholes of the NAFTA expropriation provisions and their chilling effects contrasts with more general and optimistic claims that expropriation suits do not chill government regulation. For this latter argument, see Coe & Rubins, *supra* note 87, at 599 (claiming that expropriation claims “prompt reflection and careful tailoring of means to ends” and not “the abandonment of legislation” and that governments might “expect victory” in light of the fact that expropriation claims often fail and only one NAFTA Chapter 11 case has yielded recovery).

155. *Fireman’s Fund Ins. Co. v. Mexico*, Case No. ARB(AF)/02/1, ¶ 176(j) (ICSID (W. Bank) 2006), available at <http://ita.law.uvic.ca/documents/FiremansFinalAwardRedacted.pdf>; *Técnicas Medioambientales Tecmed S.A. v. Mexico*, Case No. ARB(AF)/00/2, ¶ 122 (ICSID (W. Bank) 2004).

156. *Tecmed*, Case No. ARB(AF)/00/2, ¶ 122.

157. See Coe & Rubins, *supra* note 87, at 664.

However, this *proportionality* test has not been elaborated with sufficient detail, neither has it been applied clearly. It does not provide specific guidance on when a government measure may be a legitimate, not excessive, or proportional exercise of state police power in light of the public interest at stake.<sup>158</sup> It is unclear whether such an analysis involves, for instance, an evaluation of the effectiveness of the chosen means and the existence of less-intrusive alternatives.<sup>159</sup> Moreover, the standard of proof that may be used to prove, for instance, the effectiveness or superiority of a regulatory measure is not clearly determined. The lack of clarity on this evidentiary aspect may distort the sound application of the *proportionality* test. Whereas a stringent standard of proof may deter state regulation as governments may find it too difficult to justify a regulatory measure, a lax standard may facilitate arbitrary regulation. Similarly, the *proportionality* test leads to an “all or nothing” situation with regards to the economic consequences of an interference.<sup>160</sup> If a measure is deemed disproportionate, and thus expropriatory, the State has to pay full compensation. Conversely, if it is found that there is no expropriation, the investor receives no compensation and has to bear the economic consequence of the measure. Either the State or foreign investors, not both, bear the cost of a measure for a public interest.<sup>161</sup>

Needless to say, these gaps in the *proportionality* principle bring important complications for determining and implementing legitimate public policies. For instance, the potential need for the government to defend the rational connection and the unavailability of a less intrusive alternative may, in itself, discourage the enactment of food-related health warning measures. This may be a particularly difficult task as there may always be alternative measures and it can thus be challenging to prove conclusively the necessity of food warnings to

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158. Newcombe, *supra* note 2, at 15.

159. Note that in *Methanex*, the claimant unsuccessfully claimed that the government failed to consider less restrictive alternative measures to mitigate the effects of gasoline releases into the environment. The *Methanex* tribunal did not require the use of less restrictive measures. See *Methanex Corp. v. United States*, 44 I.L.M. 1345 (NAFTA/UNCITRAL Arb. Trib. 2005). Only in *S.D. Myers* did the tribunal apply a least-restrictive means test; however, it was in the context of a national treatment analysis. See *S.D. Myers, Inc. v. Canada*, 40 I.L.M. 1408, ¶ 255 (NAFTA/UNCITRAL 2000) (“The indirect motive was understandable, but the method contravened CANADA’s international commitments under the NAFTA. CANADA’s right to source all government requirements and to grant subsidies to the Canadian industry are but two examples of legitimate alternative measures.”).

160. See Kriebaum, *supra* note 86, at 729.

161. *Id.*

protect public health.<sup>162</sup> NAFTA Article 1101, section 4 would reinforce that difficulty as it indicates that public health policies must be consistent with Chapter 11, suggesting that such policies should conform to the objective of facilitating trade and granting significant protection to foreign investors.<sup>163</sup> From this standpoint, the government might be better off and the public interest better served without a *proportionality* test as an analysis of alternative measures would not be required as exemplified in the *Methanex* decision.<sup>164</sup> This would not completely eliminate the regulatory chill, however, because the threat of a NAFTA lawsuit and the possibility of unfavorable decision with the consequence of paying expensive compensation would still exist.

The problems with the *proportionality* test show that there is still significant uncertainty and confusion as to how to balance foreign investors' interest, state regulation, and public policy. Ultimately, an underdeveloped *proportionality* test, as currently articulated by the tribunals, may chill new regulatory measures seeking to promote the public interest such as food health warning measures. Future NAFTA decisions should attempt to resolve those problems in a consistent manner.<sup>165</sup>

The resolution of the above problems with the *proportionality* test may, however, be a challenging task for a private arbitration tribunal. This is not surprising as arbitration tribunals<sup>166</sup> are often more adept at resolving private commercial disputes and are not well equipped to handle major public policy issues that arise from Chapter 11 cases.<sup>167</sup> This may explain why arbitrators often

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162. For instance, this problem has occurred with the health exception to trade rules set out in Article XX of the GATT rendering it an ineffective exclusion. Zeigler, *supra* note 54, at 575.

163. NAFTA, *supra* note 14, art. 1101, § 4. See also Zeigler, *supra* note 73.

164. *Methanex Corp. v. United States*, 44 I.L.M. 1345, pt. IV, ¶ 15 (NAFTA/UNCITRAL Arb. Trib. 2005).

165. See Newcombe, *supra* note 2, at 6 (demonstrating the argument that international expropriation law should not attempt to find an optimal balance between state interests and private property protection, but should be left to domestic law).

166. NAFTA, *supra* note 14, arts. 1120, 1122 (explaining that NAFTA member states consented to arbitration either through the International Center for Investment Disputes (ICSID) or UNCITRAL; it is up to the initiating party to choose one of these tribunals).

167. Kara Dougherty, *Methanex v. United States: The Realignment of NAFTA Chapter 11 with Environmental Regulation*, 27 NW. J. INT'L L. & BUS. 735, 751 (2007); Chris Tollefson, *Games without Frontiers: Investor Claims and Citizen Submissions under the NAFTA Regime*, 27 (1) YALE J. INT'L L., 141 (2002); see also Ryan Suda, *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization* (NYU Law, Global Law Working Paper No. 01, 2005), available at [http://www.law.nyu.edu/global/workingpapers/2005/ECM\\_DLX\\_015787](http://www.law.nyu.edu/global/workingpapers/2005/ECM_DLX_015787); DOLZER & STEVENS, *supra* note 21, at 17.

appear to favor the protection of foreign investment over public policy,<sup>168</sup> which further reinforces the fragmentation of the NAFTA agreement. The absence of a proportionality-like reasoning in the *Methanex* case<sup>169</sup> might attest to the difficulty that these tribunals have dealing with the public interest when applying NAFTA expropriation provisions. Yet, Chapter 11 tribunals' decisions are not subject to judicial review on their merits by Canadian courts.<sup>170</sup> Tribunals are not even bound by official interpretative statements offered by the NAFTA Free Trade Commission as to the meaning of investment provisions.<sup>171</sup> With no prospect of a judicial review, there is increased risk for the government as well as less public accountability of NAFTA tribunals, which are heightened by the lack of public access to any part of the arbitration process. It is thus highly problematic to expect that tribunals will handle the balancing of private interest and public policy very well.

Further, uncertainty exists with respect to the compensation obligation for measures deemed expropriatory. The *Methanex* tribunal indicated that a measure for the public purpose is not compensable.<sup>172</sup> This is a significant departure from previous NAFTA decisions, such as *Feldman v. Mexico*, and non-NAFTA decisions,<sup>173</sup> and may be controversial.<sup>174</sup> Most state regulations can

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168. SORNARAJAH, *supra* note 2, at 125 (“Arbitration tribunals, which usually accentuate the interests of foreign investors over those of the environment, are prone to decide in favor of investment protection.”).

169. *Methanex*, 44 I.L.M. at pt. IV, ¶ 15.

170. NAFTA, *supra* note 14, arts. 201 ¶ 2, 1136 ¶ 6. Although domestic courts are not allowed to review tribunals' application of the law, they can only set aside NAFTA tribunal decisions that went beyond the scope of its jurisdiction. *See Mexico v. Metalclad Corp.*, [2001] 89 B.C.L.R.3d 359, 2001 BCSC 664 ¶¶ 67, 99 (Can.) (to the British Columbia Supreme Court, acting as the appeal court, the issue was “whether the Tribunal made decisions on matters beyond the scope of the submission to arbitration by deciding upon matters outside Chapter 11”); *see also* INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA'S CONTROVERSIAL CHAPTER ON INVESTOR RIGHTS 41 (2001), available at [http://www.iisd.org/pdf/trade\\_citizensguide.pdf](http://www.iisd.org/pdf/trade_citizensguide.pdf); Julie Soloway, *NAFTA's Chapter 11: Investor Protection, Integration, and the Public Interest*, in SUSTAINABILITY, CIVIL SOCIETY AND INTERNATIONAL GOVERNANCE, *supra* note 153, at 137, 140 (“[A] domestic court will not be entitled to review a decision on its merits, but rather, it may only rule on the much narrower legal question of whether the tribunal exceeded its jurisdiction in any way.”).

171. *Pope & Talbot Inc. v. Canada*, 40 I.L.M. 258, ¶ 23 (NAFTA Ch. 11 Arb. Trib. 2000) (interpreting Article 1105 to mean that it is not bound to “accept . . . whatever the Commission has stated to be an interpretation”). *Contra* NAFTA, *supra* note 14, art. 1131 ¶ 2 (“An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.”).

172. *Methanex*, 44 I.L.M. at pt. IV, ¶¶ 7, 15, 18.

173. *See, e.g.,* *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, Case No ARB/96/1, ¶ 192 (ICSID (W. Bank) 2000) (holding that compensation is nevertheless



arguably fall within the category of public purpose and may thus be deemed non-compensable. As a result, the *Methanex* approach may deprive the compensation obligation of its practical force, thereby rendering NAFTA Chapter 11 ineffective in providing real protection to foreign investment.<sup>175</sup> On the other hand, non-discriminatory local bylaws, taxation measures, and environmental laws that reduce a property's value do not normally create a right to compensation unless such measures render the property entirely devoid of value.<sup>176</sup> Otherwise, it would be impossible for governments to carry out their legitimate functions and domestic sovereignty could be undermined.<sup>177</sup> More specifically, the *Methanex* approach to compensation<sup>178</sup> appears to be on more solid ground when it comes to deal with regulatory measures for the protection of fundamental public interests such as public health. Indeed, it has been widely argued that health legislation is an exception to the compensation rule.<sup>179</sup> These diverging views on the compensation obligation<sup>180</sup> further increase the level of uncertainty and the risk for governments to pay expensive compensations, which may eventually chill public policies.

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required even if the taking is for the public purpose of protecting the environment); *S. Pac. Props. (Middle East) Ltd. v. Egypt*, Case No. ARB/84/3 (ICSID (W. Bank) 1992); *Phelps Dodge Int'l Corp. v. Iran*, 10 Iran-US CTR 157 (1986).

174. For the view that compensation is nevertheless required, see *Feldman v. Mexico*, Case No. ARB(AF)/99/1, ¶ 98 (ICSID (W. Bank) 2002). Non-NAFTA decisions have held similarly. See, e.g., *Compañía del Desarrollo*, Case No. ARB/96/1, ¶ 192 (“[W]here property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.”). This latter decision was cited with approval by *Tecmed. Técnicas Medioambientales Tecmed S.A. v. Mexico*, Case No. ARB(AF)/00/2, ¶ 122 (ICSID (W. Bank) 2004); see also Joseph A. Strazzeri, Note, *A Lucas Analysis of Regulatory Expropriations Under NAFTA Chapter Eleven*, 14 GEO. INT’L ENVTL. L. REV. 837, 854 (2002) (arguing that the “plain meaning” of Article 1110 indicates that compensation must be paid in all cases).

175. See *Coe & Rubins*, *supra* note 87, at 639–40 (discussing generally the police power exception to the compensation rule).

176. Tollefson, *supra* note 167, at 159–60.

177. JOHN R. JOHNSON, INTERNATIONAL TRADE LAW 224 (1998); SORNARAJAH, *supra* note 2, at 299–300.

178. *Methanex Corp. v. United States*, 44 I.L.M. 1345, ¶¶ 7, 15, 18 (NAFTA/UNCITRAL Arb. Trib. 2005).

179. See, e.g., BROWNIE, *supra* note 125, at 511–12; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. g (1987); Sohn & Baxter, *supra* note 125 (state action to maintain public health is a non-compensable taking.).

180. These inconsistencies further confirm that the standards for determining the measure of compensation for international regulatory takings are extremely underdeveloped. See Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110 (2002) (noting this problem in regards to NAFTA Chapter 11).

To make matters worse, NAFTA tribunal decisions such as *Metalclad*, *Methanex*, *Feldman*, and *Fireman*, including the holdings on the public purpose exception, the *proportionality* principle, and the compensation obligation, are not binding as there is no *stare decisis* among NAFTA tribunals.<sup>181</sup> This lack of binding precedent certainly decreases the reliance that can be placed on previous tribunal decisions and NAFTA tribunals may thus depart from them in the future.<sup>182</sup> Howard Mann argued that, “[j]ust as the Methanex Tribunal rejected the Metalclad approach, so can any future Tribunal reject the Methanex approach.”<sup>183</sup> This is particularly likely given the obligation to interpret the expropriation provisions in light of the overriding objective of NAFTA to eliminate barriers to trade.<sup>184</sup> In addition, foreign investors are also free to choose any tribunal ruling that is most amenable to their claims.<sup>185</sup> Concerning regulatory areas such as advertising, investment tribunals have not yet offered specific guidance. While addressing the issue of regulatory expropriation, the *Methanex*

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181. NAFTA, *supra* note 14, art. 1136; *Fireman’s Fund Ins. Co. v. Mexico*, Case No. ARB(AF)/02/1, ¶ 172 (ICSID (W. Bank) 2006) (“It is true that arbitral awards do not constitute binding precedent.”); Statute of the International Court of Justice, arts. 38–39, June 26, 1945, 59 Stat. 1055, 1060–61; *see also* Jessica C. Lawrence, *Chicken Little Revisited: NAFTA Regulatory Expropriations after Methanex*, 41 GA. L. REV. 261, 309 (2006) (“The doomsday predictions of anti-NAFTA ‘Chicken Littles’ fortunately failed to materialize in *Methanex*. Nevertheless, the lack of *stare decisis* among NAFTA tribunals means that this victory should not—indeed cannot—be regarded as finally resolving the problem of how to interpret the expropriations clause.”); Judith Wallace, *Corporate Nationality, Investment Protection Agreements, and Challenges to Domestic Natural Resource Law: The Implications of Glamis Gold’s NAFTA Chapter 11 Claim*, 17 GEO. INT’L ENVTL. L. REV. 365, 382 (2005).

182. *See, e.g.*, *Pope & Talbot Inc. v. Canada*, 40 I.L.M. 258 (NAFTA Ch. 11 Arb. Trib. 2000) (declining to follow prior ruling).

183. MANN, *supra* note 130, at 7.

184. Article 102 of NAFTA reads as follows:

Article 102: Objectives

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:

a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;

.....

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

NAFTA, *supra* note 14, art. 102.

185. Dougherty, *supra* note 167, at 750.

decision<sup>186</sup> is not a specific pronouncement related to advertising regulation as a potential form of expropriation. All of the above undermines the authoritative value of previous tribunal decisions and worsens the level of uncertainty concerning what approach should be adopted to resolve regulatory expropriation claims.

The above loopholes in the legal framework overall create a significant degree of uncertainty and unpredictability for public regulators as well as Parties' investors.<sup>187</sup> It will be difficult for governments to anticipate future challenges to proposed regulations. This, coupled with the fear of a NAFTA lawsuit and the possibility of paying expensive compensations, will discourage regulatory intervention.<sup>188</sup> While this may serve to constrain capricious, excessive, or

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186. *Methanex Corp. v. United States*, 44 I.L.M. 1345 (NAFTA/UNCITRAL Arb. Trib. 2005).

187. This brings back the uncertainty problem that arose in the past from the lack of clear definition of expropriation. For this latter point, see Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30 (2003).

188. Our argument confirms earlier claims that NAFTA Chapter 11 chills government regulation although most of these studies do not take an institutional approach to the issue. See Stephen J. Byrnes, *Balancing Investor Rights and Environmental Protection in Investor-state Dispute Settlement under CAFTA: Lessons from the NAFTA Legitimacy Crisis*, 8 U.C. DAVIS BUS. L.J. 103 (2007). Byrnes concluded that:

[O]ne negative result of the arbitral jurisprudence under NAFTA is the fear that investor challenges against non-discriminatory environmental regulations enacted by participating governments may lead to a "regulatory chill." Critics of NAFTA warn that arbitral awards like that rendered in *Metalclad v. United Mexican States* might inhibit protection of the public and the environment for fear of potential liability in excess of millions of dollars under NAFTA arbitrations.

*Id.* ¶ 61; see also Tollefson, *supra* note 153, at 178, 180, 185 ("[I]t is highly uncertain whether in any given case legitimate, non-discriminatory environmental or public health measures will survive a Chapter 11 challenge."); Lawrence, *supra* note 181, at 295 (noting that given "the *Methanex* tribunal's ultimate failure to put such concerns to rest, the criticisms of NAFTA opponents still carry a great deal of weight and must be addressed if the agreement is to survive"); Marc R. Poirier, *The NAFTA Chapter 11 Debate Through the Eyes of a Property Theorist*, 33 ENVTL. L. 851, 852–53 (2003) (asserting that certain provisions of NAFTA's Chapter 11 "are being invoked broadly to attack perfectly standard exercises of the police power that purport to protect public health, safety, welfare, and the environment"); Been & Beauvais, *supra* note 187, at 132–35; MANN, *supra* note 170; U.N. Conference on Trade and Dev., *World Investment Report 2003*, at 112, U.N. Doc. UNCTAD/WIR/2003 (July 2003) (noting that "if regulatory measures give rise to compensation . . . a duty to compensate might inhibit a host country from enforcing its laws or from complying with international environmental agreements"); Global Exchange, *The*

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*Dangerous Expansion of Corporate Rights over Citizen Rights through CAFTA*, <http://www.globalexchange.org/campaigns/cafta/Investment.htm> (Oct. 27, 2007) (“These powerful NAFTA challenges to public interest regulations not only impact the specific laws they challenge, but they also have a chilling effect of deterring lawmakers from enacting future laws to protect the public.”).

Critics have argued that the regulatory chill problem does not exist and NAFTA Chapter 11 has only punished arbitrary government action. These views, however, do not provide a detailed account of the inconsistencies of NAFTA Chapter 11 jurisprudence to date; underestimate the effects of Chapter 11 on the pre-litigation stage, that is, threats of lawsuit, negotiations and settlements; and pay little attention to the ways Chapter 11 interplays with political and business strategies to constrain regulation in the broader institutional context. For criticisms of the regulatory chill argument, see Soloway, *supra* note 170, at 138 (“To date, NAFTA Chapter 11 has not threatened the progress of environmental regulation in North America.”).

Chapter 11 does respect a state’s police powers; that is, the state’s right to protect the environment, consumers, public health, etc. and that the cases decided to date under Chapter 11 have not demonstrated a restriction on governments to act in the public interest . . . . It is hard to imagine that, based on the cases to date, regulators would be inhibited from proposing *bona fide* environmental regulation. In NAFTA’s first eight years, the cases only punished what tribunals considered to be outrageous behaviour on the part of government officials. . . . [In *Metalclad*] [t]here was significant evidence pointing to the fact that the governor was using, or rather abusing, environmental regulation as a manipulative tool for self-serving and parochial interests. This type of capricious action on the part of a sub-national government is exactly the type of behaviour that NAFTA was designed to constrain.

*Id.* at 156. The regulatory chill literature “is largely anecdotal and not adequately substantiated.” *Id.* at 158. Yet, in an early work, this author and others believed otherwise. See ALAN M. RUGMAN, JOHN J. KIRTON & JULIE A. SOLOWAY, ENVIRONMENTAL REGULATIONS AND CORPORATE STRATEGY: A NAFTA PERSPECTIVE 135 (1999) (concluding that “NAFTA institutions have had particular success in constraining the emergence of ‘green’ protection at all levels of regulation, facilitating regulatory convergence . . . .”). For past works arguing against the regulatory chill argument, see J. Anthony VanDuzer, *NAFTA Chapter 11 to Date: The Progress of a Work in Progress*, in WHOSE RIGHTS? THE NAFTA CHAPTER 11 DEBATE 42 (Laura Ritchie Dawson ed., 2002).

[W]hile the broadly worded substantive obligations of NAFTA states in Chapter 11 may be capable of being applied in a manner that would impose significant constraints on sovereignty, they have not been applied to do so. So far only egregious state actions that were arbitrary and unfair, overtly protectionist, or had the effect of eliminating an investor’s investment have been found to be contrary to obligations under Chapter 11.

discriminatory measures and to encourage regulatory prudence, it may also chill bona fide, non-discriminatory measures for true public purposes. For instance, in *Metalclad*,<sup>189</sup> which remains important in the context of the uncertainties associated with the inconsistencies in the current state of Chapter 11 jurisprudence, the public purpose was not a determinant factor in establishing a regulatory expropriation and the tribunal thus found the government liable for expropriation. Even if a tribunal decides to consider the public purpose sought by a measure as in *Methanex*, a tribunal may require the regulating government to demonstrate the proportionality of a measure following *Fireman* and *Tecmed*. But this test of proportionality is not clearly set out. If the government nevertheless succeeds in proving the proportionality of a measure, a tribunal may compel it to pay compensation regardless, given the divergent treatments of the compensation obligation.

More evidence of regulatory chill can be found outside the text of the NAFTA agreement and the statements of Chapter 11 tribunals. A mere threat of a

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*Id.* at 44–45. Meg Kinnear, then Senior General Counsel and Director General of the Trade Law Bureau, Canada, made the following general and cautious comments about the regulatory chill concern but did not provide specific evidence and appeared to disregard the *Metalclad* decision:

The concern, not surprisingly, comes mainly in the environmental and health areas. It is obviously a concern that is both difficult to prove and difficult to disprove. But I suggest that the evidence, to date, tends to disprove it. First of all, there have been many such regulations passed by the governments since NAFTA was put in place. Secondly, Chapter 11 of NAFTA contains various provisions that specifically give some precedence to particular environmental agreements that say the agreements should not be construed to prevent people from becoming providers of social services, such as health care. There is also an Article in Chapter 11 that says it is inappropriate to encourage investment by lowering standards of environmental protection. So even the agreement itself takes specific measures to prevent regulatory chill. The other, perhaps more important point, is that no Chapter 11 case so far has found liability based on a country's environmental, health, or other social service regulation. . . . To conclude, I think that if you look at the evidence, and our experiences of the last thirteen years, NAFTA has neither been as bad nor as good as its respective detractors and advocates had originally contended. So perhaps a middle-of-the-road view is the best way to evaluate it.

Panel, *Recent Developments in NAFTA and CAFTA*, 5 SANTA CLARA J. INT'L L. 390, 398–99 (2007).

189. *Metalclad Corp. v. Mexico*, Case No. ARB(AF)/97/1, ¶ 111 (ICSID (W. Bank) 2000).

NAFTA lawsuit along with the prospect of having to dedicate extensive time and resources to defend against foreign investors' Chapter 11 challenges may force governments to withdraw a regulatory measure and settle a NAFTA claim.<sup>190</sup> For instance, in 1997, U.S.-based Ethyl Corporation challenged Canadian pollution control legislation.<sup>191</sup> It brought a \$200 million claim against the Canadian government alleging that its ban on the gasoline additive MMT,<sup>192</sup> which Ethyl manufactured, was discriminatory and an expropriation under Chapter 11.<sup>193</sup> The ban intended to respond to public health concerns associated with the gasoline additive MMT.<sup>194</sup> Canada quickly settled before the dispute reached a NAFTA tribunal, agreed to rescind the ban, paid Ethyl thirteen million U.S. dollars and issued an apology.<sup>195</sup> In the wake of the disputes in Ethyl Corp. and S.D. Myers, Canada decided to lobby for a narrow interpretation of Article 1110 and raised serious concerns that NAFTA's foreign investment provisions were being extended so as to infringe on the Parties' sovereign rights to enact legitimate domestic legislation.<sup>196</sup>

More recently, in 2004 the provincial government of New Brunswick, Canada, abandoned a proposal to develop a public auto insurance program after a threat of NAFTA Chapter 11 lawsuit.<sup>197</sup> In response to a public outcry over skyrocketing auto insurance premiums, an all-party committee recommended a plan that would achieve average premium reductions of approximately twenty percent.<sup>198</sup> The Insurance Bureau of Canada (IBC), representing Canada's largest insurers, warned that the proposal could trigger legal action on the part of foreign firms under NAFTA Chapter 11 as the proposal could be considered an "expropriation" of the market share of NAFTA insurance providers already in the

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190. See Dougherty, *supra* note 167, at 753; Maurizio Brunetti, *Indirect Expropriation in International Law*, 5 INT'L L. FORUM DU DROIT INT'L 150, 150 (2003) (NAFTA's dispute-settlement mechanism has been effectively "hijacked by private corporations seeking to broaden the definition of expropriation under international law and force state parties to settle claims for huge amounts" despite their lack of merit.).

191. Beauvais, *supra* note 36, at 264–65.

192. MMT stands for methylcyclopentadienyl manganese tricarbonyl.

193. Beauvais, *supra* note 36, at 264–65.

194. Sanford E. Gaines, *NAFTA Chapter 11 as a Challenge to Environmental Law Making—One View from the United States* 7 (Nov. 16–18, 2000), <http://www.envireform.utoronto.ca/pdf/Conference/Gaines.pdf>.

195. Beauvais, *supra* note 36, at 264–65.

196. Edward Alden, *Canada Seeks Tighter NAFTA Rules to Limit Compensation: Trade Pact Curbs Sought on Ability of Companies to Sue Governments*, FIN. TIMES, Jan. 22, 1999, at 7.

197. PUBLIC CITIZEN, *NAFTA'S THREAT TO SOVEREIGNTY AND DEMOCRACY: THE RECORD OF NAFTA CHAPTER 11 INVESTOR-STATE CASES 1994-2005*, at 75 (2005), available at <http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf>.

198. *Id.*

market.<sup>199</sup> In a surprising reaction, New Brunswick Premier Bernard Lord officially rejected the plan, and instead recommended modest market reforms geared at lowering rates such as a first time driver's credit and a new oversight board.<sup>200</sup> The Canadian Center for Policy Alternatives suggested that the government had backed down in the face of "aggressive threats of treaty litigation and behind the scenes lobbying by federal trade officials."<sup>201</sup>

It is evident that foreign investors very often take advantage of the loopholes, potential litigation cost and the possibility of expensive compensation awards associated with NAFTA Chapter 11 to protect their interest, and sometimes do so at the expense of thwarting public policy.<sup>202</sup> These strategies continue to be used today. Noting the uncertainty arising from the different views in *Metalclad* and *Methanex*, some commentators have recently recommended that it is strategic to exploit the loopholes and inconsistencies of NAFTA Chapter 11 to advance investors' interest:

By raising the uncertain outcome of the NAFTA proceeding and the fact that there is no scope for judicial review of the Tribunal decision on its merits, counsel for mineral developers such as Glamis, may be able to achieve a better negotiating position for compensation from a government.<sup>203</sup>

The regulatory gap and the regulatory chill remain generally and, in particular, in the area of advertising regulation. Strong opinions, such as the one publicly circulated by Phillip Morris against the attempt of Canada's government to regulate the wording of cigarette marketing, confirm that the regulatory chill is very real.<sup>204</sup> In 2001, the Government of Canada proposed a regulation to

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199. *Id.* It is important to note that the IBC argument was supported by a legal opinion prepared for a number of Canadian provinces exploring similar schemes that warned that "to the extent that the replacement of private automobile insurance with a mandatory public insurance system were to deprive private insurance providers of the use or expected economic benefits of their investments," it could be argued that the program was an expropriation under NAFTA. *Id.* (citing Luke Eric Peterson, *Canadian Province Rejects Public Auto Insurance; Think-Tank Sees Treaty Chill*, INVESTMENT L. & POL'Y WKLY. NEWS BULL. (Int'l Inst. for Sustainable Dev., July 2, 2004)).

200. NAFTA'S THREAT TO SOVEREIGNTY AND DEMOCRACY, *supra* note 197.

201. *Id.*

202. *See, e.g.*, Dougherty, *supra* note 167, at 753 (referring to the time and resources needed to ward off NAFTA challenges).

203. Ingelson & Mitchell, *supra* note 135, at 89.

204. *See* Tobacco.org, *Philip Morris Submission to Canada on NAFTA's Chapter 11 Provision*, <http://www.tobacco.org/Documents/0203pnafta.html> (last visited Mar. 28, 2010).

“prohibit the display of ‘light’ and ‘mild’ descriptors on tobacco packaging.”<sup>205</sup> Phillip Morris International Inc. protested the ban on the basis of Chapter 11 arguing that, “the ban would be tantamount to an expropriation of tobacco trademarks containing descriptive terms.”<sup>206</sup> The proposed regulation was never fully developed. The threat of a NAFTA Chapter 11 lawsuit convinced Canada to back down from instituting plain packaging with health warnings for cigarettes.<sup>207</sup> Invoking the same argument, tobacco companies have also challenged Canada’s policy to impose more extensive health warnings.<sup>208</sup> Thus, it is very likely that foreign food corporations will challenge legally imposed counter-advertising duties, such as food-related health warnings, on NAFTA grounds. In practice, this possibility chills food counter-advertising legislation.<sup>209</sup>

All of this is paradoxical given that NAFTA Article 1114 indicates that governments should not be prevented from adopting measures to protect the environment and that “it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.”<sup>210</sup> Yet, the practice shows

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205. *Id.*

206. *Id.* See also Zeigler, *supra* note 73 at 568 (explaining that “Philip Morris used [a technical barrier to trade] argument[] to contest a Canadian ban on use of the terms ‘mild’ and ‘light’ in cigarette promotion, because the corporation said that a ban was not the least trade restrictive alternative to reduce tobacco-related problems.”); Steven Chase, *Tobacco Firm Warns “Mild” Cigarette Ban May Violate NAFTA*, GLOBE & MAIL, Mar. 16, 2002.

207. ROBERT WEISSMAN, INTERNATIONAL TRADE AGREEMENTS AND TOBACCO CONTROL: THREATS TO PUBLIC HEALTH AND THE CASE FOR EXCLUDING TOBACCO FROM TRADE AGREEMENTS (2003); E.R. Shaffer, J.E. Brenner & T.P. Houston, *International Trade Agreements: A Threat to Tobacco Control Policy*, 14 TOBACCO CONTROL (SUPPLEMENT II) ii19, ii22 (2005); Ellen Gould, *Trade Treaties and Alcohol Advertising Policy*, 26 J. PUB. HEALTH POL’Y 359 (2005); Interview by Runako Kumbula with Cynthia Callard, Executive Director, Physicians for a Smoke Free Canada (Apr. 1, 2002).

208. See WEISSMAN, *supra* note 147. At the national level, tobacco companies have also challenged health warnings in Canada. Although they succeeded in 1995, the Supreme Court of Canada has recently held that larger health warnings in cigarette packages are consistent with the Charter. See *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, 2007 SCC 30 (Can.); *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199 (Can.).

209. Zeigler, *supra* note 73, at 574 (arguing that NAFTA’s expropriation provision creates uncertainty and “has a chilling effect on health legislation”).

210. NAFTA, *supra* note 14, art. 1114. Article 1114 reads as follows:

Environmental Measures.

1. 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 concerns.



that Article 1114 is largely ineffective. The *Metalclad* tribunal disregarded considerations about the public purpose involved in a regulatory measure that had implications for the protection of the environment.<sup>211</sup> For the most part, tribunals—notably the *Metalclad* one—have chosen not to respond directly to Article 1114 defenses against Chapter 11 claims invoked by several governments<sup>212</sup> and yet their decisions are not subject to judicial review on their merits.<sup>213</sup> A number of laws in the area of the environment have been enacted as the critics of the regulatory chill argument assert,<sup>214</sup> but the volume of laws is not necessarily a good indication of whether the government is being deprived of its regulatory power.<sup>215</sup> To establish the deprivation, an in-depth analysis of these laws' content and regulations along with the possible decision to forgo certain policy options across the multiple levels of governmental bodies and sectors would be required.<sup>216</sup> Outside the text of the NAFTA agreement and tribunals' statements of law, upon pressures from foreign investors the Canadian government has decided to overturn domestic protections against pollution (as in the Ethyl settlement), and withdraw public health regulations (as in the above Phillip Morris case) in order to avoid being drawn into protracted and costly litigation. The glaring loophole created by the “otherwise consistent with this Chapter” language in the wording of Article 1114 appears to explain its inefficacy despite its apparent pro-regulatory message. In fact, many trade experts have argued that, due to such permissive language, Article 1114 is largely aspirational and of no legal consequence.<sup>217</sup>

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2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

*Id.*

211. *Metalclad Corp. v. Mexico*, Case No. ARB(AF)/97/1, ¶ 111 (ICSID (W. Bank) 2000).

212. Tollefson, *supra* note 153, at 180.

213. NAFTA, *supra* note 14, arts. 201, ¶ 2, 1136, ¶ 6; *see also supra* note 170.

214. Soloway, *supra* note 170; Panel, *Recent Developments in NAFTA and CAFTA*, 5 SANTA CLARA J. INT'L L. 390, 398–99 (2007) (statements by Meg Kinnear).

215. Tollefson, *supra* note 153, at 178.

216. *Id.*

217. *Id.* at 180; BARRY APPLETON, NAVIGATING NAFTA: A CONCISE USER'S GUIDE TO THE NORTH AMERICAN FREE TRADE AGREEMENT 195 (1994); JON R. JOHNSON, INTERNATIONAL TRADE LAW 225 (1998).

While the regulatory chill, in principle, exists as a result of the loopholes in the legal framework, the materialization of such a chill is largely dependent on the institutional context in which NAFTA Chapter 11 is embedded.<sup>218</sup> The political orientation of the government along with the struggles in the political system, the level of public pressure for and against regulatory intervention, the influence of corporations in the regulatory process, the evolution of the regional economy, and firms' business strategies ultimately determine whether the negative legal incentives associated with NAFTA Chapter 11 materialize into a regulatory chill.

Indeed, the broader institutional framework of food regulation aggravates the regulatory chill associated with NAFTA Chapter 11. The many strategies that the food industry uses to oppose food regulation and influence society's food culture reinforce the uncertainty and government inaction resulting from the misuse of the loopholes in the legal framework, the litigation cost, and the possibility of paying expensive compensation. The food industry influences food culture by resorting to lobbying, lawsuits, financial contributions, and sponsorships, public relations, advertising, alliances (with schools, for example), and philanthropy in order to manipulate regulatory agencies and nutrition and health professionals. The purpose is often to distort the scientific record on nutrition and diet,<sup>219</sup> discredit nutritional recommendations, and intimidate its critics.<sup>220</sup> The food industry also opposes food regulation and champions

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218. See generally Avio, *supra* note 3; Ratner, *supra* note 3.

219. WILLIAM BRUNEAU & JAMES TURK, DISCIPLINING DISSENT: THE CURBING OF FREE EXPRESSION IN ACADEMIA AND THE MEDIA (2004); Martijn B. Katan, *Does Industry Sponsorship Undermine the Integrity of Nutrition Research?*, PUB. LIBR. SCI. MED., Jan. 2007, available at <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0040006> (“[T]he Lesser et al. study raises serious concerns that some food industries may distort the scientific record on diet and health.”); Lenard I. Lesser, Cara B. Ebbeling, Merrill Gozner, David Wypij & David S. Ludwig, *Relationship Between Funding Source and Conclusions Among Nutrition-Related Scientific Articles*, PUB. LIBR. SCI. MED., Jan. 2007, available at <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0040005> (“Industry funding of nutrition-related scientific articles may bias conclusions in favor of sponsors’ products, with potentially significant implications for public health.”). A recent study in Europe has confirmed that this problem continues to be very serious. See Anna Paldam Folker, Lotte Holm & Peter Sandøe, *We Have to Go Where the Money Is—Dilemmas in the Role of Nutrition Scientists: An Interview Study*, 47 MINERVA 217 (2009) (A research study based on interviews conducted in Denmark with reputable nutrition scientists found, among other things, that “nutrition scientists experience the dilemma between their need to cooperate with the food industry for financial reasons and their fear that this may compromise their independence and scientific integrity.”).

220. See MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH (2002) [hereinafter NESTLE, FOOD POLITICS].

consumers' free choice, corporate speech, and deregulation.<sup>221</sup> It should not be surprising then to see how the food industry advocates for free food trade and emphasizes the inadequacies of counter-advertising measures, such as food warnings, and the superiority of corporate self-regulatory mechanisms to promote healthy eating.<sup>222</sup> Yet, corporate self-regulation may be symbolic, manipulative, and preemptive of government intervention. Furthermore, corporations may also influence food regulations in more indirect ways. Facilitated by NAFTA institutions, corporations can also engage in regulatory competition strategies to

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221. *Id.*; MARION NESTLE, *SAFE FOOD: BACTERIA, BIOTECHNOLOGY, AND BIOTERRORISM* (2003) (demonstrating how powerful food industries oppose food safety regulations, deny accountability, and blame consumers when something goes wrong, and how century-old laws for ensuring food safety no longer protect our food supply) [hereinafter NESTLE, *SAFE FOOD*].

222. For example, in the United Kingdom, the food industry has opposed the government's proposed traffic light system of food warning labels. In light of the events in the United Kingdom and the United States, it is expected that the food industry in Canada will probably oppose the House of Common Committee's mandatory food labeling as suggested in *Healthy Weights*.

The Food Standards Agency favours a traffic light system which uses red, amber and green labels to signify whether the food is good for you. But the watchdog has failed to get the agreement of industry, which has used a mix of different methods. Many favour guideline daily amounts, which are percentages of sugar, salt and fat per serving. Consumer groups have complained that such systems are too complicated. Major retail groups, including Tesco and Asda, have told the BBC they are not yet prepared to abide by the findings of the independent group examining the issue, despite the government's call.

*Labels 'Key to Tackling Obesity'*, BBC NEWS, Jan. 23, 2008, <http://news.bbc.co.uk/2/hi/health/7202589.stm#table>.

Similarly, in 2001, the International Council of Grocery Manufacturers Associations (ICGMA), a food industry trade group, opposed the proposed *Codex Guidelines on the Use of Nutrition and Health Claims*, available at [www.codexalimentarius.net/download/standards/351/CXG\\_023e.pdf](http://www.codexalimentarius.net/download/standards/351/CXG_023e.pdf). Most of the debate centered on a preambular clause: "Health claims should be consistent with national health policy, including nutrition policy, and support such policies where applicable." *Id.* The ICGMA proposed that the clause should be deleted altogether as it "would create barriers to trade." *Id.* The following year the U.S. delegation also objected, arguing that it would contradict the objective of international harmonization. Despite this opposition, the majority of delegations supported the clause on the grounds that it was important from a public health perspective and the clause was retained. See HAWKES, *supra* note 120, at 55; Secretary, Codex Alimentarius Comm'n, *Report of the Twenty-Ninth Session of the Codex Committee on Food Labelling*, Ottawa, Canada, May 1-4, 2001, ALINORM 01/22A, available at <http://www.codexalimentarius.net/download/report/146/AI0122ae.pdf>.

encourage the dismantling of national regulatory policies. They can threaten to move existing and new production to lower cost jurisdictions to offset the higher costs of meeting regulations. While this may enhance competitiveness and serve as a market-based check on excessive or arbitrary regulation and protectionism,<sup>223</sup> it may also be used to discourage bona fide, non-discriminatory regulation for important public purposes.

This problem has been very well documented in the United States and worldwide<sup>224</sup> and it is conceivable that, in the context of the NAFTA agreement, American food corporations that influence food regulatory policies in the United States may be influencing the making and enforcement of Canadian food regulations,<sup>225</sup> as has occurred in other economic sectors.<sup>226</sup> For example, a Canadian dietitian, commenting Marion Nestle's *Food Politics*,<sup>227</sup> shares a personal experience revealing some of the strategies that food corporations use in Canada to shape food regulations:

In the [United States] and Canada, food is political for the simple reason that there is a lot of money, and profits, at stake . . . . While the details of the book are all American, in this era of free trade, its fundamental concepts and the issues it raises are also applicable in Canada. Indeed, I was told by a representative of a multinational food corporation at an industry-sponsored dietitians' event that his company loves to sponsor such events, because they know that when it comes time

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223. ALAN M. RUGMAN & JOHN KIRTON, CONFERENCE PAPER: NAFTA, ENVIRONMENTAL REGULATIONS AND FIRM STRATEGIES: AN UPDATE WITH CHAPTER 11 CASES 23 (Nov 18–20, 2000), <http://www.envireform.utoronto.ca/pdf/Rugman/nafta.pdf>.

224. See NESTLE, FOOD POLITICS, *supra* note 220; NESTLE, SAFE FOOD, *supra* note 221.

225. Some authors have noted that NAFTA institutions “ease the task of assembling transnational coalitions to overcome national obstacles backed by weaker, national firm coalitions” as well as facilitate the formation of larger strategic alliances that can “foster a shared interest in working toward region wide regulatory convergence.” See Rugman & Kirton, *supra* note 223, at 20, 22 (respectively). It is thus possible that such transnational coalitions or alliances may aim at overcoming national regulatory obstacles.

226. For example, in the Ontario beer industry, Alcan (as a Canadian distributor for U.S. firms exporting their beer in aluminum cans into the Ontario market) was mobilized against Ontario environmental regulations. David Vogel & Alan M. Rugman, *Environmentally Related Trade Disputes Between the United States and Canada*, 27 AMER. R. OF CANADIAN STUD. 271 (1997); ALAN M. RUGMAN, JOHN J. KIRTON & JULIE A. SOLOWAY, ENVIRONMENTAL REGULATIONS AND CORPORATE STRATEGY: A NAFTA PERSPECTIVE 123 (1999).

227. NESTLE, FOOD POLITICS, *supra* note 220.

to change government regulations, they will have the support of dietitians.<sup>228</sup>

The recognition of the possible influence of foreign food corporations in the Canadian regulatory process has important implications for the legal analysis of regulatory expropriation under NAFTA Chapter 11. It suggests the need to rethink the common assumption in regulatory taking analysis that foreign investors do not take part in, or are unable to get involved in, the making and enforcement of local laws and regulations. For example, in *Tecmed*, the tribunal held the view that foreign investors' inability to participate in the government's decision-making process<sup>229</sup> and the social and political circumstances that surround a regulatory decision<sup>230</sup> are also important factors in both assessing the *proportionality* of the measure and thus establishing unlawful expropriation. In light of the possibility that foreign food corporations may influence the Canadian regulatory process, such assumption should be taken with caution and NAFTA tribunals may want to look outside the legal box to recognize such a problem. Once that fact is established and following *Tecmed*, the recognition of the actual participation of foreign investors in the local regulatory process should affect the conclusions that can be drawn as to whether a measure such as food counter-advertising regulations is expropriatory and unlawful under the public purpose exception.

Furthermore, the strong economic ties between the United States and Canada, and the dominant role of American food corporations in the Canadian consumer market, favor a less interventionist approach to food advertising regulation. Specifically, food warning regulations in one country will create differential treatment for foreign investors and hence raise the need for harmonizing technical regulations<sup>231</sup> which are likely to disturb the large flow of goods, services, and capital between the United States and Canada. All of these create an institutional environment that discourages the enactment and enforcement of food counter-advertising measures and hence worsen the regulatory chill associated with the NAFTA expropriation provisions.

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228. Elaine Power, *Resource Review - Food Politics: How the Food Industry Influences Nutrition and Health*, MEMBERS ONLINE NEWSLETTER (Dietitians of Canada, Toronto, Ont.), May 2003, available at <http://web.archive.org/web/20060630034213/http://foodpolitics.com/pdf/resrevfoodpoli.pdf>.

229. Técnicas Medioambientales Tecmed S.A. v. Mexico, Case No. ARB(AF)/00/2, ¶ 122 (ICSID (W. Bank) 2004).

230. *Id.* ¶¶ 132-33.

231. This problem, for example, arose when the United States decided to introduce mandatory nutrition labeling in 1990. It was difficult to harmonize this labeling with Canada's food regulations, resulting in trade barriers and differential costs imposed on foreign investors. See HAWKES, *supra* note 120, at 53.

The broader institutional framework creates an environment that encourages the possibility of obtaining a government's commitment to restrain from advertising regulatory intervention. A foreign investor may condition its foreign investment on a government's commitment to restrain from any regulatory intervention including advertising regulation. Transnational investors are expected to be in a better position to use such conditionality strategies as they have greater bargaining and persuasive power to obtain governmental commitments. In such an event, and pursuant to the *Methanex*<sup>232</sup> decision, a Party's investor may overcome the exceptions to the protection against expropriation set out in Article 1110 and particularly avoid the burden of food-related health warnings.

Therefore, the broader institutional environment of Canada's trade relations, in which NAFTA Chapter 11 is embedded, favors a fairly strong regulatory chill that may thwart legitimate public policy and advertising regulatory measures in particular. Canada is likely to be deprived of its ability to regulate its national food market to enhance the well-being of its citizens. As a result, largely unregulated food markets will facilitate the corporate control of food supply and consumer food information through increasing corporate advertising and promotion. In light of the current patterns of food supply and consumption, corporations will probably prioritize profit-making objectives over the nutritional value of food products. This will ultimately worsen the public health problems associated with the consumption of low-nutrient, high-calorie foods.

In practice, such regulatory chill and the ensuing government inaction will entail an important restructuring of both the hierarchy of fundamental rights and the opportunities for enhancing national social welfare. The current trade system as embedded in NAFTA Chapter 11 seems to favor the primacy of property rights over both human rights,<sup>233</sup> such as public health,<sup>234</sup> and public goods, as well as trade and private markets over government intervention. Chapter 11 and, in particular, the expropriation standard may become an institutional instrument that, prioritizing investors' property rights, is facilitating the prevalence of market rationality and values over the public interest. In this

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232. *Methanex Corp. v. United States*, 44 I.L.M. 1345, pt. IV, ¶ 7 (NAFTA/UNCITRAL Arb. Trib. 2005).

233. Our analysis confirms earlier criticisms that characterized NAFTA Chapter 11 as "a human rights treaty for a special-interest group," namely foreign investors, as it gives the bulk of the rights to the few and ignoring the rights of those who are otherwise affected by the investment. See Jose Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 307-09 (1997).

234. For a discussion of public health as a human right, see Kriebaum, *supra* note 2, at 18 ("*Methanex* did not arise in a privatisation context but still concerned public health and hence human rights."). See generally BRIGIT C.A. TOEBES, *THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW* (1999).

context, public health and consumers' well-being are subordinated to self-regulating market imperatives, and thus, almost commodified.<sup>235</sup>

Some may argue that sacrificing a portion of the protection of public health may be a small price to pay for increasing society's welfare through freer trade, particularly if there are other regulatory alternatives that are less intrusive of trade. The primacy of trade and foreign investor protection is supposed to enhance the efficiency of the economy or Canada's overall social welfare.<sup>236</sup> This is problematic, however. For instance, Canadian competitors have no NAFTA Chapter 11 protection against expropriation and compensation rights granted to foreign competitors. NAFTA Chapter 11 and the regulatory chill associated with it thus place foreign competitors at an advantage over their domestic counterparts. More importantly, in the absence of government intervention and the failure of consumer choice, wealth creation and economic growth resulting from free trade are likely to benefit a privileged sector of society at the expense of jeopardizing obesity, hunger, and public health issues that particularly affect low-income citizens. The tax system, coupled with the persistence of inequality and poverty in Canada, is not necessarily capable of mitigating these problems that free trade tends to neglect.

Politically, that regulatory chill exemplifies the global power of corporations, the weakening of national sovereignty, and the facilitative role that trade agreements such as NAFTA play in reinforcing economic globalization. While NAFTA provides foreign investors with a legal protection against arbitrary expropriation and thus enhances the benefits of international trade, such investors may also exploit the loopholes in the trade agreements and the structure of the regional economy to gain unjustified advantages and political power. They may take advantage of the uncertainty associated with the public purpose exception, the lack of a well-defined proportionality test, the weak precedent-setting power of tribunal decisions, and the threat of expensive Chapter 11 litigation and payment of compensation. It is through these loopholes in the legal framework that corporations may be able to legally construct their global power. Transnational corporations are in an even better position to ignore all trade agreement rigidities if they can condition their foreign investment on a government's commitment to restrain from regulatory intervention, particularly when a nation is desperate for capital inflows, access to new technology, and job creation in the face of fierce global competition. In the area of food consumption, large corporations may be in a better position to control consumer food information and, to a significant extent, to manage society's food culture.

To mitigate the above problems associated with the regulatory chill, it is desirable not only to correct the loopholes and inconsistencies of NAFTA Chapter

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235. See generally KARL POLANYI, *THE GREAT TRANSFORMATION* (1957).

236. Soloway, *supra* note 170, at 137–38 (NAFTA Chapter 11 provisions are designed to encourage economic growth).

11 jurisprudence, but also to encourage consumer-citizenship activism in order to both counter-balance a possible corporate influence in the regulatory process and help legitimize, legally and politically, bona fide, non-discriminatory regulatory measures for pressing public purposes.<sup>237</sup> While a detailed discussion of the relevance of consumer activism is beyond the scope of this work, it is important to note some of its advantages for tackling the regulatory chill problem associated with NAFTA Chapter 11 in its institutional context.

The presence of public pressure and sound consumer activism can put pressure on governments to revise or introduce new food policies when the public interest is at stake, a practice local courts often encourage.<sup>238</sup> For instance, in 2001 a coalition of actors including farm, consumer, health, environmental, and industry organizations announced its opposition to Monsanto's attempts to commercialize genetically modified wheat in Canada. These groups raised serious concerns about market acceptance, environmental risk, and the lack of a democratic and transparent process in biotech regulation and policy.<sup>239</sup> This type

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237. The significance of public pressure and consumer activism to counter corporate opposition to food regulation as well as to provide support for needed regulatory measures has been documented in NESTLE, SAFE FOOD, *supra* note 221, at 76 .

238. See *Fraser v. Saanich* (District), [1999] 1999 CarswellBC 2148, ¶ 43 (B.C. Sup. Ct.).

While neighbor[hood] participation in municipal politics often places an almost adversarial atmosphere into land use questions, this participation is a key element to the democratic involvement of said citizens in community decision making. Signing petitions, making submissions to municipal councils, and even the organization of community action groups are sometimes the only avenues for community residents to express their views on land use issues . . . . However, an unfavo[r]able action by local government does not, in the absence of some other wrongdoing, open the doors to seek redress on those who spoke out in favo[r] of that action. To do so would place a chilling effect on the public's participation in local government.

*Id.*

239. Emily Eaton, *Getting Behind the Grain: The Politics of Genetic Modification on the Canadian Prairies*, 41 ANTIPODE 256 (2009). Examples are available in other consumer areas. See, e.g., *Daishowa Inc. v. Friends of the Lubicon*, [1998] 39 O.R.3d 620, ¶ 63 (On. Gen. Div.) (finding that a public interest group's consumer boycott against a company's paper products was lawful, the court recognized that that group had multiple purposes in their campaign namely they tried to educate the public and persuade governments to change their policies). Courts in the United States have also examined this issue. See, e.g., *Leonardini v. Shell Oil Co.*, 216 Cal. App. 3d 547, 264 Cal. Rptr. 883 (Cal. Ct. App. 1989). Shell Oil sued a consumer advocate and a union attorney for reporting to a state health agency that Shell was using cancer-causing materials in a product in home



of public activism helps democratize regulatory capitalism<sup>240</sup> as regulatory power is delegated not only to the government, the industry, corporate agents, and professional associations, but also to consumers and citizens more generally. This is particularly significant given the tendency of the food industry to capture regulatory agencies.<sup>241</sup> The Supreme Court of Canada has already recognized that consumers' expressions are not only important for a healthy economy but also for furthering greater democracy.<sup>242</sup>

Besides democratizing the regulatory process, public pressure and consumer activism are also critical for improving the quality and effectiveness of public policies. By stimulating an inter-communication between stakeholders and multiple food rationalities and discourses, the public's and consumer groups' views will enrich the content and form of food policies. They may call for the government and the food industry to be more responsive and reflective of multiple food rationalities associated with taste, price, nutrition and health, safety, environmental risk, convenience, local economic development, cultural identity, and even social status, that characterize food consumption in modern industrialized capitalist societies.<sup>243</sup> Consider the following example: a consensus conference on genetically modified foods was held in Calgary, Alberta, in March 1999. The conference was organized by researchers at the University of Calgary, with funding from a federal research grant and the provincial government of Alberta. A number of citizens were recruited to participate in this conference. The Canadian government eventually created a national Biotechnology Advisory Committee, even including a citizen representative from the Calgary conference, thus recognizing that more participatory legitimation for policy might be

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plumbing. *Shell v. Leonardini*, the initial suit, was followed by this SLAPP-back suit for malicious prosecution. After the trial court directed verdict on liability under this ordinarily difficult to prove tort action, the jury awarded \$175,000 actual damages for intimidation; \$22,000 in attorney fees; and \$5,000,000 in punitive damages. Shell's appeals to both the California Supreme Court and the U.S. Supreme Court were denied. *Id.*

240. David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 12 (2005).

241. NESTLE, FOOD POLITICS, *supra* note 220.

242. *Guignard v. City of Saint-Hyacinthe*, [2002] 1 S.C.R. 472, 2002 SCC 14, ¶¶ 23–24 (Can.) (Consumer counter-advertising is “a form of the expression of opinion that has an important effect on the social and economic life of a society. It is a right not only of consumers, but of citizens.”).

243. See Larch Maxey, *Can we Sustain Sustainable Agriculture? Learning from Small-Scale Producer-Suppliers in Canada and the UK*, 172 GEOGRAPHICAL J. 230 (2006) (The author notes that many policymakers have followed a growing number of consumers and producers in supporting organic farming and a host of ‘alternative’ food networks. This work explores often overlooked voices and stories within sustainable food discourses among small-scale producer-suppliers in south Wales and southern Ontario and suggests some implications for policymakers.).

desirable. The Canadian citizens' report nevertheless reached substantially precautionary conclusions in contrast to the "Promethean" outlook more common among governing elites.<sup>244</sup> For instance, raising concerns about biased information and the lack of public participation, the participating citizens affirmed that "[w]hile food biotechnology offers potential benefits, its long-term effects on the environment are unknown."<sup>245</sup> This made evident that deliberative legitimization of public policies becomes plausible if elites can attenuate their Promethean outlook and the public is able to influence official discourses.<sup>246</sup>

Public pressure and consumer activism thus help strike a balance between the competing discourses of food consumption as well as between regulatory mechanisms, namely, governmental regulation, food market forces, corporate self-regulation,<sup>247</sup> public participation, and other social and cultural institutions. These democratic inter-communications between corporate, consumer, and governmental discourses and regulatory activities are likely to improve food regulation, healthy eating standards, and, more specifically, eliminate undesirable regulatory chill problems.

In terms of the legal analysis of regulatory expropriation, the presence of public pressure may be an important consideration in legally legitimizing bona fide, non-discriminatory regulatory measures for pressing public purposes. In *Tecmed*, the tribunal reasoned that the social and political circumstances that surround a regulatory decision<sup>248</sup> are also important factors in assessing the proportionality of the measure and establishing unlawful expropriation. In particular, the tribunal suggests that an otherwise expropriatory regulation will not be categorized as expropriation where it is implemented in proportional response to a serious urgent situation or social emergency.<sup>249</sup>

Thus, in tandem with the need to take more seriously the public purpose exemption in NAFTA Article 1110 and the police power of Parties' governments as in *Methanex*,<sup>250</sup> the analysis of regulatory expropriation should make more

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244. John Dryzek, Robert Goodin, Aviezer Tucker & Bernard Reber, *Promethean Elites Encounter Precautionary Publics: The Case of GM Foods*, 34 SCI. TECH. & HUMAN VALUES 263, 274–75 (2009) (also comparing the Canadian experience with Australia, Denmark, the United Kingdom, and the United States).

245. CANADIAN CITIZENS' CONFERENCE ON FOOD BIOTECHNOLOGY. CITIZENS' FINAL REPORT PRESENTED MARCH 7, 1999, available at <http://www.ucalgary.ca/~pubconf/report.html>.

246. Dryzek et al., *supra* note 244.

247. See, e.g., Advertising Standards Canada, Canadian Code of Advertising Standards, <http://www.adstandards.com/en/Standards/canCodeOfAdStandards.aspx>.

248. Técnicas Medioambientales Tecmed S.A. v. Mexico, Case No. ARB(AF)/00/2, ¶¶ 132–33 (ICSID (W. Bank) 2004).

249. See Coe & Rubins, *supra* note 87, at 656.

250. *Methanex Corp. v. United States*, 44 I.L.M. 1345, pt. IV, ¶ 15 (NAFTA/UNCITRAL Arb. Trib. 2005).

realistic assumptions about the ability of foreign investors to influence a domestic regulatory process as well as give serious consideration to the element of public pressure, particularly with respect to measures seeking to protect public health.<sup>251</sup>

## V. CONCLUSION

This work has discussed the extent to which Chapter 11 of NAFTA deprives the Canadian government of its ability to introduce legislation to impose counter-advertising duties on foreign food corporations such as food-related health warnings aimed at reducing obesity and hunger in Canada. It was argued that while expropriation has been broadly defined, recent NAFTA tribunal decisions indicate that a non-discriminatory regulation enacted in accordance with due process that may affect foreign investors' property rights but advance a public purpose may not constitute expropriation. It follows that a governmental regulation of food advertising imposing counter-advertising duties on foreign food corporations to promote healthy eating should not be deemed expropriatory. However, it is unclear whether this interpretation of the NAFTA expropriation provisions will be followed by NAFTA tribunals and courts in the future, given the inconsistencies and loopholes in the legal framework, notably the divergent treatments of the public purpose exception and the gaps in the "proportionality" principle that is supposed to balance private interest and public policy. This uncertainty creates a regulatory chill that may prevent Canada's government from engaging in an active regulation of food counter-advertising on the fear of a NAFTA lawsuit and the possibility of paying expensive compensation.

Furthermore, an institutional analysis has revealed that the many strategies that the food industry often uses to oppose food regulation and influence society's food culture appear to reinforce such legal uncertainty, regulatory chill, and government inaction. Ultimately, this regulatory chill favors the corporate control of consumer food information as well as the primacy of foreign investors' property rights and trade over consumer well-being and public health in the area of food advertising. In this context, it was suggested that consumer-citizenship activism is important to mitigate the possible corporate influence on the regulatory process and help legitimize, legally and politically, bona fide, non-discriminatory regulatory measures for pressing public purposes.

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251. It is also important to consider the inclusion of a citizen submission process that allows citizens to complain about non-enforcement of laws in the NAFTA agreement as it has been provided for in some BITs. See *The U.S.-Chile and U.S.-Singapore Free Trade Agreements: Hearing Before the S. Comm. on Finance, 108th Cong. 4 (2003)* (statement of Paul L. Joffe, Senior Director, International Affairs, National Wildlife Federation), available at <http://finance.senate.gov/hearings/testimony/2003test/061703pjtest.pdf>.

In view of these institutional insights, this work has also suggested correcting the loopholes and inconsistencies of NAFTA Chapter 11 jurisprudence, notably the need to take more seriously the public purpose exemption in NAFTA Article 1110. Moreover, the analysis of regulatory expropriation should incorporate more realistic assumptions about the ability of foreign investors to influence a domestic regulatory process and give serious consideration to the element of public pressure, particularly with respect to measures seeking to protect public health. While more empirical research is required to detail the relevance of the broader institutional framework, this work provides important reasons for the need to contextualize both the balancing of foreign investors' property rights and public policy and, more specifically, the analysis of regulatory expropriation and its relationship to domestic counter-advertising laws.

