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## Memorandum

**From: Todd Tucker, Public Citizen's Global Trade Watch<sup>1</sup>**

**Date: June 14, 2011**

**Re: May 2007 Preamble Change Fails to Resolve Concerns with FTA Investment Rules**

NAFTA-style trade deals contain investment rules that allow corporations to bypass national legal systems and launch attacks on governments in international tribunals. The basis for these attacks can be as simple as institution of a new environmental policy that affects the corporation's expected future profits. Judges for these so-called "investor-state" cases are selected in part by the corporation, and the trade-pact rules are tailored to corporate demands. Often the mere threat of one of these investor-state awards can cast a chill on public-interest regulation.<sup>2</sup> All told, more than \$350 million has been paid to date in these cases. Moreover, there are over \$9.1 billion in claims in the 13 investor-state cases outstanding under NAFTA-style deals, relating to environmental, public health, and transportation policy.<sup>3</sup> An additional \$483 million has been awarded under U.S. Bilateral Investment Treaties (BITs), which contain similar investment rules. Billions of dollars are also pending in BIT cases now underway.

The Panama, Colombia and Korea "free trade agreements" (FTA) may be considered by Congress in the near future. These pacts contain investment rules that are almost identical to those in NAFTA, except where they are worse.<sup>4</sup> There was one investment-related addition made to the preambles of these FTAs as part of a May 10, 2007 deal with the Bush administration. It stated that the parties: "AGREE that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement..."<sup>5</sup>

Some have suggested that this provision goes all or most of the way towards resolving the concerns with these provisions. This is not the case. There is no certainty as to the legal meaning of the May 2007 preambular provision, as has been noted in the *American Journal of International Law*.<sup>6</sup> This memo examines six different approaches to preambular language, including the four that have been taken by the tribunals under the 45 final awards issued under U.S. FTAs and BITs,<sup>7</sup> and finds the May 2007 preambular modification fails to address the main concerns raised by scholars and members of Congress with regard to the investment provisions. Indeed, there is scant historical support for the notion that pro-public interest provisions of preambles are protective of regulatory prerogatives: nearly 90 percent of the time, tribunals have given them no weight at all. Deeper changes will be required to the investment provisions of the proposed FTAs with Korea, Panama and Colombia, as well as a Trans-Pacific FTA (which includes Peru, the U.S. and eight other countries) now under negotiation.

## **APPROACHES TAKEN BY PANELS TOWARDS PREAMBULAR PROVISIONS**

### ***Approach 1: Ignore the preamble***

In 60 percent of the finalized awards (27 out of 45), arbitral panels simply ignored the preambular provisions, not citing it at all.<sup>8</sup>

### ***Approach 2: Only pay attention to “pro-investor” preambular clauses***

Preambular provisions are a grab bag of clauses, a majority of which can be read as “pro-investor” or “pro-investment” rather than “pro-public interest” or “pro-environment.”<sup>9</sup> There were nine awards where only the pro-investor preambular provisions were analyzed.<sup>10</sup> Taken together, in 80 percent of awards either ignored preambular provisions (under Approach 1), or only selectively paid attention to a preamble’s pro-investor clauses (Approach 2).

Not surprisingly, investors have encouraged arbitral tribunals to look selectively at the “pro-investor” clauses in FTAs and BITs’ preambles. And tribunals often used the “pro-investor” preambular provisions to support an expansive reading of the FTA/BIT obligation to provide “fair and equitable treatment” (FET) – an interpretation that scholars have criticized as going beyond the actual practice of states.<sup>11</sup> The FET-related pro-investor preambular provision that has been consulted extensively by panels reads: “Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources...”

In the 2006 *Azurix v. Argentina* case brought under the U.S.-Argentina BIT, Azurix cited this preambular provision, and argued that, with regard to the content of the FET standard... “[a]ny uncertainties should be interpreted in favor of the investor given the objectives of the BIT as expressed in its preamble.”<sup>12</sup> The tribunal sided with the investor in this reading of the preamble, and found a FET violation.<sup>13</sup>

### ***Approach 3: The preamble has little to no independent weight***

An additional four awards found that preambular clauses had little to no independent weight.<sup>14</sup> Taken together, nearly 90 percent of decisions ignored the preamble (Approach 1), selectively paid attention only to pro-investor clauses (Approach 2), or found that preambular provisions had little to no independent weight (Approach 3).

For instance, the NAFTA panel in *ADF Group vs. the United States* noted that the Preamble can be helpful, but it should “not to be regarded as overriding and superseding” the actual agreement text.<sup>15</sup> The 2008 tribunal that decided *Continental Casualty Company v. Argentina* under the U.S.-Argentina BIT found that preambular language is “not a legal obligation in itself for the Contracting Parties, nor can it be properly defined as an object of the Treaty.” The tribunal argued that giving even pro-investor provisions much weight “would be contrary to an effective interpretation of the Treaty.”<sup>16</sup>

### **U.S. State Department a Leading Skeptic of Preambular Language**

**Interestingly, this third approach appears to be that favored by the U.S. government.** In the NAFTA arbitral tribunal in the *Canadian Cattlemen for Fair Trade vs. the United States*,<sup>17</sup> the U.S. State Department lawyers argued that: “[a]lthough the preamble ... may inform the construction of provisions in NAFTA Chapter Eleven [i.e. the investment chapter], they are not capable of transforming the nature of those obligations, or of imposing independent ones on treaty signatories.”<sup>18</sup>

In September 2007, in the *Glamis v. U.S.* award, the U.S. State Department noted the pernicious influence of preambular language in claimants’ arguments under various past BIT and FTA cases, arguing that: “We do not believe that the standard that’s articulated in those cases is reflective or has been shown to be reflective of the minimum standard of treatment under customary international law. Many of those Tribunals explicitly state that they are not tying the standard to that. And when they have gleaned the standard, as far as we can tell, many of them have looked at language from the preamble and have basically elevated that into a standard without examining State practice.”<sup>19</sup>

In December 2008, in the *Grand River v. U.S.* case, the U.S. State Department stated: “the key to interpreting the provisions of the NAFTA must be the text itself, as informed by the treaty’s context, object, and purpose, *only to the extent those additional sources are relevant to, and consonant with, the substantive provision at issue.* This approach is grounded in the well-accepted principle that general objectives can shed light on treaty provisions, but cannot impose independent obligations on treaty signatories” [italics added].<sup>20</sup>

**If the United States attempted to invoke the new May 2007 preambular clause as part of its defense in a future arbitral proceeding, the claimant and tribunal would likely cite these State Department arguments to invalidate the defense.** Additionally, they could note that these arguments were made *after* the addition of the May 2007 preambular language, showing that the arguments reflected a current position of the U.S. government.

(It is of note that the U.S. does not appear to be alone in this interpretation of a limited import for the preamble. The Canadian government’s submission in the *Thunderbird Gaming v. Mexico* case brought under NAFTA confirmed that “[w]hile the preamble may contain useful hints as to the object and purpose, it is not the end of the inquiry. An obligation itself provides a strong indication of its object and purpose.”<sup>21</sup> The OECD has also noted that pro-environment preambular clauses often appear alongside pro-investor clauses, observed that preambles “stop short of defining a hierarchy between the objectives,” that they “do not establish rights and obligations between the parties,” and that therefore “the role of environmental language in the preamble is different from the role of provisions in the body of the treaty.”<sup>22</sup>)

***Approach 4: Pro-public interest provisions must be balanced against, and possibly watered down by, pro-investor provisions***

Of the five remaining cases, all found that pro-“public interest” preambular provisions had to be weighed against (and possibly watered down by) pro-investor provisions.<sup>23</sup>

**Trade flows > environment.** In the *S.D. Myers v. Canada* case brought under NAFTA, the award mentions two “commercial” and one “environmental” provision of the preamble in passing,<sup>24</sup> and suggests that the cumulative result of these provisions in the context of the U.S.-Canada agreements is that the least trade-restrictive environmental policies should be followed. Specifically, “where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade.” The preamble was not interpreted as forgiving national treatment or FET violations.<sup>25</sup>

**Investment > international cooperation.** In the *F-W Oil Interests v. Trinidad & Tobago* case brought under the U.S.-Trinidad BIT, the panel mentioned a pro-investor preambular provision, as well as a preambular provision on “economic cooperation.” The panel suggested that the two should be balanced against one another, although it emphasized the pro-investor provision as support for the notion that “[t]he BIT, in other words, was conceived as having not just a protective role, but a dynamic one in encouraging and stimulating future investment.”<sup>26</sup>

**No clear weights to be given to different clauses in preamble.** In the *Grand River v. U.S.* case, the Canadian tobacco businessmen that were challenging the U.S. tobacco settlement cited the FET-related preambular provisions as support for their argument for a broad reading of their rights: “if a tribunal is presented with two equally plausible meanings it should choose the one most in accord with the objectives of promoting investment and competitive opportunity.” The tribunal noted these arguments and responded that “NAFTA involves a balance of rights and obligations, and does not point unequivocally in a single direction. While NAFTA’s preamble speaks of promoting investment, it also affirms the need to preserve the NAFTA Parties’ ‘flexibility to safeguard the public welfare.’”<sup>27</sup> While it is positive that the tribunal did not adopt the more extreme reading urged by the claimants in this case, the award’s conclusions indicate that tribunals are at a loss of how much weight to accord to any preambular provision.

**Pro-investor view of economic development.** The November 2006 *Patrick Mitchell v. Congo* annulment award cited the pro-investor preambular provision in the U.S.-Congo BIT “that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of both Parties.” The panel went on to say that, “ICSID tribunals do not have to evaluate the real contribution of the [investment] operation in question [to the economic development of the country]. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case.”<sup>28</sup> In other words, BIT protections may or may not measurably contribute to economic development, but they must be honored as a contractual restraint on state policy space.

The awards in the *Lemire v. Ukraine* dispute under the U.S.-Ukraine BIT represent perhaps the most tortured attempt to give weight to preambular provisions. In the 2010 Decision on Jurisdiction and Liability, the tribunalists first stated that “the Preamble emphasizes the promotion of investments of nationals of one party in the territory of the other, without any reference to the origin of the funds invested” as support for the notion that a U.S. investor could invest funds that did not necessarily come from the U.S. (paragraph 57). Second, the tribunalists cited the preambular provision “that fair and equitable treatment is desirable in order to maintain a stable framework for investment” as support for a broad FET reading. Specifically, the tribunalists concluded that an investor could have “legitimate expectations” that a newly capitalist country in the process of privatizing its radio sector would go on to grant a given foreign investor all the licenses they would need to be very successful, and that failure to do so could constitute a FET violation (paragraphs 264-266). Third, the tribunalists state:

“The object and purpose of the BIT – the third interpretive criterion – is defined in its Preamble: the parties ‘*desir[e] to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party*’ and recognize that the BIT ‘*will stimulate the flow of private capital and the economic development of the Parties*’. **The main purpose of the BIT is thus the stimulation of foreign investment and of the accompanying flow of capital.** But this main purpose is not sought in the abstract; it is inserted in a wider context, the economic development for both signatory countries. Economic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, **the object and purpose of the Treaty is not to protect foreign investments *per se*, but as an aid to the development of the domestic economy.** And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.” (bolded emphasis mine, paragraphs 272-273)

While on first read, much of this passage seems laudable from a public interest perspective, upon closer inspection it does not deviate significantly from the pro-investor bias of past readings of preambular provisions. First, it continues to assign primary weight – as indicated by the words “the main purpose” – to the pro-investor provisions of the preamble. Second, and without appearing to consult any theory of economic development, the tribunalists suggest that economic development will be accomplished through the protection of foreign investments. In other words, even though the BIT’s purpose is not to protect foreign investments “*per se*,” offering FET protection to foreign investments (even if domestic investments do not receive FET protection) is the instrument by which economic development will be attained. The tribunal failed to elaborate on this sweeping statement. This is of special concern, since it is not immediately obvious how granting radio licenses to a particular foreign investor contributes appreciably to economic development, irrespective of the theory of development consulted.

Fourth, the tribunalists cite in passing a preambular provision on “economic cooperation” in a section where the Decision discusses Ukrainian music content (paragraph 510). While the tribunalists’ discussion at this point is not particularly objectionable, it is nonetheless unclear what weight is being applied to the preamble.<sup>29</sup>

The *Lemire v. Ukraine* proceedings went on to become very contentious. Only two of the three tribunalists signed onto the final award, which found in favor of the U.S. investor, awarding him 70 times the value of his investment, or over \$8.7 million, based on an assumption that Lemire could have built out his radio empire to encompass 14 additional channels nationwide if only his

treatment from regulators had been different. While the initial Decision on Jurisdiction on Liability had been somewhat more nuanced in its consideration of the preambular provisions, the final Award referred only to pro-investor provisions of the preamble as support for the notion that “Mr. Lemire had the legitimate expectation that Gala, which at the time was only a local station in Kyiv, would be allowed to expand on its own merits, in parallel with the growth of the private radio industry in Ukraine” (paragraph 69).<sup>30</sup>

The third tribunalist, Jürgen Voss, wrote a scathing 157-page dissent, saying that the majority awarded “highly speculative, even exotic, profits” (paragraph 538). As Voss noted,

“In market economies, unequal legal protection moreover tends to distort competition. Fair and effective competition requires the same framework conditions for all business operators competing in the same economy. This necessity militates against different levels of legal protection, depending on the nationality of business owners. This aspect is gaining importance with the rapid globalization of capital movements, with increasing foreign ownership of domestic corporate citizens as a result. These complexities in my view require self-restraint of tribunals in extending the FET standard to the treatment of businesses operating in the host country as its ‘corporate citizens’ but owned by foreign investors. This issue is especially sensitive where BIT protection tends to strengthen benefiting foreign investors in their competition with domestically-owned companies and thus may lead to ‘reverse discrimination’ of the latter.” (paragraph 69)

Voss attacked the majority’s reading of the preamble in several places. In paragraph 110, he writes, “the Majority [in its Decision on Jurisdiction and Liability] associates the FET standard with ‘the main purpose of the BIT’ as stated in the latter’s Preamble, i.e., ‘the stimulation of foreign investment....’ It thus implies that the standard be delineated in light of this overriding investor-friendly objective.” In paragraphs 133 and 136, Voss cites this expansive interpretation as particularly problematic in the radio sector. He notes that tribunals should be very deferential in granting high dollar value awards based on failed tenders for radiowave frequencies, since this – as he states in paragraph 394 – “opens the floodgate of claims from frustrated tender applicants potentially accumulating to liability avalanches’ for the States concerned.”<sup>31</sup>

Both the majority and Voss noted that FET rules can grant foreign investors greater rights than their domestic counterparts (Award, paragraph 56; Dissent, paragraph 121). In any case, the fact that Voss dissented matters little, since a “win” only requires two arbitrators to rule in favor of the investor. In investor-state cases, the investor picks one arbitrator, the respondent government picks a second, and the two sides agree on a third to preside. In other words, an investor can win on the basis of supportive rulings from two arbitrators it had a hand in picking.

In sum, the conflicting goals of the preamble led the majority to engage in an ad hoc balancing exercise where (as lawyers schooled in investment issues rather than development) they simply gave more weight to investor rights. This is a likely outcome for investment disputes under the May 2007 preamble as well, since it does not prescribe the weights to be assigned the different preambular provisions, nor how conflicts between preambular and core text provisions should be resolved. Such weights are necessary, given some of the structural bias in international investment arbitration towards expansive readings of investor rights.<sup>32</sup>

### ***Approach 5: Pro-investor outnumber pro-public provisions, and are thus dominant***

While the previous four approaches encompass all those used by tribunals in all publicly available, final awards under U.S. FTAs or BITs, still other arguments have been advanced by claimants, respondents and outside parties. In the *Methanex v. U.S.* award, an *amicus* brief filed by environmental groups and a submission by Canada raised the pro-environment provisions of the NAFTA preamble as support for the U.S. right to regulate environmental matters.<sup>33</sup> The claimant Methanex responded viciously to this line of argument, noting that preambular language is merely hortatory, that pro-investor preambular provisions outnumbered pro-environment provisions in any case, and noting that no environmental language even made it into the “Objectives” section of NAFTA.<sup>34</sup> (We group this case under Approach 1, since the panel did not address these arguments.)

### ***Approach 6: Attempt to apply great weight to the May 2007 preambular language could cause breakdown in treaty interpretation***

Imagine a panel were predisposed to give great weight to the May 2007 preambular provision. The argument in favor of preambular language having some meaning as “context” in interpreting an FTA or BIT is derived from Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), which state:

#### “Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

#### Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”<sup>35</sup>

VCLT Articles 31 and 32 lay out a hierarchy of the elements to be consulted in interpretation: 1) text (i.e. ordinary meaning of words); 2) context; 3) objects and purpose; 4) subsequent agreement and practice; and 5) supplementary means of interpretation. An interpreter moves farther out along this hierarchy until they find a clear and reasonable meaning.<sup>36</sup>

Meanwhile, Article 27 of the Vienna Convention states that “[a] party may not invoke the provisions of its own internal law as justification for its failure to perform a treaty.”<sup>37</sup> This Article 27 language has been cited in many awards.<sup>38</sup>

How would our imagined panel attempt to give weight the May 2007 preambular language? Imagine that a Korea-incorporated firm challenged a U.S. public interest regulation under the U.S.-Korea FTA (which includes the May 2007 preambular language). The claim is that a Connecticut land use restriction affecting the Korean investor’s investment diminished the value of the investment 60 percent, but did not seize or transfer the assets to the state. The investor cites this as an indirect expropriation or regulatory taking – a claim that would not be compensable under U.S. law. The U.S. might choose to invoke the May 2007 preambular language as part of the context (as is permissible following from VCLT Article 31) for its defense that the Korean investor should have no greater rights in the U.S. than U.S. investors. If the tribunal were to attempt to incorporate the May 2007 language into its deliberations, it would immediately run into a VCLT Article 27 problem – that U.S. laws can provide no excuse for failing to live up to FTA obligations. Indeed, the claimant or tribunal might refer to the U.S. State Department’s argument in the *Grand River* case that preambles can only be given weight if they are “consonant” with the underlying FTA obligation to not indirectly expropriate. Where the preamble is not “consonant” with the FTA obligation, the former cannot “transform” the nature of the obligation or impose “independent” obligations, as the U.S. argued in the *Cattlemen* case.

In other words, the May 2007 language puts a tribunal in the untenable position of only having authority to consult the preambular language due to Article 31 of the Vienna Convention, while another article of the Vienna Convention – Article 27 – prevents the tribunal from consulting domestic legal standards as a basis for letting the U.S. “off the hook.”

## ANALYSIS

Even advocates for the May 2007 preambular language seem hesitant to argue that it will be binding. As one of the architects of the language stated: “This language *may* be crucial to tribunals interpreting the text of the investment chapter *in some cases*” [italics added]. He went on to say:

“Suppose a tribunal is considering two possible interpretations of a provision in the investment chapter of an FTA. One interpretation would provide a foreign investor under the trade agreement with greater rights than the rights of investors under U.S. law, and the other interpretation would provide the investor under the agreement with the same rights, or lesser rights. This language in the Preamble would preclude the tribunal from adopting the first interpretation. It would also preserve policy discretion not only for the U.S. Government, but also for the governments of our trading partners as well.”<sup>39</sup>

There is no tribunal award that has considered two equally plausible interpretations of a country’s obligations under a BIT or FTA, and then cited the preamble as an interpretive “tie breaker,” so the argument above is admittedly speculative in nature. But the preamble cannot “preclude” the tribunal from adopting an interpretation or “preserve policy space,” since – as the U.S. noted in the *Grand River* and *Cattlemen* cases – the preamble does not carry independent weight or establish separate obligations.



Moreover, the May 2007 language itself is highly confusing, saying that the parties “AGREE that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement...” Several aspects of this language are noteworthy:

1. **Possibility of greater rights.** While alleging (without support) that, “in the United States,” the “protections of investor rights under domestic law equal or exceed” the FTA standard, the preambular language suggests that the FTA standard may trump domestic law if “the protections of investor rights under domestic law” do not equal or exceed the FTA standard.
2. **No mention of greater procedural rights.** While mentioning “greater substantive rights,” the preamble does not foreclose the possibility of the FTA providing greater *procedural* rights for foreign investors – even in instances where domestic law equals or exceeds the FTA standard of protection. Greater procedural rights can occur when foreign investors have the option of resolving a claim either in domestic courts or by international arbitration.<sup>40</sup>
3. **Ambiguous interconnection between terms.** It is unclear how different parts of the preambular language fit together. What is the relationship between the words before and after the word “where”? What is the relationship between the phrases “substantive rights,” “investment protections” and “protections of investor rights”? FTAs often distinguish between protections for “investors” and protections for “investments.” For instance, the Peru FTA investment chapter’s provisions on FET<sup>41</sup> and expropriation<sup>42</sup> refer only to “investments,” while the national treatment provision refers to both “investments” and “investors.”<sup>43</sup> Indeed, practically every clause in the investment chapter can be scrutinized as to whether it applies to “investments,” “investors” or both. As a formal interpretive matter, it would be possible to read the words of the preamble after the word “where” as distinguishing two baseline scenarios: one (explicitly mentioned) where protections for *investors* in domestic law are equal or greater to the FTA standard; and a second (only deducible by inference) where protections for *investments* are greater in the FTA. The preamble, as currently worded, states that “substantive rights with respect to investment protections” are not greater under the FTA in the first baseline scenario. But that does not preclude the possibility that the FTA would provide “greater substantive rights with respect to investment protections” under the second baseline scenario.

Moreover, as a simple matter of fact, the claim that “investors are not hereby [in the FTA] accorded greater substantive rights with respect to investment protections than domestic investors under domestic law” is not true. U.S. law would not typically allow for the types of regulatory takings claims regularly made under FTAs and BITs, nor would the law of our trading partners.<sup>44</sup>

Assume that a Korean investor bought shares in Citigroup’s securities trading arm following passage of the 1999 Gramm-Leach-Bliley Act, which did away with the Glass-Steagall firewall between commercial and investment banks. Say legislation in 2013 partially reinstated the Glass-Steagall firewall, and the value of Citigroup’s trading operations dropped 70 percent, resulting in a loss of value of the Korean investor’s shares. Under U.S. law, the Korean investor would suffer a loss, and that would be the end of the story. There would be no basis for a takings claim under the Constitution’s Fifth Amendment, since the government had not claimed ownership of and/or

physically invaded the Korean's shares. A reasonable lawyer would advise against a takings claim of any kind for fear it could be seen as frivolous, since the investment retained more than 5-10 percent of its value,<sup>45</sup> and since judges would be likely to defer to the legislature as to the wisdom of instituting Glass-Steagall in 1933, repealing it in 1999, and partially reinstating it in 2013.<sup>46</sup> Moreover, the courts may be likely to see this as political question best resolved between the executive and legislative branches.

Under the U.S.-Korea FTA, however, the investor could launch an investor-state claim against the United States, arguing that his shares constituted an "investment," the value of which was "substantially" reduced by the new 2013 rules. The claimant could argue that the policy "indirectly expropriated" his investment in violation of his "legitimate, investment-backed expectations" when he made the investment in 1999.<sup>47</sup> Investor-state tribunals have second-guessed elected governments in similar manners, and allowed compensation for expropriation claims that do not destroy the value of the investment.<sup>48</sup> In this hypothetical situation, how is a tribunal to interpret the preambular language? Clearly, the FTA substantive "protections of investor rights" exceed "those set forth" in U.S. law. But this contradicts the assertion in the preamble that U.S. law equals or exceeds FTA protections.

Moreover, as the tribunal in the *S.D. Myers* award noted, the Vienna Convention "also contains, in Article 27, a general principle that ...*A party may not invoke the provisions of its own internal law as justification for its failure to perform a treaty.*"<sup>49</sup> When the "text" puzzles, "context" can help resolve the ambiguity as a secondary methodology. But what happens when the "context" itself puzzles, as is undoubtedly the case with the May 2007 preambular language? The tribunal is under no obligation to solve this secondary puzzle, and indeed may find it counterproductive to do so, particularly when the preambular text appears to be geared towards giving the United States a justification to invoke its "own internal laws" as a reason to not comply with FTA textual obligations. In a legal battle to determine whether the Vienna Convention Article 31's soft "permission given to consult preambles when helpful" approach should trump the Vienna Convention Article 27's hard prohibition on "internal-law-as-excuse," it is not difficult to imagine which would come out on top. A tribunal would be likely to agree with the conclusions of scholars (see below), and decline recourse to the preambular language.

Finally, when tribunals want to determine how protective of government prerogative the parties intended to be, they often look at provisions contemporaneously negotiated – often in other treaties with other governments.<sup>50</sup> In the case of the Korea FTA, a tribunal would not even have to go to another pact with other countries. They would simply compare the hortatory preambular investment language with the strong essential security language *in the same pact*, and conclude that policymakers did not expect as much deference to legislatures in the example of the conflict with domestic legal standards suggested by the preamble.<sup>51</sup> As NAFTA arbitrator and Associate Director of the National Law Center for Inter-American Free Trade David Gantz has argued, the preambular language is "considerably less troublesome" than the broader reforms in investment language that had been pledged earlier in 2007,<sup>52</sup> and, at most, "the language might give the arbitrators more pause" before passing a judgment. Contrast this with Gantz's take on the essential security language: "the tribunal has *no discretion to second-guess* the party invoking the national security exception" [italics added].<sup>53</sup> If arbitrators were to follow their fellow arbitrator Gantz, they would note that the preambular language is weak compared to what could

have been imposed (such as through the essential security exception). Therefore, negotiators must have wished the preambular language to be relatively weak.

### **Preamble Puzzle in Action**

The NAFTA panel in the U.S.-Mexico Cross-Border Trucking Dispute brought by the Mexican government against the U.S. government included Dr. Gantz. It concluded: “Finally, in light of the fact that both Parties have made references to their national legislation on land transportation, the Panel deems it appropriate to refer to Article 27 of the Vienna Convention, which states that ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’ This provision directs the Panel not to examine national laws but the applicable international law. Thus, *neither the internal law of the United States nor the Mexican law should be utilized for the interpretation of NAFTA. To do so would be to apply an inappropriate legal framework...* Finally, the Panel concludes that language in the Preamble of NAFTA, which states that the Parties ‘resolve to . . . preserve their flexibility to safeguard the public welfare’ cannot be relied upon by the United States as an independent basis for failing to comply with its obligations under the various provisions found in the NAFTA text and Annex I. Under Article 31 of the Vienna Convention, as mentioned earlier, the preamble is part of the ‘context’ to be considered in interpreting the treaty. However, there is no suggestion in NAFTA that the preambular language was intended to override the textual obligations. Rather, *the language used in the Preamble —‘resolve’ rather than ‘agree to,’ ‘shall,’ or ‘must’—indicate that the Preamble is aspirational and hortatory.* The Panel also notes that in the Preamble, the Parties have also ‘resolved to . . . create an expanded and secure market for the goods and services produced in their territories. . .’ which is consistent with the obligations placed upon the United States by Articles 1202 and 1203, and under Annex I.”<sup>54</sup> [italics added]

This tribunal ruling generally reinforces the previous approaches noted in this memo: that preambular language is hortatory, and that domestic law cannot be invoked as a justification to not live up to treaty obligations. Moreover, as the last italicized passage states, preambular provisions might have more meaning (in the view of this particular tribunal) if they used the phrase “agree to.” The May 2007 language simply reads “agree.” A tribunal would likely see the absence of the word “to” as indicating an absence of a concrete undertaking or enforceable provision.

## **CONCLUSION**

Future U.S. trade and investment agreements must go beyond the May 2007 language on investor rights. In particular, the investor-state system should be eliminated, and the actual text of the investment chapter must be changed. Specifically, the FET and indirect expropriation provisions must be altered so that claims must comply with the “no greater rights” principle; policies to prevent and mitigate financial crises must be allowed; a general exception for environmental and labor protections (from the investment and other chapters) must be instituted; and the loopholes that allow corporations to engage in shell games to launch investor-state cases must be eliminated.<sup>55</sup>

As this brief survey shows, there is scant historical support for the notion that pro-public interest provisions of preambles are protective of regulatory prerogatives: nearly 90 percent of the time, tribunals have given them no weight at all. In the remaining cases, tribunals engaged in an ad hoc “balancing test” that gave the pro-corporate preambular provisions the most weight. In the unlikely situation that the May 2007 preambular language would be given *any* weight in a future investor-state case, a claimant or tribunal would be able to point to various U.S. State Department comments giving preambular provisions little to no weight.

Moreover, the language may create more interpretative problems that it solves: preambles only have weight because of Article 31 of the Vienna Convention. However, Article 27 of the same treaty states that internal laws cannot be an excuse for complying with the terms of the agreement. The preamble, which relies on a reference to domestic law, would force a tribunal to come to an internally contradictory result. For this reason, tribunals will be unlikely to consult the new preambular language, and will simply apply the anti-public interest core provisions of the pending FTAs with Panama, Colombia and Korea.

## ENDNOTES

<sup>1</sup> Tucker is research director of Public Citizen’s Global Trade Watch. He thanks Greg Greenberg, Lori Wallach, Rachel Ackoff and Genevieve Gold for helpful comments, and LaTiesha Cooper, Travis McArthur, McKenzie Millar, Asne Oyehaug, Carmen Robinson, Hugh Schlesinger and Greg Smith for research assistance.

<sup>2</sup> For instance, in August of last year, Canada paid U.S. firm AbitibiBowater \$130 million to stop the company’s NAFTA arbitration from going forward. The company argued that NAFTA gave it the right to resell its timber-harvesting licenses and water-use permits after having closed down a paper mill in Newfoundland. Canadian legal scholars argued that the federal government’s concessions to AbitibiBowater undermined the “concept of water as a public trust” and created new property rights where Canadian law does not usually recognize any. See “AbitibiBowater NAFTA settlement has privatized Canadian water, trade committee hears,” Council of Canadians, March 8, 2011. Available at: <http://www.canadians.org/media/trade/2011/08-Mar-11.html>

<sup>3</sup> See “Table of Foreign Investor-State Cases and Claims under NAFTA, CAFTA and Peru FTA April 2011,” Public Citizen. Available at: <http://www.citizen.org/documents/investor-state-chart-april-2011.pdf>

<sup>4</sup> For more detailed analysis of these provisions, see “May 10th ‘Deal’ Does Nothing to fix Bush Trade Agreements’ Extreme NAFTA Chapter 11-style Foreign Investor Privileges,” Public Citizen. Available at: <https://citizen.org/documents/ACF9C86.pdf>

<sup>5</sup> The United States - Peru Trade Promotion Agreement, “Preamble,” [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset\\_upload\\_file971\\_9505.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file971_9505.pdf)

<sup>6</sup> “The implications of this [preambular] provision remain to be clarified in potential future arbitrations.” See John Crook (ed.), “New Investment and Dispute Settlement Provisions in U.S.-Peru Trade Agreement,” *Contemporary Practice of the United States Relating to International Law, American Journal of International Law* 103, American Society of International Law, October 2009, at 768.

<sup>7</sup> This memo examines only those FTA or BIT awards where: a) the U.S. is a party to the FTA or BIT, although not necessarily to the dispute at hand; and b) where an award on the merits was issued. In other words, settled cases, or cases where the panel found it did not have jurisdiction, are not considered.

<sup>8</sup> The arbitral panel did not address the preambular provisions in these cases, other than perhaps recording a comment by claimant or excerpting text of agreement. These cases include: *Argentina v. Sempra Energy International*, *Canada v. Chemtura Corporation* (formerly Compton Corporation), *Canada v. Merrill and ring Forestry L.P.*, *Canada v. Pope and Talbot Inc.*, *Canada v. United Parcel Service of America, Inc.*, *Democratic Republic of the Congo v. American Manufacturing and Trading, Inc.*, *Ecuador v. Chevron Corporation and Texaco Petroleum Corporation*, *Ecuador v. M.C.I. Power Group L.C.*, *New Turbine Inc.*, *Egypt v. Champion Trading Company*, *Estonia v. Alex Genin*, *Grenada v. Rachel S. Grynberg*, *Kazakhstan v. AIG Capital Partners Inc.*, *Kazakhstan v. Biedermann International, Inc.*, *Mexico v. Archer Daniels Midland Company*, *Tate and Lyle Ingredients Americas, Inc.*, *Mexico v. Corn Products International, Inc.*, *Mexico v. Fireman’s Fund Insurance Company*, *Mexico v. Gami Investments, Inc.*, *Mexico v. Marvin Feldman Karpa*, *Mexico v. Robert Azinian*, *Mexico v. Waste Management, Inc.*, *Moldova v. Link-Trading Joint Stock Company*, *Panama v. Nations*

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Energy Inc., Romania v. Noble Ventures, Inc., Ukraine v. Generation Ukraine, Inc., United States of America v. Glamis Gold, Ltd., United States of America v. Methanex Corporation, and United States of America v. Mondev International Ltd.

<sup>9</sup> For instance, NAFTA's preamble has 15 clauses. Eight could be classified as "pro-investor," while six relate more to the "public interest." The first clause is neutral. Actual text: "The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:  
STRENGTHEN the special bonds of friendship and cooperation among their nations;  
CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;  
CREATE an expanded and secure market for the goods and services produced in their territories;  
REDUCE distortions to trade;  
ESTABLISH clear and mutually advantageous rules governing their trade;  
ENSURE a predictable commercial framework for business planning and investment;  
BUILD on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation;  
ENHANCE the competitiveness of their firms in global markets;  
FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights;  
CREATE new employment opportunities and improve working conditions and living standards in their respective territories;  
UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;  
PRESERVE their flexibility to safeguard the public welfare;  
PROMOTE sustainable development;  
STRENGTHEN the development and enforcement of environmental laws and regulations; and  
PROTECT, enhance and enforce basic workers' rights;  
HAVE AGREED as follows:..."

The U.S.-Argentina BIT preamble has four major clauses, three of which could be classified as "pro-investor": "The United States of America and the Argentine Republic, hereinafter referred to as the Parties;  
Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;  
Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;  
Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources;  
Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights; ..."

<sup>10</sup> These cases included: Argentina v. Azurix Corporation, Argentina v. CMS Gas Transmission Company, Argentina v. Enron Corporation and ponderosa Assets, L.P., Argentina v. LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc., Ecuador v. Duke Energy Electroquil Partners, Electroquil S.A., Ecuador v. Occidental Exploration and Production Company, Mexico v. International Thunderbird Gaming Corporation, Mexico v. Metalclad Corporation, and Turkey v. PSEG Global, Inc.

<sup>11</sup> See Suzanne Spears, "The Quest for Policy Space in a New Generation of International Investment Agreements," *Journal of International Economic Law*, 13:4, 2010, at 1065

<sup>12</sup> Azurix Corp. – The Argentine Republic, ICSID Case No. ARB/01/12 (July 14, 2006) (Sureda, Lalonde P.C., O.C., Q.C., Martins, Arbs.). Available at: <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>, at para 381.

<sup>13</sup> The tribunal stated: "In the preamble of the BIT, the parties agreed that 'fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources'. Therefore, the BIT itself is a document that requires certain treatment of investment which the parties have considered necessary to 'stimulate the flow of private capital'. The Tribunal in interpreting the BIT must be mindful of the objective the parties intended to pursue by concluding it." See Azurix Corp. – The Argentine Republic, ICSID Case No. ARB/01/12 (July 14, 2006) (Sureda, Lalonde P.C., O.C., Q.C., Martins, Arbs.), at paras 307, 360. Available at: <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>.

<sup>14</sup> These cases included: Argentina v. Continental Casualty Company, Czech Republic v. Ronald S. Lauder, Mexico v. Cargill, Incorporated, and United States of America v. ADF Group Inc.

<sup>15</sup> *ADF Group Inc. v. United States*, ICSID Case No. ARB (AF)/00/1 (NAFTA), at para 147. Available at: [http://ita.law.uvic.ca/documents/ADF-award\\_000.pdf](http://ita.law.uvic.ca/documents/ADF-award_000.pdf)

<sup>16</sup> *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (US/Argentina BIT), at para 258. Available at: [http://ita.law.uvic.ca/documents/CMS\\_FinalAward\\_000.pdf](http://ita.law.uvic.ca/documents/CMS_FinalAward_000.pdf)

<sup>17</sup> Because this case was dismissed at the jurisdictional phase, it is not incorporated into the numerical tallies summarized in this paper.

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<sup>18</sup> See Award on Jurisdiction, *Canadian Cattlemen for Fair Trade v. United States*, UNCITRAL, (NAFTA), Jan. 28, 2008, at para 57. Available at: <http://www.naftaclaims.com/Disputes/USA/CCFT/CCFT-USA-Award.pdf>

<sup>19</sup> *Glamis Gold, Ltd v United States of America*. Available at: <http://www.naftaclaims.com/Disputes/USA/Glamis/Glamis-Transcript-Day09.pdf>

<sup>20</sup> Counter-Memorial of Respondent United States of America, Grand River Enterprises Six Nations Ltd., Jerry Montour, Kenneth Hill, Arthur Montour v United States of America (December 22, 2008)(Feldman)  
<http://www.naftaclaims.com/Disputes/USA/GrandRiver/GRE-USA-Merits-Counter-Memorial-R.pdf>

<sup>21</sup> Submission of The Government of Canada Pursuant to NAFTA article 1128, International Thunderbird Gaming Corporation v United Mexican States (May24,2004)(Legault)<http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird%20-%20Canada%201128%20Submission.pdf>, at para 17.

<sup>22</sup> Kathryn Gordon, Joachim Pohl (2011), "Environmental Concerns in International Investment Agreements: a survey", *OECD Working Papers on International Investment, No. 2011/1*, OECD Investment Division, At 14.  
<http://www.oecdistanbul.org/dataoecd/50/12/48083618.pdf>

<sup>23</sup> These included: Canada v. S.D. Myers, Inc., Democratic Republic of the Congo v. Patrick Mitchell, Trinidad and Tobago v. F-W Oil Interests, Inc., Ukraine v. Joseph Charles Lemire, and United States of America v. Grand River Enterprises Six Nations, Ltd., et al.

<sup>24</sup> See First Partial Award, S.D. Myers v Canada (November 13, 2000)(Schwartz, Chiasson, Hunter) pg. 45-47,50  
<http://ita.law.uvic.ca/documents/SDMeyers-1stPartialAward.pdf>

<sup>25</sup> See First Partial Award, S.D. Myers v Canada (November 13, 2000)(Schwartz, Chiasson, Hunter)  
<http://ita.law.uvic.ca/documents/SDMeyers-1stPartialAward.pdf>. See paras 196-204, 220-221, and 322

<sup>26</sup> Award, F-W Oil Interests, Inc. v The Republic of Trinidad and Tobago (March 3, 2006)(Case No. ARB/01/14), para 112. Available at: <http://ita.law.uvic.ca/documents/FWOilAward.pdf>

<sup>27</sup> See Award, Grand River Enterprises Six Nations Ltd. v. United States of America (Jan. 12, 2011)(Nariman, Anaya, Crook), at para 69, Available at: [http://ita.law.uvic.ca/documents/GrandRiverEnterprises\\_v\\_US\\_Award\\_12Jan2011.pdf](http://ita.law.uvic.ca/documents/GrandRiverEnterprises_v_US_Award_12Jan2011.pdf)

<sup>28</sup> *Patrick Mitchell v. Democratic Republic of Congo*, Annulment Proceedings Regarding the Award Rendered on February 9, 2004, Case No. ARB/99/7, Decision On The Application For Annulment Of The Award, November 1, 2006, at paras 32-33.

<sup>29</sup> See Decision on Jurisdiction and Liability, Joseph Charles Lemire v. Ukraine (Jan. 14, 2010) (Fernández-Armesto, Paulsson, Voss)  
<http://ita.law.uvic.ca/documents/Lemirev.Ukraine2010.pdf>

<sup>30</sup> See Award, Joseph Charles Lemire v. Ukraine (March 28, 2011) (Fernández-Armesto, Paulsson, Voss)  
[http://ita.law.uvic.ca/documents/LemireVUkraine\\_Award\\_28March2011.pdf](http://ita.law.uvic.ca/documents/LemireVUkraine_Award_28March2011.pdf)

<sup>31</sup> See Dissenting Opinion of Arbitrator Dr. Voss, Joseph Charles Lemire v. Ukraine (March 1, 2011)  
[http://ita.law.uvic.ca/documents/LemireVUkraine\\_DissentOfJurgenVoss\\_1March2011.pdf](http://ita.law.uvic.ca/documents/LemireVUkraine_DissentOfJurgenVoss_1March2011.pdf)

<sup>32</sup> In an additional case, the tribunal did not address a balancing test that was suggested by the respondent. In the *United Parcel Service v. Canada* case brought under NAFTA, the Canadian government was on the defense. Accordingly, it would have been in the government's defensive interest to make an argument that the pro-public interest provisions should trump the pro-investor provisions. Nonetheless, Canada merely argued in favor of a balancing requirement, saying that the preamble's mention of a public interest condition help to "strike a balance between the diverse objective common to the NAFTA Parties," so that any one condition is not given "too much weight." Because the tribunal did address this argument, we do not include this case in Approach 4 but instead in Approach 1. See Award on the Merits, *United Parcel Service v Canada* (May 24, 2007) (Cass, Fortier, Keith)  
[http://www.naftaclaims.com/Disputes/Canada/UPS/UPS-Canada-Final\\_Award\\_and\\_Dissent.pdf](http://www.naftaclaims.com/Disputes/Canada/UPS/UPS-Canada-Final_Award_and_Dissent.pdf)

<sup>33</sup> See Submission of Non-disputing Parties Bluewater Network, Communities for a Better Environment and Center for International Environmental Law, *Methanex Corporation v United States of America* (March 9, 2004) (Wagner)  
<http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexAmicusSubBluewater.pdf>, paras 6-9.  
Fourth Submission of the Government Of Canada Pursuant to NAFTA Article 1128, *Methanex Corporation v United States of America* (January 30, 2004)(Knobel, Legault)  
<http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexCanada1128ReAmend.pdf>, para 16.

<sup>34</sup> Fuller quote: "Earthjustice next argues that environmental measures are entitled to a "special" or heightened presumption of legitimacy.<sup>31</sup> In support of this argument, Earthjustice cites NAFTA's preamble and the North American Agreement on Environmental Cooperation ("NAAEC"), neither of which state that government or environmental measures are entitled to a presumption of legitimacy,

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let alone a special or heightened one... Earthjustice claims that “[t]he environmental provisions of [NAFTA and NAAEC] are part of the context in which this Tribunal must interpret Methanex’ claim under Chapter 11.” Yet Earthjustice ignores the larger context within which those provisions and hortatory language appear. Earthjustice selectively quotes the few portions of NAFTA and its side agreements that relate to environmental protection and conservation, but disregards the fact that those environmental provisions occupy a subordinate position in the overall framework of NAFTA. The primary purpose of NAFTA is to foster open trade and investment liberalization, thus the core obligations relate to the achievement of those objectives. Environmental protection and conservation is only a secondary objective, cited in hortatory language in the Preamble and in a little used side agreement. Earthjustice cannot seriously think that it can misconstrue hortatory statements to create positive obligations to which the signatories never agreed, or that it can use a side agreement (NAAEC) as a prism for interpreting the primary agreement (NAFTA). The Tribunal can only accept Earthjustice’s argument if it disregards traditional principles of treaty interpretation and forgets that NAFTA is a trade and investment treaty with environmental provisions, not an environmental treaty with trade and investment provisions. The proper context within which the Tribunal must consider Methanex’ claim consists of the trade and investment obligations that are the essence of NAFTA, not the environmental provisions and hortatory language that are subordinate to those core trade and investment obligations... Strangely enough, IISD concedes that Chapter 11 must be interpreted as an “integrated conception,” which signifies that the same approach must apply to the Preamble and Objectives, at a minimum. As such, the Tribunal should consider the whole of the Preamble and Objectives. The Preamble contains nine hortatory statements that refer to reducing distortions in trade, establishing clear and mutually advantageous rules for governing trade, ensuring a predictable commercial framework for business planning and investment, and enhancing the competitiveness of firms in global markets. The nine statements relating to trade, compared to three related to environmental protection and conservation, indicate that NAFTA is primarily intended to promote and liberalize trade among the signatory countries. Importantly, the statements relating to trade precede, and are incorporated into, the statements relating to environmental protection. For example, the signatories agreed to “undertake each of the preceding [obligations to create and support open trade and liberalization] in a manner consistent with environmental protection and conservation.” More importantly, the Objectives of NAFTA, in Article 102, do not refer to the environment or to sustainable development, but do mention promoting fair competition and substantially increasing investment opportunities as objectives of the agreement. By ignoring this context, IISD has violated traditional rules of treaty interpretation, which require consideration of the treaty text as a whole rather than selective parts thereof.” See Claimant Methanex Corporation’s Reply to The Amicus Curiae submissions of Earthjustice and The International Institute For Sustainable Development, *Methanex v United States of America* (April 23, 2004) <http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexCommentsReAmicus.pdf>

<sup>35</sup> See <http://www.unhcr.org/refworld/type,MULTILATERALTREATY,UN,,3ae6b3a10,0.html>

<sup>36</sup> See discussion also in *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Jan. 14, 2010, paras 256-273. See also reasoning in *ADF Group v. United States*, at para 147.

<sup>37</sup> Vienna Convention on the Law of Treaties, art. 27, January 27, 1980 <http://www.worldtradelaw.net/misc/viennaconvention.pdf>; pg. 11

<sup>38</sup> For instance, in the *Sempra v. Argentina* award, where the tribunal sided with the investor, and also in the *GAMI v. Mexico* case, where the tribunal sided with the government.

<sup>39</sup> Chairman Charles B. Rangel (D-N.Y.), “A New Trade Policy for America,” in Terrence Stewart, ed. *Opportunities and obligations: new perspectives on global and U.S. trade policy*, (The Netherlands: Kluwer Law International, 2009), at 302.

<sup>40</sup> See Simon Lester, “USCIB on Investor-State in the TPP”, *International Economic Law and Policy Blog*, May 10, 2011 <http://worldtradelaw.typepad.com/ielpblog/2011/05/uscib-on-investor-state-in-the-tpp.html>

<sup>41</sup> See United States - Peru Trade Promotion Agreement, U.S.-PE, Article 10.5.1: “Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”

<sup>42</sup> See United States - Peru Trade Promotion Agreement, U.S.-PE, Article 10.7.1: “No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization...”

<sup>43</sup> See United States - Peru Trade Promotion Agreement, U.S.-PE, Article 10.3 (1-2): “1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”

<sup>44</sup> J. Peter Byrne, “Ten Arguments for the Abolition of the Regulatory Takings Doctrine,” *Ecology Law Quarterly*, 22, 1995; Vicki Been and Joel Beauvais, “The Global Fifth Amendment? Nafta’s Investment Protections and the Misguided Quest for an International ‘Regulatory Takings’ Doctrine,” *New York University Law Review*, April 2003, Available at SSRN: <http://ssrn.com/abstract=337480>; Jeeyep Kim, “National Chaos?: Would the Indirect Expropriation Provisions of the Korea-US FTA Destroy the Korean Land Use System,” unpublished paper, 2008. Available at: [http://works.bepress.com/jeeyep\\_kim/](http://works.bepress.com/jeeyep_kim/)

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<sup>45</sup> While courts have not specified a precise formula for the percentage of property destruction necessary to constitute a regulatory taking, the *Lucas v. South Carolina Coastal Comm'n* panel in 1992 stated that it would likely be a minimum of 90 to 95 percent destruction. Quoted in Matthew Porterfield, "State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations," Working Paper, Jan. 4, 2011 draft, at 15. Available at: [http://works.bepress.com/context/matthew\\_porterfield/article/1000/type/native/viewcontent](http://works.bepress.com/context/matthew_porterfield/article/1000/type/native/viewcontent)

<sup>46</sup> For a history of these rules, see Todd Tucker, "How to Reform WTO and FTA Rules to Confront Too-Big-To-Fail Banks," Public Citizen Memorandum, May 10, 2011, at 18-22. Available at: <http://www.citizen.org/documents/memo-gats-conflict-with-bank-size-limits-may-10-2011.pdf>

<sup>47</sup> The claimant in the *LG&E v. Argentina* case argued that a decline in the value of shares in an investment could be seen as an indirect expropriation. As Porterfield argues, "The tribunal noted that although LG & E's earnings had been adversely affected, it still maintained its shares in the company, and that accordingly '[w]ithout a permanent, severe deprivation of LG&E's rights with regard to its investment, or almost complete deprivation of the value of LG&E's investment . . . these circumstances do not constitute expropriation. . . ." See Matthew Porterfield, "State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations," Working Paper, Jan. 4, 2011 draft, at 9. Available at: [http://works.bepress.com/context/matthew\\_porterfield/article/1000/type/native/viewcontent](http://works.bepress.com/context/matthew_porterfield/article/1000/type/native/viewcontent)

<sup>48</sup> In *Metalclad v. Mexico*, the threshold was deemed to be "interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be-expected economic benefit of property." In *Pope & Talbot v. Canada*, the award stated that "under international law, expropriation requires [only] a 'substantial deprivation.'" See Matthew Porterfield, "State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations," Working Paper, Jan. 4, 2011 draft. Available at: [http://works.bepress.com/context/matthew\\_porterfield/article/1000/type/native/viewcontent](http://works.bepress.com/context/matthew_porterfield/article/1000/type/native/viewcontent)

<sup>49</sup> First Partial Award, *S.D. Myers v Canada* (November 13, 2000)(Schwartz, Chiasson, Hunter) <http://www.naftaclaims.com/Disputes/Canada/SDDMyers/SDDMyersMeritsAward.pdf>, para 203.

<sup>50</sup> As we have noted elsewhere with regard to "Denial of Benefits" clauses, tribunals have made determinations about how strong countries intended their "Denial of Benefits" provisions to be based on what provisions other countries were including in their BITs negotiated at the same time. If the language in the other countries' pacts was tougher, then arbitrators tend to find that the parties must have favored a weaker interpretation. See: Sierra Club, Public Citizen, et. al. "Investment Rules in Trade Agreements: Top 10 Changes to Build a Pro-Labor, Pro-Community and Pro-Environment Trans-Pacific Partnership," Aug. 9, 2010. Available at: <http://www.citizen.org/documents/InvestmentPacketFINAL.pdf>

<sup>51</sup> During the debate on the Oman FTA, members of Congress raised concerns that the FTA's "essential security" defense provision might not be strong enough to protect against an investor-state case from the controversial Dubai Ports World company, or a state-state case from Oman on the company's behalf. It was suggested that the "essential security" defense provision be strengthened so that it read: "For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies." The Peru FTA Investment Chapter could have similarly been amended to read: "For greater certainty, if a Party informs an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement) that an investor or Party's claim would afford greater substantive rights with respect to investment protections than domestic investors under domestic law, the tribunal or panel hearing the matter shall not grant compensation for any such claims." Instead, we have unclear hortatory language that is not part of the core substantive obligations of the agreement in the investment chapter.

<sup>52</sup> Here, he is referring to the promise made in March 2007 that the Democratic leadership would "Ensure that trade agreement accords 'no greater rights' to foreign investors in the US than to US investors." See "A New Trade Policy for America," Ways & Means Committee Fact Sheet, March 27, 2007. As noted above, this would have entailed changes to the core investment text.

<sup>53</sup> David Gantz, "The 'Bipartisan Trade Deal,' Trade Promotion Authority And The Future Of U.S. Free Trade Agreements," *Saint Louis University Public Law Review*, XXVIII, 2008, at 143, 145. See Gantz's CV at: <http://www.law.arizona.edu/faculty/getprofile.cfm?facultyid=41>

<sup>54</sup> "Final Report of the Panel", In the Matter of Cross-Border Trucking Services, Feb. 6, 2001, Panel: J. Martin Hunter, Luis Miguel Diaz, David A. Gantz, C. Michael Hathaway, Alejandro Ogarrio. Available at: <http://www.naftaclaims.com/Disputes/USA/USTrucking/USTruckingChapter20.pdf>.

<sup>55</sup> See: Sierra Club, Public Citizen, et. al. "Investment Rules in Trade Agreements: Top 10 Changes to Build a Pro-Labor, Pro-Community and Pro-Environment Trans-Pacific Partnership," Aug. 9, 2010. Available at: <http://www.citizen.org/documents/InvestmentPacketFINAL.pdf>