

# Investor-State Dispute Settlement in the Trans-Pacific Partnership Agreement

Submission to the Department of Foreign Affairs and Trade

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## Key Recommendations

This submission outlines serious problems with both the process of investor-state dispute settlement and the handling of important issues of public policy by investment arbitration tribunals. The key recommendations are that the government should:

- ❖ **strongly oppose the inclusion of investor-state dispute settlement in the Trans-Pacific Partnership Agreement**
- ❖ **not sign any agreements that contain an investor-state dispute settlement clause**

## Introduction

Over the last decade there has been an explosive increase of investor-state disputes resolved in international arbitration. Many of these disputes have revolved around public policy measures and have implicated sensitive issues such as access to drinking water, mining development on sacred indigenous sites, health warnings on cigarette packaging and restrictions on the use of dangerous chemicals.<sup>1</sup> This has sparked a debate within academic and policy circles about whether international trade and investment agreements infringe on a government's 'right to regulate'.

Concerns about the public policy implications of investor-state dispute settlement arose during the negotiation of the Australia-United States Free Trade Agreement (AUSFTA) and are reflected in the final text of the investment chapter of that agreement.<sup>2</sup> AUSFTA does not contain a standard investor-state dispute settlement clause. The decision of the Howard government to exclude the clause can be linked to widespread opposition to investor-state dispute settlement from both civil society and Australian state governments.<sup>3</sup>

The Rudd government is now involved in negotiations for a Trans-Pacific Partnership Agreement (TPP) with several countries, including the United States, and the issue of investor-state dispute settlement is re-emerging. Minister for Trade Simon Crean has expressed serious reservations about the inclusion of an investor-state dispute settlement clause in the TPP, and he has very good reasons to be concerned.

This public submission looks at some of the serious failings of the current system of international investment arbitration. It also draws on the experience of Canada, which has been exposed to claims by American investors

under the investment chapter of the North American Free Trade Agreement (NAFTA) for the last fifteen years, to illustrate how an investor-state dispute settlement mechanism in the TPP could negatively affect public policy in Australia. A particular focus is given to NAFTA investor-state disputes concerning regulation aimed at the protection of the environment.

## Concerns with Process

Historically, disputes between foreign investors and host states were resolved in local courts. However, in the 1960s an international system emerged that allowed investors to take claims against governments before arbitral panels. This system was developed through the inclusion of clauses on investor-state dispute settlement first in bilateral investment treaties (BITs) and later in bilateral and plurilateral trade agreements that contained chapters on investment protection. Collectively, BITs and investment chapters of trade agreements are referred to as international investment agreements (IIAs).

Although investor-state dispute settlement has been around for a long time, only a handful of cases emerged prior to the mid-1990s.

Thereafter, the frequency of disputes increased rapidly and as of the end of 2008, the total number of *known* cases had reached 317.<sup>4</sup> The large number of disputes can be attributed in part to the proliferation of BITs (there are now estimated to be more than 3000 worldwide) but also to recent arbitral interpretations of provisions in IIAs, which have both broadened the range of potential claims that can be made against a state and increased investor interest in this form of dispute settlement.

An international 'investment court' to deal with investor-state disputes has not been established and, as there is no multilateral agreement on investment, nothing comparable to the World Trade Organization Dispute Settlement Understanding has been set up. Instead, IIAs refer to one or more sets of procedural rules, which can be used for the creation and function of one-off arbitral panels.

The rules most commonly referred to in IIAs are those developed by the UN Commission on International Trade Law (UNCITRAL)<sup>5</sup> and the International Centre for the Settlement of Investment Disputes (ICSID).<sup>6</sup> The UNCITRAL rules are *ad hoc* and no organisation keeps track of disputes where they are applied. On the

other hand, ICSID, a part of the World Bank Group, maintains a website with relevant details about disputes in which its rules are utilised and posts tribunal awards if they are made public.<sup>7</sup> Although ICSID was established in 1966, the first ICSID arbitral tribunal did not convene until 1972 and the pace of cases brought before the Centre remained slow for decades.<sup>8</sup> It is only in the last ten years that the caseload of ICSID has increased sharply. Between 2001 and 2006, the number of disputes filed under ICSID was 150% of the total number of cases filed over the first 35 years that the Centre was in existence.<sup>9</sup>

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In a typical case, regardless of whether ICSID or UNCITRAL rules are chosen, an investment arbitral tribunal will have three members: one chosen by the investor, one chosen by the state and a third that is mutually agreed upon and will act as president. It is not only barristers and retired judges that are frequently appointed as arbitrators, but also professors, who in many cases also have careers as leading

private lawyers.<sup>10</sup> In fact, it is entirely possible for an individual to act as a legal representative for a respondent or claimant in one case, and an arbitrator in another.<sup>11</sup>

It has been said that 'the awards of arbitrators are more widely enforceable than any other adjudicative decision in public law'.<sup>12</sup> IIAs often explicitly obligate states to recognize awards, thus allowing investors to seek enforcement in the local courts of the host state.<sup>13</sup> Furthermore, where an IIA provides for enforcement under the ICSID Convention, an investor can seek enforcement in the domestic courts of any state party to the Convention. Article 54 of the ICSID Convention stipulates that each Contracting State shall recognize an ICSID award as binding and enforce the pecuniary obligations imposed by that award within its territory as if it were a final judgment of a domestic court. Awards may also be enforceable under other arbitration treaties such as the New York Convention. The New York Convention is similar to the ICSID Convention in that it requires courts in contracting states to enforce arbitral awards. Australia has ratified both the ICSID and the New York conventions.

There are four key areas of investor-state dispute settlement that are commonly criticized in the academic and policy literature:

#### ❖ Institutional Bias & Conflicts of Interest

Only investors can initiate an investor-state dispute under an IIA, and thus the system requires their continued participation in order to survive. As investors will obviously only participate if they see that it is in their interest to do so, it is unsurprising that many observers suggest that there is an inherent pro-investor bias in the system.

The means by which arbitrators are chosen and rewarded for their services also creates the appearance of a biased system. Court judges have no financial stake in the outcome of the cases they preside over. Arbitrators, on the other hand, are not only chosen by the parties to the dispute, they are also paid by the hour with no time limits on proceedings. Such incentives inevitably favour the party advancing the claim (i.e., the investor), even if unintentionally.<sup>14</sup>

The fact that individuals can act as both arbitrators and counsel in different cases is also problematic as they may 'consciously or

unconsciously' make decisions as arbitrators that will further their client's interests in another case.<sup>15</sup> Furthermore, even when such a direct conflict of interest does not exist, a large number of arbitrators work for law firms with corporate clients that have a direct stake in the interpretation of IIAs.<sup>16</sup>

#### ❖ Inconsistency

Awards rendered in investment arbitration are only binding on the parties involved in the dispute: the rulings of tribunals are said to have no *stare decisis*. Hence, tribunals do not have to base their decisions on the decisions of previous tribunals. Furthermore, unlike in the realm of trade disputes, there is no appellate body to ensure consistent interpretation of international investment law. As a result, there have been cases where several awards have been issued addressing the same facts where panels have reached diverging conclusions. This has led to what some have termed a 'legitimacy crisis' in international investment arbitration.<sup>17</sup>

This problem is compounded by the ambiguous nature of the provisions found in IIAs (e.g. the requirement to provide 'fair and equitable treatment', see further below). When the outcome of arbitration is uncertain, states that

are faced with a threat of arbitration are more likely to settle investor claims, often at the expense of public policy (see further discussion of 'regulatory chill' below).

#### ❖ Lack of Transparency & Participation

Despite the compelling rationale that the public has a stake in investor–state disputes (because public policies are often challenged and because public funds are used to pay damages to investors), the arbitration procedures that govern the resolution of such disputes are based on the model of private firm-to-firm arbitration, which was designed with the protection of commercial interests in mind. As such, arbitration has traditionally been confidential. Consequently, there are generally no requirements for investor–state disputes to be made known to the public, or any provisions for public access to documents and awards produced in the course of the arbitration. The ICSID Secretariat does keep a registry of all cases filed under its rules, and also publishes the awards on its website if neither party to the dispute objects. However, other arbitration institutions, such as the International Chamber of Commerce (ICC), do not have such a public register and cases resolved under *ad hoc* mechanisms of dispute resolution (e.g.

UNCITRAL) are only kept track of in an *ad hoc* manner by interested academics and lawyers.

There have been some advances in transparency in recent years, particularly in cases involving the NAFTA countries.

However, it remains the case that under the ICSID or UNCITRAL Rules, hearings cannot be opened to the public unless both parties agree, and investors have opted for closed hearings in several recent cases concerning public policy.<sup>18</sup>

There is also no tradition of involving non-disputant third parties in arbitration. The most common means of third party participation in other international tribunals is through the submission of *amicus curiae* ('friend of the court') briefs. While historically there has been no role for *amici* in investor–state disputes, in recent years a trend of such participation has been emerging. The precedent<sup>19</sup> for such participation was set within the context of the NAFTA, but the idea has also spread to BITs negotiated by Canada and the US, and was incorporated into the ICSID Rules in 2006.

Australia's existing IIAs are a mixed bag with respect to the issues of transparency and *amicus* participation. The investment chapter of the

Australia-Chile Free Trade Agreement is the most progressive, with provisions providing for the submission of *amicus* briefs, publication of documents and open hearings. However, the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) has no provision on *amicus curiae* and only a very weak provision on transparency. The transparency clause only provides that parties 'may make publicly available all awards and decisions produced by the tribunal' which excludes all other relevant documents submitted by parties to the tribunal. Furthermore, there are additional protections for confidentiality which are not well defined and could therefore be broadly interpreted to mean that parties could designate any and all information submitted to the tribunal as confidential if they so desired.

#### ❖ High Costs

The ICSID Secretariat charges a fee for the lodging of a request for arbitration (US\$25,000), for any interpretation, revision or annulment of an arbitral award rendered pursuant to the Convention (US\$10,000), for the administration of a dispute (US\$20,000 per year plus out of pocket expenses), and for the appointment of an arbitrator or decisions on the challenge of an arbitrator in arbitrations not conducted under

the Convention or Additional Facility Rules.<sup>20</sup> ICSID Arbitrators receive reimbursement for any direct expenses reasonably incurred in the course of the arbitration, and unless otherwise agreed between them and the parties, a fee of US\$3,000 per day of meetings or other work performed in connection with the proceedings. The tribunal in an ICSID case is free to determine how the costs of the arbitration, and the legal fees of the parties, should be distributed in the award.<sup>21</sup>

The UNCITRAL Rules provide that the arbitral tribunal shall fix the costs of arbitration in its award.<sup>22</sup> There is no ceiling for arbitrator fees under the UNCITRAL Rules, though it is stipulated that they 'shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case'.<sup>23</sup> It is also suggested that the 'costs of arbitration shall in

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principle be borne by the unsuccessful party'.<sup>24</sup> However, the arbitral tribunal may choose to divide the costs, including legal fees, between the parties, taking into account the circumstances of the case.

In 2005, UNCTAD reported that companies have been known to spend up to US\$4 million on lawyers' and arbitrators' fees for an investor-state dispute, and countries can expect an average tribunal to cost US\$400,000 or more in addition to the US\$1–2 million in legal fees.<sup>25</sup> The costs of participation in an investor-state dispute have undoubtedly risen significantly since then. The most staggering example is the case of *PSEG v. Turkey*, where costs and legal fees amounted to nearly US\$21 million. In that case the Turkish government was required to pay 65% of these costs (~US\$13.5 million) which far outweighed the compensation (~\$US 9.1 million) it was ordered to pay the investor.<sup>26</sup>

In addition to the procedural costs associated with international arbitration, there is the issue of damages. Tribunals are given a significant degree of discretion to determine damages, which may include a company's lost future profits. While it is a rather extreme case, by 2006, Argentina was facing more than thirty

claims for an estimated US\$17 billion in compensation, amounting to nearly the entire annual budget of the national government.<sup>27</sup> The Czech Republic was obliged to pay more than US\$350 million in compensation to a Dutch investor, which according to one report meant a near doubling of the country's public sector deficit.<sup>28</sup> A 2009 survey found 33 cases involving claims of more than \$1 billion, the highest being a claim for \$50 billion, and more than 100 additional cases where claims were between \$100 and \$900 million.<sup>29</sup>

## Canada's NAFTA Experience

The situation of Australia under the TPP is best compared to that of Canada under NAFTA; both countries are small in terms of size of their population and economy compared to the US, but nevertheless are important sources and receivers of US foreign investment. As such, it is worth noting that as of May 2010, Canada had been served with twenty-seven notices of intent to submit a claim to arbitration under NAFTA (all from American investors): nine cases were pending; thirteen had been withdrawn or were inactive; one had been settled (with payment to the investor and agreement to repeal a regulation); and in four



cases a tribunal had made an award on damages. Two of the four awards on damages were decided in favour of the investor. Even though the government was successful in its most recent case, it was still required to bear half the arbitration fees, which amounted to nearly US\$1 million, in addition to its own legal costs.<sup>30</sup>

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Before turning to some examples of investor-state disputes over Canadian environmental policies, it is important to explain the basis for these claims in NAFTA. Like most IIAs, Chapter 11 of NAFTA has provisions covering discrimination (national treatment and most favoured nation treatment), the international minimum standard of treatment (covering 'fair and equitable treatment'), and expropriation. Measures to prevent discrimination have potential implications for regulation, but it is the minimum standard of treatment/fair and equitable treatment and clauses on expropriation that have generated the most

discussion in academia and caused the greatest concern amongst regulators and NGOs.

#### ❖ **The Minimum Standard & Fair and Equitable Treatment**

The international minimum standard can essentially be thought of as a 'floor', below which the treatment of foreign investors should not fall. It has long been debated whether or not such a minimum standard exists in customary international law. Defining the precise nature and content of the standard remains quite problematic, as it is rarely laid out explicitly in the texts of IIAs. Referring to cases on state responsibility, one could conclude that the standard potentially relates to three areas: compensation for expropriation; responsibility for destruction or violence by non-state actors; and denial of justice.<sup>31</sup> However, as expropriation is dealt with separately in IIAs (see below), and responsibility for destruction or violence is usually covered by reference to 'full protection and security', the only content unique to the minimum standard, in this view, would be 'denial of justice'. The principle of denial of justice derives from customary international law and relates to the conduct of national courts.

The real controversy arises when tribunals interpret the minimum standard as requiring treatment beyond that which is established in customary international law. In this respect, it is the seemingly harmless reference to 'fair and equitable treatment' (often included in the minimum standard clause) that has caused considerable difficulty for governments. Scholars, arbitrators and lawyers have fiercely debated whether this language should be read as further explication of the minimum standard or instead as an additional requirement. The issue is complicated by the fact that some treaties include a reference to fair and equitable treatment without any mention of the minimum standard or customary international law, suggesting that it can be an autonomous treaty standard.

Those that view that fair and equitable treatment as a discrete standard argue that tribunals should test government measures against its 'plain meaning'. However, this is problematic given that, as an UNCTAD report suggests: 'the concepts "fair" and "equitable" are by themselves inherently subjective and therefore lacking in precision'.<sup>32</sup> Despite this, there appears to be broad support for the plain meaning approach in the investment law

literature and in arbitral jurisprudence.<sup>33</sup>

Following a review of recent arbitral awards, Westcott concluded that 'ensuring stability of the business and legal framework is now an established element of fair and equitable treatment'.<sup>34</sup> The International Law Association (ILA) International Law on Foreign Investment Committee goes even further with its suggestion that 'certain elements of an emergent standard of review of administrative action appear to be taking shape' which reflect 'contemporary approaches to good governance'.<sup>35</sup> In the view of the Committee, fair and equitable treatment requires quite significant obligations on the part of the host state:

it is now reasonably well settled that the standard requires a particular approach to governance, on the part of the host country, that is encapsulated in the obligations to act in a consistent manner, free from ambiguity and in total transparency, without arbitrariness and in accordance with the principle of good faith. In addition, investors can expect due process in the handling of their claims and to have the authorities act in a manner that is non-discriminatory and proportionate to the policy aims involved. These will include the need to observe the goal of creating favourable investment conditions and the observance of the legitimate commercial expectations of the investor.<sup>36</sup>

It is clear that a very wide array of government actions, and indeed inactions, could fall within the purview of such a capacious standard. It is, therefore, unsurprising that fair and equitable

treatment is considered by some to be 'the most important standard, from the perspective of investor protection'<sup>37</sup> and, according to UNCTAD, it is also the most likely provision to be invoked by an investor in an arbitral claim.<sup>38</sup>

In 2001, the NAFTA Free Trade Commission issued Notes of Interpretation of Certain Chapter 11 Provisions, rejecting the interpretation of the standard that some tribunals had proffered by clarifying that 'fair and equitable treatment' does not require treatment in addition to or beyond that which is required by customary international law.<sup>39</sup>

Recent Canadian and American IIAs have also included more explicit definitions. For example, the 2004 US Model BIT spells out that the clause on the minimum standard should be read in light of customary international law.<sup>40</sup> An accompanying annex defines customary international law as resulting 'from a general and consistent practice of States that they follow from a sense of legal obligation' and specifies that the minimum standard refers 'to all customary international law principles that protect the economic rights and interests of aliens'. AUSFTA, AANZFTA and the Australia-Chile FTA also follow this model.

Although the clarification provided in these agreements undoubtedly represents an improvement on the original NAFTA Chapter 11 text and that found in other IIAs, it is questionable whether the issue has been definitively resolved. Explicitly equating fair and equitable treatment with the minimum standard may only serve to intensify the debate on the current status of customary international law in the area; investors and many arbitrators may argue that the minimum standard has evolved (and expanded) considerably in recent history.<sup>41</sup> This has been the strategy of investors in several recent investor-state disputes.

Another issue is the possibility that investors may be able to access more ambiguous references to 'fair and equitable treatment' in earlier agreements through a most favoured nation treatment clause.<sup>42</sup>

#### ❖ Indirect Expropriation

The direct taking of foreign property has historically been one of the most significant risks to foreign investment. Outright takings are now considered rare in most parts of the world. For the last fifteen years, the key debate in academic and policy circles has been on the coverage in IIAs of so-called *indirect* expropriation. Indirect expropriation falls short

of actual physical taking of property but results in the effective loss of management, use or control, or a significant depreciation of the value of the assets of a foreign investor.<sup>43</sup>

Indirect expropriations have variously been referred to in IIAs by language such as measures having a ‘similar’ or ‘equivalent’ effect to expropriation or that are ‘tantamount’ to expropriation.

For further clarity, a distinction can be made between ‘creeping expropriations’ and ‘regulatory takings’. Creeping expropriations involve the slow and incremental encroachment on the ownership rights of a foreign investor, leading to the devaluation of the investment.<sup>44</sup>

Regulatory takings are defined by UNCTAD as ‘those takings of property that fall within the police powers of a State, or otherwise arise from State measures like those pertaining to the regulation of the environment, health, morals, culture or economy of a host country’.<sup>45</sup> It is obviously the latter form of indirect expropriation that is of principle relevance in discussions on the right to regulate.

In establishing whether or not a regulatory taking has occurred, tribunals have tended to adopt one of two basic approaches. Under the

first approach, the tribunal focuses solely on the *effect* of the regulation on the investor.<sup>46</sup> In evaluating the effect of a measure, tribunals will likely examine both its economic impact and its duration. While outside of investment arbitration (e.g., in the European Court of Human Rights) there is indication that an investment must be rendered valueless or that the economic impact on it must be at least ‘severe’ or ‘substantial’ for a measure to qualify as an expropriation, investment tribunals place a stronger emphasis on the ‘legitimate expectations’ of the investor.<sup>47</sup>

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Those tribunals ascribing to the second approach will also examine the effect of a measure on an investor, but will additionally address its *purpose*. The tribunal will assess whether a measure falls within a state’s ‘police powers’ and may also evaluate whether the

need to fulfil the stated purpose of the measure is *proportional* to the negative effect felt by the investor.<sup>48</sup> The definition and scope of police powers are not agreed upon and it is debated whether they should be quite strictly circumscribed to cover only measures necessary for the maintenance of public order and safety, or should instead be considered broad enough to cover regulation more generally.<sup>49</sup> Given the difficulty of drawing a 'bright line' between *bona fide* non-compensable regulation and a taking, many commentators and arbitrators suggest that such a determination can only be achieved on a case-by-case basis.<sup>50</sup>

A regulatory measure which has been determined to constitute a taking can be assessed for legality in the same way as a direct expropriation.<sup>51</sup> According to customary international law and most IIAs, there are three conditions that must be satisfied for a taking to be lawful: it must be for a public purpose, it must be non-discriminatory and compensation must be paid to the affected investor. Some IIAs, such as NAFTA, AUSFTA, AANZFTA and the Australia-Chile FTA also include a fourth condition, referred to as 'due process'.<sup>52</sup>

Indirect expropriation has been an extremely controversial issue in the NAFTA countries. Although there has been no 'Note of Interpretation' issued on the NAFTA expropriation provision, the most recent model BITs drawn up in the US and Canada include an annex that lays out a three-part test, drawn from American domestic jurisprudence, for the determination of whether a regulatory taking has occurred. The factors to be considered are: the economic impact of the government action; the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and the character of the government action.<sup>53</sup> The 2004 US Model BIT Annex also has a provision which states that:

Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute indirect expropriations.<sup>54</sup>

Australia's recent IIAs follow this model.

For the moment, this new type of expropriation provision is untested in arbitration. However, opinions have been expressed about its potential efficacy. Some observers are not optimistic that all potential loopholes have been filled, and argue that the three-part test is

vague and outdated in relation to both domestic and international jurisprudence.<sup>55</sup> In this respect, it is worth noting that the 2005 *Methanex v. United States* decision on regulatory takings is generally considered to be stronger than the wording of the annexes found in recent IIAs. The tribunal in that case found 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, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.<sup>56</sup>

It has also been suggested that the use of the ambiguous terminology 'rare circumstances' will only encourage lawyers to develop creative arguments to test the boundaries of the exception.<sup>57</sup>

## Cases

A significant proportion of investor-state cases involving Canada have concerned environmental regulation. The summaries provided below are based on arbitral documents that can be found on the Canadian Department of Foreign Affairs and International Trade website.<sup>58</sup>

### ❖ *Ethyl Corp v. Canada*

Methylcyclopentadienyl manganese tricarbonyl (MMT) is a fuel additive used to increase the level of octane in unleaded gasoline. The health and environmental impacts of MMT have been debated since the 1970s.

In May 1995, the Government of Canada introduced Bill C-94, an act to regulate the importation of, and interprovincial trade in, certain manganese-based substances. Bill C-94 failed to pass through Parliament before the session ended in January 1996, but was reintroduced in April of that year as Bill C-29. Bill C-29 was enacted into law on 24 June 1997, banning the import and interprovincial trade of MMT except in cases where it would not be used as a gasoline additive. As MMT is not produced in Canada, the ban ensured the removal of MMT from all Canadian gasoline. Although in theory a company could establish manufacturing plants to produce MMT for sale within a single province, this would be highly unlikely to occur in practice.

Ethyl Corporation (Ethyl), incorporated under the laws of the State of Virginia and sole shareholder of Ethyl Canada Inc., was the developer and sole importer of MMT into

Canada at the time of the ban. Ethyl filed a Notice of Intent to Submit to Arbitration under Chapter 11 of NAFTA and the UNCITRAL Rules of Arbitration on 10 September 1996 (prior to the passage of Bill C-29 into law), and a Notice of Arbitration on 14 April 1997 (more than two months before the MMT Act came into force). Ethyl argued that the ban amounted to expropriation of its investment, as well as breach of Chapter 11's national treatment standard and the prohibition on performance requirements. The company claimed US\$201 million in damages plus 'costs associated with efforts to prevent the Government of Canada's breach of its NAFTA obligations', costs associated with the arbitration proceedings and interest. The company later raised its claim to US\$251 million plus costs.

Canada challenged the jurisdiction of the tribunal to hear Ethyl's claims, which it argued were outside the scope of Chapter 11. However, the tribunal found that it had jurisdiction over the case. Canada settled with Ethyl less than a month later, agreeing to reverse the ban on MMT, to pay Ethyl US\$13 million in legal fees and damages and to issue a statement declaring that current scientific information did not demonstrate any harmful effects of MMT to

health or automotive systems. Several scholars and NGOs have hypothesized that the Canadian government settled this case because it was concerned about the large amounts of money that it had spent on the arbitration and the huge damages it could be expected to pay Ethyl if it lost.<sup>59</sup>

#### ❖ *S.D. Myers v. Canada*

In the early 1990s, S.D. Myers—an international waste treatment company headquartered in Ohio—sought to import polychlorinated biphenyls (PCBs) and PCB wastes from Canada for processing in the United States. The firm was (temporarily) thwarted by a 1995 government ban on the movement of these substances across the Canada-US border. PCBs are highly toxic substances that have been the subject of increasingly strict regulation in Canada and the United States since the 1970s, including restrictions on imports and exports. Furthermore, Canada has ratified the Basel Convention on the Transboundary Movement of Hazardous Wastes, a multilateral environmental agreement that prohibits the export and import of hazardous wastes (including PCBs) to and from non-parties (such as the US) unless an agreement exists between the party and non-party that is *as stringent* as

the Convention (Article 11). While there is a bilateral agreement (the 1986 Agreement Concerning the Transboundary Movement of Hazardous Waste) between Canada and the US, it was unclear to the Canadian government at the time that it implemented the ban whether this agreement actually covered PCBs (which were not classified by the US as hazardous waste) and met the requirements of Article 11 of the Basel Convention.

S.D. Myers filed for NAFTA Chapter 11 arbitration in 1998, seeking US\$20 million in damages. S.D. Myers claimed that Canada had breached the articles in Chapter 11 covering national treatment, the minimum standard of treatment, performance requirements and expropriation. The arbitral tribunal determined that Canada had, in imposing the ban on the trans-border movement of PCBs, breached some of these provisions should pay S.D. Myers nearly CAD\$7 million in damages and costs. With regard to the Basel convention, the tribunal determined that Article 11 permitted cross-border movement of hazardous waste under the terms of the bilateral Transboundary Agreement. However, they also noted: 'Even if the Basel convention were to have been ratified by NAFTA Parties, *it should not be presumed that*

*Canada would have been able to use it to justify the breach of a specific NAFTA provision.'*<sup>60</sup> The tribunal concluded that '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.*'<sup>61</sup>

#### ❖ *Vito Gallo v. Canada*

On 29 March 2007, Mr. Vito G. Gallo, a US citizen, filed a Notice of Arbitration against the Government of Canada under Chapter 11 of the NAFTA and the UNCITRAL Rules of Arbitration. The dispute concerns Mr. Gallo's endeavours to convert the Adams Mine site (a former open-pit iron ore mine in northern Ontario) into a landfill. The proposed project, which would have involved the disposal of household and commercial waste in a manmade lake, was very controversial. NGOs and local communities raised concerns about the potential for surface and groundwater contamination and argued that the proposed project, which had only been approved following a major overhaul of the province's environmental review process, was poorly designed. In 2004, the newly elected government of Ontario passed Bill 49-An Act to



Prevent Disposal of Waste at the Adams Mine Site. This Act forestalled any future development of the landfill and provided a formula by which compensation was to be paid to Mr. Gallo's company, based on the expenses it had incurred in the development of the project.

Mr. Gallo rejected the compensation, choosing instead to try to obtain a larger award that would include 'lost future profits' under NAFTA Chapter 11. Mr. Gallo is seeking in excess of US\$355.1 million.

This case is ongoing.

#### ❖ *Clayton/Bilcon v. Canada*

Several members of the Clayton family and Bilcon of Delaware filed a Notice of Arbitration against the Government of Canada under the provisions of Chapter 11 of NAFTA and the UNCITRAL Rules of Arbitration in May 2008.

The dispute concerns the environmental review of Bilcon's proposed quarry and marine terminal in Nova Scotia. In Canada, such reviews are conducted by the provincial government and in certain instances also by the federal government. In the case of the Bilcon

proposal there were several 'triggers', including the project's potential impact on fisheries, that necessitated federal involvement and a joint review was therefore conducted. The project proposal was subjected to the highest level of review (a panel review) and was ultimately rejected. Although the review panel found a variety of potential harms that could result from the quarry and marine terminal, in their recommendation they placed particular emphasis on the impact that the investment would have on the 'core community values' in the area where the project was to be sited. Bilcon and the Claytons argue that this type of impact falls outside of the scope of an environmental assessment. The Statement of Claim also covers other aspects of the review process, which the investors describe as exceedingly lengthy and onerous. The investors are seeking \$101 million in compensation plus the costs of the arbitration and also 'fees and expenses incurred to mitigate the effect of the measures'.

In addition to objecting to the tribunal's jurisdiction on certain issues, the Government of Canada refutes that there was anything unusual, let alone discriminatory or arbitrary, about the panel review. They note the

ecological importance of the Bay of Fundy (where the proposed project was to be situated) as well as its status as a Right Whale Conservation Area and UNESCO Biosphere Reserve. Canada also points out that the investors have not put forward any evidence that suggests that they have been treated less favourably than either domestic investors or foreign investors hailing from another country.

This case is ongoing.

#### ❖ *Chemtura Corp. v. Canada*

This dispute, brought by US-based Chemtura Corporation (formerly Crompton Corporation), concerns an organochlorine insecticide commonly known as lindane. Since the 1970s there has been growing concern about the health and environmental effects of lindane. It has been classified as a neurotoxin, a persistent organic pollutant and it is a potential endocrine disruptor. It has already been banned in 52 countries and in 2009 was listed in Annex A ('elimination') of the Stockholm Convention on Persistent Organic Pollutants.

In the late 1990s, when the events of interest in this case took place, Canada had restricted most uses of lindane but still permitted its use for

seed treatment of certain crops, most importantly canola. These treated seeds were also exported to the US, where there was no registration for lindane use on canola or tolerance levels for residues in food. Although technically illegal, US Customs did not prevent the importation of lindane-treated seeds. The situation changed in 1997 when Gustafson, an American subsidiary of Chemtura, alerted the US Environmental Protection Agency (EPA) to the discrepancy between law and practice on this issue. According to Canada, in doing so Gustafson was trying to secure a market for its lindane substitute product known as Gaucho. The EPA agreed with the company that the imports of lindane-treated seeds were illegal and mandated that they be stopped by 1 June 1998.

In response to the threat of a border closure, two industry associations – the Canadian Canola Growers Association and the Canola Council of Canada – brokered a Voluntary Withdrawal Agreement with the four companies registered in Canada to sell products with lindane as the active ingredient. The agreement provided a phase-out of the use of lindane-based products on canola in order to appease the EPA. As a part of the voluntary

agreement the Canadian Pest Management Regulatory Agency (PMRA) agreed to expedite the approval of lindane-free versions of existing products and to also to make registration of replacement products a priority. Around the same time, the PMRA was re-evaluating the registration of lindane for all agricultural uses. This was part of a broad program to review a large number of 'old' pesticides registered in the system. In 2001, following the completion of the re-evaluation, the PMRA elected to suspend all remaining agricultural uses of lindane. It offered the affected companies a three-year phase out of existing products if they agreed to withdraw their registrations immediately. Chemtura did not accept the terms of the offer and its registrations were cancelled in February 2002.

Chemtura now claims that the PMRA pressured it to enter into the voluntary agreement and suggests that the agency was motivated by trade concerns rather than environmental or health concerns. Furthermore, Chemtura argues that the PMRA did not meet its obligations under the voluntary agreement to fast-track the company's registration applications. The company also claims that the PMRA's review of lindane was improperly

conducted. The company is asking for US\$80.2 million in damages as well as other costs amounting to a total of over US\$83.1 million.

This case is ongoing.

#### ❖ *Dow AgroSciences v. Canada*

In August 2008, Dow AgroSciences LLC, a subsidiary of Dow Chemical and owner of Dow AgroSciences Canada, filed a Notice of Intent to Submit a Claim to Arbitration against the Government of Canada under Chapter 11 of NAFTA. Dow's claim concerns Québec's 2003 Pesticides Management Code which bans the use of certain pesticides for cosmetic purposes (i.e. lawn care). The company argues that the ban is in breach of the minimum standard of treatment and is also tantamount to an expropriation of its investment. Specifically, Dow argues that the inclusion of the active ingredient 2,4-D in the list of substances covered by the ban is not based on science and is therefore arbitrary and unjust. Québec's regulators have relied on the precautionary principle as justification for their ban of 2,4-D in the absence of conclusive scientific evidence on its environmental and health impacts.

Dow is seeking restitution (i.e. a repeal of the ban). In the (likely) event that the tribunal chooses not to award restitution but instead monetary compensation, Dow requests \$2 million plus costs. This is a relatively small sum, which could be attributed to the fact that Québec is a relatively small market for lawn care products. However, it has raised questions about the company's motivations for challenging the ban. Several observers have hypothesized that Dow initiated the dispute in the hopes of having a 'chilling effect' on other municipalities and provinces considering similar bans.<sup>62</sup>

This case has not yet proceeded to arbitration.

## Conclusions

There is a clear trend of investor-state disputes arising over matters of public policy in Canada as well as in other countries. While it is evident that these disputes cost taxpayers a great deal of money, often even if the government wins a case, other potential long-term implications of investment arbitration on policy development are difficult to quantify.

Supporters of investment protection argue that legitimate regulation will not be found in breach of regulative rules and norms of investment protection and, further, that arbitral tribunals are equipped to make decisions on the legitimacy of government actions.<sup>63</sup> The assumption here is that cases where environmental or health and safety measure have been utilized as a cover for protectionism will be clearly distinguishable from those where action was motivated by a legitimate desire to protect the public and/or the environment.

There is evidence in each case discussed above that the Canadian federal or provincial government was responding to genuine environmental concerns. However, in some cases there were also indications that other factors played a role, as is likely to be the case in practically all political decisions. The question is whether the existence of multiple factors influencing a government, which is arguably inevitable given the complexity of the issues raised in these disputes, provides proof that environmental concern is not legitimate. Loy makes the crucial point that: 'Virtually every piece of environmental or conservation legislation or regulation affects a commercial

sector, and will thus be politically supported (or opposed) by private interest groups'.<sup>64</sup>

At the end of the day, investment tribunals do not typically see it as in their purview to require governments to revoke contested policy measures. Nevertheless, by awarding damages to companies that have been involved in environmentally damaging (or otherwise harmful) activities, they pull taxpayer funds away from areas where they could be used for the public good and they effectively reverse important policy principles, such as the 'polluter pays' principle.<sup>65</sup> Furthermore, there is the potential for investor-state disputes to have a broader and more long-term impact on public policy through what has been termed 'regulatory chill'. The concept of regulatory chill reflects the fact that policy makers will be wary of introducing measures that could be challenged in arbitration because of the immense costs associated with the arbitration system and the uncertainty surrounding how investment provisions will be interpreted in any given case. Occurrences of regulatory chill are incredibly difficult to prove (effectively one has to find evidence of something that *hasn't happened*). Nevertheless, several scholars have put forward case studies that suggest that

investor threats of arbitration had an impact on the development of specific policies.<sup>66</sup>

In recent weeks the threat posed by investor-state dispute settlement became far more tangible for Australian policymakers and the public. When the government announced its plans for plain packaging rules for cigarettes, there was a great deal of discussion in the media about the potential legal challenges that could be taken by the tobacco industry. However, what was less reported on was that Philip Morris, one of the world's largest tobacco companies, is currently suing Uruguay in international investment arbitration for taking measures very similar to those put forward by the Rudd administration. Uruguay has a BIT with Switzerland, where Philip Morris has a base of operations. Philip Morris is headquartered in the US and one can, therefore, postulate that if AUSFTA had an investor-state dispute settlement mechanism it is highly likely that the company would have made use of it. In fact, Philip Morris is pushing for investor-state dispute settlement to be included in the TPP. In a public submission to the United States Trade Representative, the company notes that the ability to take governments to arbitration is a 'vital' aspect of investment protection. More

alarming, the submission specifically refers to Australia's planned restrictions on cigarette packaging as 'tantamount to expropriation' – the exact claim that Philip Morris has made against Uruguay.<sup>67</sup>

*'Philip Morris, one of the world's largest tobacco companies, is currently suing Uruguay in international investment arbitration for taking measures very similar to those put forward by the Rudd administration'*

It is true that recent Australian IIAs have been more carefully drafted than those found in many countries such as Uruguay. Nevertheless, the clarifications made in these agreements are problematic and Australian public policy will remain at risk of challenge as long as the government continues to agree to submit itself to investor-state dispute settlement.

Furthermore, even if every potential loophole in the wording of provisions on the international minimum standard and expropriation could be filled, it would still be the case that investment arbitration is a fundamentally flawed system in the eyes of anyone who takes basic principles of

democracy and fairness seriously, and is thus a completely inappropriate forum for questions of public import to be decided. Australia has an excellent court system - why shouldn't foreign investors use it?

This submission has addressed the potential implications of investor claims brought against the Australian government and has particularly focused on the threat presented by entering into an agreement with a major source of inward foreign investment – the US. However, this should not be taken as an implicit acceptance of the inclusion of investor-state dispute settlement in other treaties. At face value, it may appear strategic for the government to include investor-state dispute settlement in IIAs signed with less developed countries that are not major exporters of investment, but such an approach lacks foresight. It is well recognised that global trade and investment patterns are rapidly changing and that countries which historically were considered capital importers are now major sources of overseas investment. As a result, patterns of investor-state disputes are likely to change in the future. In a long view, Australia may not be as immune to claims from investors from developing countries as the government currently assumes.

Evidence that the tides are changing is already available; Britain is embroiled in an arbitration with an Indian investor who claims he has been discriminated against and a Chinese investor may bring forward a case against the Belgian government over its role in the sale of Fortis Bank, a Dutch-Belgian financial firm, to BNP Paribas, a French financial firm, during the global financial crisis.<sup>68</sup> As one NGO has noted about the latter case: '[t]he lack of leniency which ICSID tribunals have exhibited in dealing with cases from Argentina's financial crisis, may now come back to haunt rich countries'.<sup>69</sup> A potential dispute between a Chinese investor and Australia has even been postulated in a British newspaper; the article quotes a Sydney-based lawyer who suggests that Chinalco could take action against the Rudd government under the terms of the 1988 Australia-China BIT over the proposed super-profits tax on the mining industry.<sup>70</sup>

A consistent approach rejecting investor-state dispute settlement would not only better protect Australian public policy, it would also complement Australia's other international commitments, such as those directed at supporting sustainable development. The regulation of foreign investment is crucial in

ensuring that projects contribute to sustainable development but it is much more difficult for developing countries to preserve their right to regulate under IIAs than it is for countries such as the US and Australia to do so. The significant costs associated with arbitration as well as the limited access to specialized legal expertise in many countries are critical issues. Furthermore, even assuming that governments have the resources to effectively defend their actions in arbitration, if they lose they may face considerable difficulty in paying damages awarded to the investor. As such, regulatory chill is far more likely to occur in developing countries.<sup>71</sup>

For these reasons, Australia should build on the admirable precedent that it established in AUSFTA and exclude investor-state dispute settlement clauses from all future international trade and investment agreements.

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- <sup>1</sup> See, e.g.: *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3; *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22; *Glamis Gold Ltd v. United States of America*; *FTR Holding S.A. (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7; *Chemtura Corp. v. Canada*.
- <sup>2</sup> Washington, DC, 18 May 2004 (in force 1 January 2005), full text of the agreement available at [www.dfat.gov.au](http://www.dfat.gov.au).
- <sup>3</sup> Patricia Ranald, 'The Australia-US Free Trade Agreement: Reinforcing Re-peripheralisation' in Paul Bowles, Ray Broomhill, Teresina Gutiérrez-Haces and Stephen McBride (eds.) *International Trade and Neoliberal Globalism: Towards Re-peripheralisation in Australia, Canada and Mexico?* (2008) at 43; Ann Capling Kim Nossal, 'Blowback: Investor-State Dispute Mechanisms in International Trade Agreements' (2006) 19 *Governance* 151.
- <sup>4</sup> UNCTAD, 'Latest Developments in Investor-State Dispute Settlement', *IIA MONITOR No. 1* (2009) at 1.
- <sup>5</sup> UNCITRAL Arbitration Rules, 28 April 1976, Report of the United Nations Commission on International Trade Law on the Work of its Ninth Session, UN Doc. A/31/17 (1976), reproduced in 15 *ILM* (1976): 701.
- <sup>6</sup> 'Rules of Procedure for Arbitration Proceedings (Arbitration Rules)', *ICSID Convention, Regulations and Rules* (2006) <http://icsid.worldbank.org>.
- <sup>7</sup> See <http://icsid.worldbank.org>.
- <sup>8</sup> Gabriel Egli, 'Don't Get BIT: Addressing ICSID'S Inconsistent Application of Most Favored-Nation Clauses to Dispute Resolution Provisions' (2007) 34 *Pepperdine Law Review* 1045 at 1063.
- <sup>9</sup> 'Canada: ICSID at a Crossroads', *Mondaq*, 27 September 2006, [www.mondaq.com](http://www.mondaq.com).
- <sup>10</sup> 'Private Practices', *American Lawyer* (2003) [www.americanlawyer.com](http://www.americanlawyer.com).
- <sup>11</sup> Jack Coe 'Transparency in the Resolution of Investor-State Disputes: Adoption, Adaption, and NAFTA Leadership' (2006) 54 *University of Kansas Law Review* 1339 at 1351-2.
- <sup>12</sup> Gus Van Harten, *Investment Treaty Arbitration and Public Law* (2007) Oxford University Press at 5.
- <sup>13</sup> *Ibid*: 118.
- <sup>14</sup> Carlos Garcia, 'All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration' (2004) 16 *Florida Journal of International Law* 301 at 352.
- <sup>15</sup> Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22 *Arbitration International* 495 at 498.
- <sup>16</sup> Howard Mann, 'Is "Fair and Equitable" Fair, Equitable, Just, or Under Law?' (2006) 100 *American Society of International Law Proceedings* 74.
- <sup>17</sup> Charles N. Brower, Charles H. Brower and Jeremy Sharpe, 'The Coming Crisis in the Global Adjudication System' (2003) 19 *Arbitration International* 415; Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521.
- <sup>18</sup> For example, in the case of *Chemtura Corp. v. Government of Canada*.
- <sup>19</sup> The term 'precedent' is used here very loosely, as there is no *stare decisis* in investment arbitration.
- <sup>20</sup> This schedule of fees is effective as of 1 January 2008.
- <sup>21</sup> ICSID Convention: Art. 61.
- <sup>22</sup> UNCITRAL Rules: Rule 38.
- <sup>23</sup> *Ibid*: Rule 39.
- <sup>24</sup> *Ibid*: Rule 40.
- <sup>25</sup> UNCTAD, *Investor-State Disputes and Policy Implications* (2005) TD/B/COM.2/62, Geneva, at 7.
- <sup>26</sup> *PSEG Global Inc. and Konya Ilgin Elektrik Uretim Ve Tikaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award, 19 January 2007.
- <sup>27</sup> Van Harten (see note 12 above) at 2.
- <sup>28</sup> International Institute for Sustainable Development, 'A Parliamentarian's Guide to International Investment Agreements and their Implications for Domestic Policy-Making' (2007), Winnipeg.
- <sup>29</sup> Luke Eric Peterson, 'Arbitration Scorecard: Treaties', *Focus Europe*, 1 July 2009, [www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202431684674&hbxlogin=1](http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202431684674&hbxlogin=1).
- <sup>30</sup> See Final Award, *Merrill & Ring Forestry L.P. v. The Government of Canada*, [www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Merrill\\_Award-033110.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Merrill_Award-033110.pdf).
- <sup>31</sup> M. Sornarajah, *The International Law on Foreign Investment* (2<sup>nd</sup> ed, 2004) Cambridge University Press at 330.
- <sup>32</sup> UNCTAD, 'Fair and Equitable Treatment', *Issues in International Investment Agreements* (1999) at 10-1.



- <sup>33</sup> Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (2008) at 65.
- <sup>34</sup> Thomas Westcott, 'Recent Practice on Fair and Equitable Treatment' (2007) 8 *Journal of World Investment and Trade* 409 at 425.
- <sup>35</sup> ILA International Law on Foreign Investment Committee, *International Law on Foreign Investment: First Report of the International Law Association* (2006) at 16.
- <sup>36</sup> *Ibid.* Yannaca-Small identifies similar categories of obligation falling under the fair and equitable treatment standard including: the obligation of vigilance and protection; due process including non-denial of justice and lack of arbitrariness; transparency; and good faith (which could cover transparency and lack of arbitrariness). Catherine Yannaca-Small, 'Fair and Equitable Treatment Standard in International Investment Law', *OECD Working Papers on International Investment* (2004) at 26. See also Behrens who lists good faith, non-discrimination, lack of arbitrariness, due process, transparency, consistency and proportionality as the key requirements of fair and equitable treatment. Peter Behrens, 'Towards the Constitutionalization of International Investment Protection' (2007) 45 *Archiv des Völkerrechts* 153 at 175.
- <sup>37</sup> ILA International Law on Foreign Investment Committee (see note 35 above) at 16.
- <sup>38</sup> UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (2007) UNCTAD/ITE/IIA/2006/5 at 32. See also Subedi (note 33 above) at 63.
- <sup>39</sup> Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission (FTC), 31 July 2001, [www.state.gov/documents/organization/38790.pdf](http://www.state.gov/documents/organization/38790.pdf).
- <sup>40</sup> Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (US Model BIT), 2004: Art. 5, [www.state.gov](http://www.state.gov).
- <sup>41</sup> Courtney Kirkman, 'Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105' (2002) 34 *Law and Policy in International Business* 343. See also Thomas Westcott (note 34 above).
- <sup>42</sup> This has been the strategy of Chemtura Corporation in its pending NAFTA Chapter 11 case against Canada. See *Chemtura Corporation v. Canada*, Redacted Reply of the Claimant Investor, 15 May 2009.
- <sup>43</sup> UNCTAD, 'Taking of Property', *Issues in International Investment Agreements* (2000) UNCTAD/ITE/IIT/15, Geneva.
- <sup>44</sup> *Ibid* at 11.
- <sup>45</sup> *Ibid* at 12.
- <sup>46</sup> Yves Fortier and Stephen Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor' (2004) 19 *ICSID Review: Foreign Investment Law Journal* 293 at 300.
- <sup>47</sup> Muse-Fisher suggests that there is a two-part test to determine the legitimate expectations of an investor: (i) the tribunal must determine whether the investor had an actual expectation that his property would not be affected by a given regulation when he purchased it; and (ii) if he did have such an expectation, the tribunal must evaluate whether this expectation was reasonable. The US courts have been hesitant to find an investor's expectations reasonable when he is entering a heavily regulated jurisdiction, particularly if newly-enacted legislation only builds on the existing framework, but international investment tribunals have been less consistent in this respect. Michael Muse-Fisher, 'CAFTA-DR and the Iterative Process of Bilateral Investment Treaty Making: Towards a United States Takings Framework for Analyzing International Expropriation Claims' (2007) 19 *Pacific McGeorge Global Business & Development Law Journal* 495 at 518-19.
- <sup>48</sup> Andrew Newcombe, 'The Boundaries of Regulatory Expropriation in International Law', in Philippe Kahn and Thomas Wälde (eds.) *New Aspects of International Investment Law* (2007) at 417; Howard Mann and Julie Soloway, *Untangling the Expropriation and Regulation Relationship: Is There a Way Forward?*, Report to the Ad Hoc Expert Group on Investment Rules and the Department of Foreign Affairs and International Trade, Canadian Department of Foreign Affairs and International Trade (2002).
- <sup>49</sup> See: Muse-Fisher (note 47 above); Simon Baughen, 'Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven' (2006) 18 *Journal of Environmental Law* 207; Jeffrey Turk, 'Compensation for 'Measures Tantamount to Expropriation' Under NAFTA: What it Means and Why it Matters' (2005) 1 *International Law & Management Review* 41.
- <sup>50</sup> Fortier and Drymer (note 46 above) at 314.

- <sup>51</sup> W. Michael Reisman and Robert Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation' (2004) 74 *British Yearbook of International Law* 115 at 121.
- <sup>52</sup> Due process, a concept borrowed from the American legal system, generally requires that the regulation is made in accordance with host state law and that affected parties are given access to municipal courts if they choose to challenge the government measure.
- <sup>53</sup> 2004 US Model BIT: Annex B.4(a); Agreement between Canada and ..... for the Promotion and Protection of Investments, 2003: Annex B.13(1), [www.international.gc.ca](http://www.international.gc.ca).
- <sup>54</sup> US Model BIT: Annex B.4(b).
- <sup>55</sup> Muse-Fisher (note 47 above) at 509.
- <sup>56</sup> *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. IV.D.7.
- <sup>57</sup> Rachel Edsall, 'Indirect Expropriation Under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations' (2006) 86 *Boston University Law Review* 931. [www.international.gc.ca](http://www.international.gc.ca).
- <sup>58</sup> [www.international.gc.ca](http://www.international.gc.ca).
- <sup>59</sup> Howard Mann, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights* (2001) IISD and World Wildlife Fund; Ray C. Jones, 'NAFTA Chapter 11 Investor-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?' (2002) 2 *Brigham Young University Law Review* 527.
- <sup>60</sup> *S.D. Myers v. Government of Canada*, Partial Award, 13 November 2000, para 212, emphasis added.
- <sup>61</sup> *Ibid*, para 221, emphasis added.
- <sup>62</sup> Evidence provided by Mr. Hugo Séguin (Public Affairs Coordinator, Équiterre) to the Canadian Standing Committee on International Trade, Number 10, 2<sup>nd</sup> Session, 40<sup>th</sup> Parliament, 24 March 2009.
- <sup>63</sup> Charles Brower, 'Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium' (2001) 29 *Pepperdine Law Review* 43; Thomas Wälde, 'International Disciplines on National Environmental Regulation: With Particular Focus on Multilateral Investment Treaties' (2001) in *The International Bureau of the Permanent Court of Arbitration (ed.), International Investments and Protection of the Environment: The Role of Dispute Resolution Mechanisms*, PCA Peace Palace Papers, Kluwer Law International, The Hague, pp. 29–71.
- <sup>64</sup> Frank Loy, 'On a Collision Course? Two Potential Environmental Conflicts Between the U.S. and Canada' (2002) 28 *Canada-United States Law Journal* 11 at 24.
- <sup>65</sup> Mann (note 59 above) at 33; Public Citizen and Friends of the Earth, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy: Lessons for Fast Track and the Free Trade Area of the Americas* (2001) at 9.
- <sup>66</sup> See further: David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (2008) Cambridge University Press; Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (2009) Cambridge University Press.
- <sup>67</sup> Submission of Philip Morris International in Response to the Request for Comments Concerning the Proposed Trans-Pacific Partnership Trade Agreement, 25 January 2010, [www.ustr.gov/tpp](http://www.ustr.gov/tpp).
- <sup>68</sup> 'ICSID in crisis Straight-jacket or investment protection?', *Bretton Woods Project News Release*, 10 July 2009.
- <sup>69</sup> *Ibid*.
- <sup>70</sup> 'Australian tax could breach treaty with China', *The Daily Telegraph*, 9 May 2010.
- <sup>71</sup> See further Tienhaara (note 66 above).