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THE IMPACT OF THE NAFTA EXPERIENCE ON CANADIAN POLICY CONCERNING INVESTOR-STATE ARBITRATION

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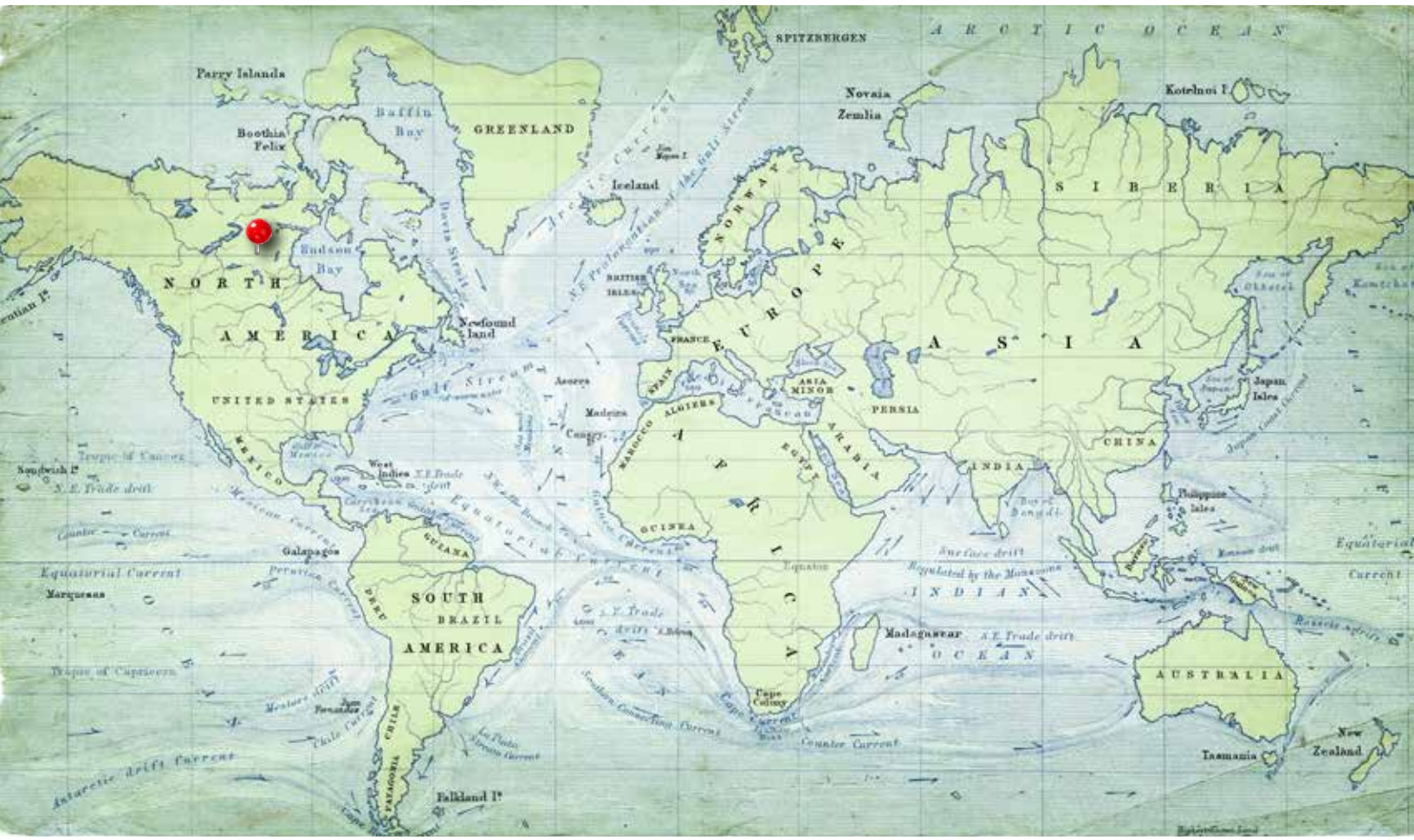

THE IMPACT OF THE NAFTA EXPERIENCE ON CANADIAN POLICY CONCERNING INVESTOR-STATE ARBITRATION

Armand de Mestral and Lukas Vanhonnaeker

The opinions expressed in this publication are those of the author and do not necessarily reflect the views of the Centre for International Governance Innovation or its Board of Directors.

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ABOUT THE INVESTOR-STATE ARBITRATION PROJECT

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA between developed democracies — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where civil society groups and academic critics have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government, equivalent to those provided by contemporary investment protection agreements.

CIGI Senior Fellow Armand de Mestral is the lead researcher on the ISA project. Contributors to the project are Marc Bungenberg, Charles-Emmanuel Côté, David Gantz, Shotaro Hamamoto, Younsik Kim, Céline Lévesque, Csongor István Nagy, Luke Nottage, Ucheora Onwuamaegbu, Carmen Otero, Hugo Perezcano, August Reinisch and David Schneiderman. A conference was held in Ottawa on September 25, 2015. The papers presented at that conference are in the process of being issued as CIGI Papers and will ultimately appear as a collective book.

ABOUT THE AUTHOR

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ACRONYMS AND ABBREVIATIONS

BIT	bilateral investment treaty
CETA	Comprehensive Economic and Trade Agreement
FET	fair and equitable treatment
FIPA	foreign investment protection agreement
FTA	free trade agreement
FTC	Free Trade Commission
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
IIAs	international investment agreements
ISA	investor-state arbitration
MFN	most favoured nation
NAFTA	North American Free Trade Agreement
TPP	Trans-Pacific Partnership Agreement
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
USTR	United States Trade Representative
WTO	World Trade Organization

EXECUTIVE SUMMARY

Canada, together with its North American Free Trade Agreement (NAFTA) partners the United States and Mexico, has responded to a variety of criticisms that have been levelled against Chapter 11, Part B of NAFTA, which establishes the right of foreign investors from the three countries to claim damages by way of arbitration for alleged violations of Chapter 11, Part A. These responses have fallen short of actual amendment of NAFTA, but they have changed the way investor-state arbitration (ISA) is being practised by taking significant steps toward more transparent procedures. Canada and the United States have also made significant strides toward responding to criticisms of the substantive standards of protection of foreign investors by changing the drafting of their respective model bilateral investment treaty (BIT) or foreign investment protection agreement (FIPA) and by incorporating different formulations of these standards in subsequent trade and investment treaties such as the Trans-Pacific Partnership Agreement (TPP). Canada's acceptance in the Comprehensive Economic and Trade Agreement (CETA) Chapter 8 of the European Union's proposal for a standing tribunal to replace ad hoc arbitration constitutes another significant response to the critics of ISA.

INTRODUCTION

ISA is a subject that leaves few people indifferent. This seems to be particularly true in developed democracies such as Canada.[1] This paper considers the responses of the Government of Canada, often taken in conjunction with the United States and Mexico, to the concerns that have been expressed over recourse to ISA under NAFTA Chapter 11, Part B. Accordingly, the aim is not to provide an exhaustive analysis of all the concerns formulated against ISA in general but rather to focus on NAFTA Chapter 11, Part B, examining positions taken in Chapter 11 cases, the enactment of positions such as Notes of Interpretation, or the adaption of the drafting of the Canadian Model FIPA, the US Model BIT or the negotiation of subsequent investment protection agreements such as CETA, between Canada and the European Union. This paper is divided into two parts, the first addressing concerns over the procedural aspects of ISA under NAFTA Chapter 11, and the second discussing the interpretation and application of some of the more controversial substantive provisions of NAFTA Chapter 11.

Ultimately, there are two strands to be discerned in the reaction of the NAFTA governments to criticism of Chapter 11 proceedings: the first seeks to ensure the broader acceptability of ISA procedures; the second seeks to enhance democratic accountability by protecting the authority of governments to act in the public interest.

CONCERNS RELATED TO PROCEDURAL ASPECTS OF ISA UNDER NAFTA: REACTIONS OF THE NAFTA PARTIES

The Lack of Transparency and the Status of *Amicus Curiae* Briefs

Values such as transparency and democratic participation are an inherent part of the legitimacy of adjudicatory institutions. Creating a transparent process and democratic participation allow the conceptualization of a given regime as legitimate. If these values are overlooked, however, the power relationships seem unjustified and ultimately lead to serious criticism.[2] The legitimacy of international institutions or mechanisms is often challenged.[3] The perception of "obsessive secrecy"[4] in ISA proceedings under NAFTA Chapter 11 has been the object of criticism. It is argued by scholars and civil society organizations that transparency "has become an important factor in assessing the legitimacy

1 The criticisms most commonly levelled against ISA are explored in Armand de Mestral, "Investor-State Arbitration between Developed Democratic Countries" (2015), CIGI ISA Paper No 1, 15 September 2015. It was followed by an analysis of possible remedies under Canadian law: Armand de Mestral, "Does Canadian Law Provide Remedies Equivalent to NAFTA Chapter 11 Arbitration?" (2016), CIGI ISA Paper No 4, 27 May 2016. The current paper builds upon these in undertaking an analysis of the concerns about ISA. The final paper in the ISA series will examine the options available to the Government of Canada to respond to public concerns about the propriety of ISA between developed democracies.

2 See David D Caron, "The Legitimacy of the Collective Authority of the Security Council" (1993) 87 Am J Intl L 552 at 562–563 (on the challenge to the legitimacy of the Security Council based on the perception of the Council's dominance). See on the same issue, David Caron, "Strengthening the Collective Authority of the Security Council" (1993) 87 Am Soc'y Intl L Proc 303 at 305–306.

3 In particular, the authority of both the UN Security Council and the International Criminal Court (see in this regard e.g. Lara A Ballard, "The Recognition and Enforcement of International Criminal Court Judgments in US Courts" (1007) 29 Colum Hum Rts L Rev 143 at 154–155) has been questioned.

4 Jeffery Atik, "Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process" in Todd Weiler, ed, *NAFTA – Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (New York: Transnational Publishers, 2004) at 148.

of international organizations"[5] by allowing a monitoring system, clarifying the steps required for compliance and increasing the predictability of dispute resolution mechanisms such as ISA.[6]

The Practice of NAFTA Tribunals Regarding the Transparency of Proceedings and Amicus Curiae

There is no general rule of confidentiality applicable to NAFTA Chapter 11 proceedings. Conversely, NAFTA Chapter 11 does not provide the public with a right to transparency and, consequently, no obligation either to disclose or conceal information is imposed to the parties. The NAFTA tribunals that have tackled this issue have confirmed this. In *Metalclad*,[7] after Mexico sought a formal order from the tribunal that the proceedings be confidential, the tribunal responded that neither NAFTA nor the International Centre for Settlement of Investment Disputes (ICSID) Rules or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules contain an express restriction limiting the freedom of the disputing parties to make information concerning the arbitration available to the public.[8] The *Loewen* tribunal went further by not only rejecting the existence of a general obligation of confidentiality but also emphasizing the following: "In the case of an arbitration under NAFTA, particularly an arbitration to which a Government is a party, it is not to be supposed that, in the absence of express provision, the Convention or the Rules and Regulations impose a general obligation on the parties the effect of which would be to preclude a Government (or the other party) from discussing the case in public, thereby depriving the public of knowledge and information concerning government and public affairs."[9]

The *SD Myers* tribunal similarly affirmed the non-applicability of a general principle of confidentiality to NAFTA Chapter 11 ISA proceedings.[10] However, at the same time, and quite inconsistently, it concluded that article 25(4) of the UNCITRAL Arbitration Rules, which provides for the privacy of hearings, extends this privacy to written submissions of the disputing parties that are to be considered as forming part of the hearing. The tribunal stated in this regard that, "It would be artificial and might adversely affect the efficient organization of Chapter Eleven arbitration proceedings if such materials [written submissions, trial exhibits, etc.] were to be deemed less private [than the hearings]."[11]

Regarding *amicus curiae*, since NAFTA is an agreement entered into between states, civil society organizations do not have an inherent right to participate in ISA proceedings. They can, however, make representations and put pressure on governments and tribunals to take into account concerns related to democratic participation and transparency in ISA proceedings under the agreement.

The possibility for *amicus* briefs is not explicitly provided under NAFTA Chapter 11, and non-governmental organizations were generally denied access to Chapter 11 ISA proceedings in the early NAFTA cases, as nothing in the text gave them a right to participate.[12] However, two tribunals did take a strong stand in favour of accepting *amicus curiae* briefs, emphasizing the need to take the public interest into account: the *UPS* and *Methanex* tribunals.[13] In this regard, the tribunal in *Methanex* stated: "The public interest in this arbitration arises from its subject matter [a challenge to an environmental regulation], as powerfully suggested by the Petitions [requesting *amicus curiae* participation]. There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process

5 Andrea Kupfer Schneider, "Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations" (1999) 20 Mich J Intl L 697 at 703. See also John O McGinnis & Mark L Movesian, "Commentary: The World Trade Constitution" (2000) 114 Harv L Rev 511 at 547, 574, 603.

6 See in this regard Schneider, *supra* note 5 at 710 and McGinnis & Movesian, *supra* note 5 ("[t]ransparency levels the playing field by ensuring that regulations are publicized and the steps for compliance are clear" at 574).

7 *Metalclad Corp v Mexico*, Award, 25 August 2000, ICSID Case No ARB(AF)/97/1.

8 *Ibid* at para 13. However, the tribunal added the following: "The above having been said, it still appears to the Arbitral Tribunal that it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties if during the proceedings they were both to limit public discussion of the case to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound."

9 *The Loewen Group Inc v United States*, Decision, 28 September 1999, ICSID Case No ARB(AF)/98/3 at para 8.

10 *SD Myers, Inc v Canada*, 13 May 2000, Procedural Order No 16 (UNCITRAL) at paras 8–9.

11 *Ibid* at para 12.

12 See generally Andrea K Bjorklund, "The Participation of Amicus Curiae in NAFTA Chapter Eleven Cases" in *Essay Papers on Investment Protection*, 22 March 2002, online: <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/participate-e.pdf>.

13 See *United Parcel Service of America Inc v Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001 (UNCITRAL) at paras 61–62, 70, 73 [*UPS* Decision on Intervention and Participation as Amici Curiae] and *Methanex Corporation v United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001 (UNCITRAL) at paras 31, 39, 47, 49, 53 [*Methanex* Decision on Intervention as Amici Curiae].

could benefit from being perceived as more open or transparent, or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm."[14]

Despite this holding, the openness of NAFTA Chapter 11 tribunals to *amicus curiae* has a limited reach as, while the broader acceptance of *amicus curiae* briefs by tribunals was welcomed by critics, these tribunals' decisions "did not give potential *amici* the right to receive pleadings or to attend hearings."[15] Third-party demands for participation were often considered as requests to join the respective disputes as parties, even when it was claimed that non-disputing parties had a direct and public interest in the dispute, such as in the *Merrill* arbitration.[16] In the *UPS* case, while the tribunal at first seemed to be open to third-party participation, it held that it did not have the authority to accept another party to the proceeding on the basis of the scope of the consent granted by the parties to the arbitration.[17] In *Merrill*, the tribunal followed the reasoning of the *UPS* tribunal and added that NAFTA and the UNCITRAL Rules (the governing laws) only guaranteed participation to a "Party and an Investor of Another Party."[18]

The Reaction to Concerns Related to the Transparency of Proceedings

Canadian officials took a strong stand in favour of a modification of practice under NAFTA Chapter 11 and, in 1998, the Canadian government issued a paper suggesting the possibility of interpreting NAFTA Chapter 11 in a way that would permit enhanced transparency and the disclosure of information related to the nature of Chapter 11 claims. However, this first attempt to buttress the legitimacy of ISA under NAFTA Chapter 11 did not have practical consequences as the NAFTA parties could not reach a consensus as to whether it was necessary to act in respect of transparency.[19] It was only in 2001 that the three NAFTA parties decided to intervene and to enhance the transparency of ISA proceedings, which led the parties to issue notes of interpretation that, among other issues, tackle the transparency of ISA proceedings under Chapter 11.

The notes of interpretation emphasize that "[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration," that "nothing in the relevant arbitral rules imposes a general duty of confidentiality" and that "[e]ach Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal."[20]

The NAFTA parties can thus be seen as having led the way toward greater transparency in ISA proceedings, not only for NAFTA but also as a model for other ISA proceedings.

Canada and the United States also issued a joint statement affirming that "they will consent to opening to the public hearings in Chapter 11 disputes to which either is a party, and to request the consent of disputing investors to such open hearings,"[21] an issue not tackled by the text of NAFTA Chapter 11. This initiative was soon followed by Mexico, which affirmed the same openness to public hearings in a joint statement dated July 16, 2004.[22]

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14 *Methanex* Decision on Intervention as Amici Curiae, *supra* note 13 at para 49.

15 Charles H Brower II, "Structure, Legitimacy, and NAFTA's Investment Chapter" (2003) 35 Vand J Transnatl L 37 at 72. See also *UPS* Decision on Intervention and Participation as Amici Curiae, *supra* note 13 at paras 67–69 and *Methanex* Decision on Intervention as Amici Curiae, *supra* note 13 at paras 41–42, 46–47.

16 *Merrill & Ring Forestry LP v Canada*, Final Award, 31 March 2010 (UNCITRAL) [*Merrill & Ring* Award]. See also *Merrill & Ring Forestry LP v Canada*, Tribunal Decision on Motion to Add a New Party, 31 January 2008 (UNCITRAL).

17 *UPS* Decision on Intervention and Participation as Amici Curiae, *supra* note 13 at paras 35–43.

18 *Merrill & Ring Forestry LP v Canada*, Letter of 31 July 2008 from the tribunal to Steven Shrybman regarding submission of an application on behalf of the Communication, Energy and Paperworkers Union of Canada, the United Steelworkers and the British Columbia Federation of Labour, 31 July 2008, (UNCITRAL).

19 For a brief discussion of this document, see J Anthony VanDuzer, "What Have We Done? NAFTA States Have Concerns Regarding Investor-State Settlement under NAFTA Chapter 11" (1999) 25 Can Council Intl L Bull 13.

20 See NAFTA Free Trade Commission (FTC), *North American Free Trade Agreement – Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001, online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng/>.

21 Office of the US Trade Representative, "NAFTA Commission Announces New Transparency Measures", 7 October 2003, online: <https://ustr.gov/archive/Document_Library/Press_Releases/2003/October/NAFTA_Commission_Announces_New_Transparency Measures.html>

22 NAFTA Free Trade Commission Joint Statement, "A Decade of Achievement", 16 July 2004, online: <https://ustr.gov/archive/Document_Library/Press_Releases/2004/July/NAFTA_Free_Trade_Commission_Joint_Statement_ _A_Decade_of_Achievement.html>.

While the NAFTA parties did not tackle the question of *amicus curiae* in the Free Trade Commission's (FTC's) Notes of Interpretation, the openness of NAFTA tribunals to non-disputing party participation was confirmed by Canada and the United States in a statement of the FTC on non-disputing participation of October 7, 2003.[23]

Modification of the ICSID and UNCITRAL Arbitration Rules on the Transparency of Proceedings

Criticisms related to the transparency deficit of NAFTA can be seen as one factor that led to the modification of the ICSID and UNCITRAL Arbitration Rules. The ICSID Arbitration Rules were modified in 2006, with the support of the NAFTA parties, and now include provisions that allow and even encourage the publication of more information about disputes.[24] Similarly, the UNCITRAL Arbitration Rules were modified in April 2014, with the support of the NAFTA parties, and led to the adoption of new transparency rules for ISA proceedings conducted under UNCITRAL, leading to public access to information about claims filed with UNCITRAL.[25] The NAFTA parties have supported these changes.

Improvement of Transparency in the Negotiation Process of International Investment Agreements

Democratic participation — which, like ISA, is also ensured by a high degree of transparency — is critical when assessing the legitimacy of a given institution or dispute settlement mechanism as representative participation promotes legitimacy through integrity.[26] The importance of democratic participation on the international scene and its strong links with considerations of legitimacy can be illustrated by the role it plays in the domestic realm and, in particular, in light of the fact that "[c]onstitutions generally validate themselves by basing their legitimacy upon 'the people' of a particular state."[27] It has been asserted that NAFTA is afflicted by an inherent democratic deficit by having been "negotiated by the executive branch of each country with limited input by the public."[28] It should be noted, however, that the adoption of the Canada-United States Free Trade Agreement 1988 was the object of a general election in Canada and a very close and hard-fought debate in the US Congress.

Canada and the United States have sought to reduce the perceived democratic deficit by enhancing the transparency of NAFTA Chapter 11 proceedings. It is also noteworthy that the Obama administration undertook a period of public consultation during the 2009 review of the US Model BIT in an attempt to reduce the democratic deficit.[29] However, the secrecy of negotiations is still very much alive and an important issue in the context of the negotiations of the TPP and the Transatlantic Trade and Investment Partnership (TTIP), which have been held in confidence, with only limited reference of drafts to elected

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23 Statement of the NAFTA Free Trade Commission on Non-Disputing Party Participation, 7 October 2003, online: <www.state.gov/documents/organization/38791.pdf>.

24 The ICSID Arbitration Rules were modified and became effective on 10 April 2006. The new rules include improvements concerning the transparency of proceedings, including the possibility for tribunals to consider requests from third parties to file amicus briefs (Arbitration Rule 37), the opening of ICSID hearings to the public (Arbitration Rule 32), and the requirement for ICSID to "promptly" publish "excerpts of the legal reasoning" of every award (Arbitration Rule 48), online: <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF.htm>.

25 The *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (New York: United Nations, 2014) came into effect on April 1, 2014, and comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based ISA. It is noteworthy that on March 17, 2015, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, GA Res 69/116, UNGAOR, 69th Sess, UN Doc A/RES/69/116 (2014) [Mauritius Convention] was open for signature. The Mauritius Convention is an instrument by which the parties to investment treaties concluded before April 1, 2014, express their consent to apply the UNCITRAL Rules on Transparency.

26 Caron, "The Legitimacy of the Collective Authority of the Security Council", *supra* note 2 ("integrity may be promoted by providing the opportunity for representative participation and fostering an ongoing dialogue as to the legitimacy of any action" at 561). See also, about the WTO, Jeffery Atik, "Democratizing the WTO" (2001) 33 Geo Wash Intl Rev 451 at 454ff ("the WTO suffers a democracy deficit based on the extremely attenuated democratic influence on its decision-making. As important regulatory competence is removed from national lawmaking organs and transferred to the WTO, there is a net democracy loss. The WTO places a large sphere of economic activity beyond the reach of ordinary national politics" at 457 [footnotes omitted]).

27 Mark Killian Brewer, "The European Union and Legitimacy: Time for a European Constitution" (2001) 34 Cornell Intl LJ 555 at 578.

28 Nicola W Ranieri, "Investors' Rights, Legal Concepts, and Public Policy in the NAFTA Context" in Leon E Trakman and Nicola W Ranieri, eds, *Regionalism in International Investment Law* (Oxford: Oxford University Press, 2013) 400 at 412. It is noteworthy that in the United States, NAFTA was negotiated under fast-track authority "where the executive presented the package for congressional approval on a yes-or-no basis, with no congressional opportunity for input."

29 See "The 2012 US Model BIT and What the Changes (or Lack Thereof) Suggest about Future Investment Treaties" (November 2012) VIII:2 Political Risk Insurance Newsletter 1. "Opinions expressed during the consultation processes leading to the 2012 Model varied widely, ranging from calls for changes that would enhance investor protections, to those that would strengthen requirements for environmental protection and promotion of labor rights, to those that would more explicitly carve out government authority and discretion from potential liability" (*ibid* at 1).

officials as required by law in the United States,[30] but not in Canada.[31] In defence of this situation, both governments maintain that trade agreements cannot be negotiated in public.[32]

The US Model BIT and the Canadian Model FIPA on the Transparency of Proceedings

Canada adopted strong measures to enhance transparency in ISA proceedings when it drafted its Model FIPA in 2004 on the basis of its experience under NAFTA Chapter 11 arbitrations. In this regard, "Canada's stated objectives in redrafting its model FIPA were to clarify substantive investment obligations and to maximize transparency."[33] The willingness of Canada to improve transparency of ISA proceedings is evidenced by several provisions on this topic in the Canadian Model FIPA.[34]

The United States took into account similar concerns relating to transparency under NAFTA Chapter 11 arbitration proceedings when it drafted its Model BIT in 2004, which was subsequently modified in 2012. In this regard, the US Model BIT includes in article 29 an obligation for arbitral proceedings to be transparent. When the Model BIT was drafted, it transcended ICSID's transparency requirement at the time and provided, among other rules, that tribunal hearings be open to the public and that parties should publish the minutes or transcripts of the hearings together with all tribunal orders, awards and decisions. The result is that despite the wide criticisms about the "secret tribunals" in ISA proceedings, the transparency rules provided in the US Model BIT often go further than most other forums of dispute resolution, along lines similar to the UNCITRAL's 2014 amended rules.

CETA Provisions on the Transparency of Proceedings

Canada also took into account concerns related to transparency in the recently signed CETA with the European Union which, for the first time in an investment agreement, explicitly incorporates the UNCITRAL Transparency Rules in its article 8.36(1).[35]

As far as *amicus curiae* submissions are concerned, it is noteworthy that CETA, in its dispute settlement chapter (Chapter 29), provides for the possibility for "non-governmental persons established in a Party [to] submit amicus curiae briefs to the arbitration panel,"[36] thus explicitly allowing non-disputing parties to participate via *amicus curiae* briefs.

Adoption of the CETA "Investment Tribunal" — A Significant New Departure by Canada and the European Union

The final version of the CETA text, which emerged from the lengthy "legal scrub" in September 2016, includes an investment tribunal, which is a major departure from traditional ISA practice.[37] This tribunal[38] is to be formed of five Europeans, five Canadians and five persons who are not citizens of either jurisdiction. The notice of arbitration is issued in the traditional manner and the arbitration is subject to the ICSID or UNCITRAL Rules, but the procedures are conducted before an investment

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30 See JF Hornbeck & William H Cooper, "Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy", *Congressional Research Service*, 4 November 2010.

31 See e.g. Canadian Labour Congress, "75% of Canadians Have Never Heard of Major 'TPP' Trade Deal Being Negotiated in Secret", online: <canadianlabour.ca/issues-research/75-canadians-have-never-heard-major-"tpp"-trade-deal-being-negotiated-secret> and Maira Sutton, "TPP Negotiations Go Further Underground with Unprecedented Secrecy Around Meetings in Canada", 8 July 2014, online: <www.eff.org/deeplinks/2014/07/tpp-negotiations-unprecedented-secrecy-around-ottawa-meetings>.

32 The rationale behind this practice of secrecy is often argued to be improving the quality of the negotiation and enabling the negotiators to secure the best deal possible. In particular, it is argued that too much transparency could jeopardize the negotiations if there is a risk that valuable information will be divulged, thus making it more difficult for the countries involved to negotiate in their best interests. In addition, secrecy allows the negotiating countries to avoid having to undertake a two-front campaign within the negotiations and as far as domestic policy is concerned.

33 Andrew Newcombe, "Canada's New Model Foreign Investment Protection Agreement", August 2004 at 1, online: <www.italaw.com/documents/CanadianFIPA.pdf>.

34 See "Agreement Between Canada and ------- for the Promotion and Protection of Investments" (2004), art 38 [Canadian Model FIPA], online: <www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

35 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union [and its Member States...]*, 29 February 2016 [CETA], online: European Commission <trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf>. Article 8.36(1) of Chapter 8 of CETA provides that "1. The UNCITRAL Transparency Rules, as modified by this Chapter, shall apply in connection with proceedings under this Section." See also article 8.37 ("Information sharing") of the same chapter.

36 *Ibid,* Annex 29-A, paras 43 to 46. It is noteworthy, in addition, that both the United States and Canada took positions on *amicus curiae* briefs in the context of the WTO. In this regard, while the United States welcomed the openness of the WTO Appellate Body to *amicus curiae* briefs, Canada was less enthusiastic; see WTO, Dispute Settlement Body, "Minutes of Meeting held on 7 June 2000" (7 July 2000) ,WTO Doc WT/DSB/M/83, paras 7, 11–12.

37 See CETA, *supra* note 35, s F and, in particular, art 8.29.

38 The structure and procedures of the investment tribunal are analyzed in much greater detail in Céline Lévesque, "The European Commission Proposal for an Investment Court System: Out with the Old, in with the New?" CIGI, ISA Paper No 10, 26 September 2016.

tribunal made up of three tribunal members named by the tribunal chief justice and not by the parties to the dispute. Tribunal members are required to be fully independent and may not serve as counsel in other ISAs; they are also subject to a special code of conduct.[39] This new procedure thus responds to the frequently heard criticism that arbitrators cannot be perceived as fully independent of private interests and that they are not certain to be conscious of the public interests involved in investor-state claims. Awards of the investment tribunal are to be subject to appeal, on a variety of grounds, to an appellate body of the tribunal, but the form of the appellate process has yet to be clarified by the CETA parties. CETA also announces the intention of both parties to seek to create a global investment court.

A slightly different variant of this investment tribunal was first proposed by the European Commission in view of the TTIP negotiations with the United States in 2015.[40] A very similar procedure was incorporated into the EU-Vietnam Free Trade Agreement concluded in 2016.[41] Canada thus appears to have accepted the view of the European Commission that a radical departure was necessary to ensure broad public acceptance as well as formal approval by many European Union member state governments. This is a significant departure from traditional procedure and Canada seems to have accepted the opinion of the European Union that radical change was required in the CETA text. The European Union appears wedded to the idea that all states, whether developed or developing, should be subject to foreign investment rules, and that these rules should be enforced by an independent standing tribunal whose members are named by the public authorities and not by private arbitrators. However, it is not yet clear that Canada will pursue this model in all its future trade agreements. This may well happen, but it must be noted that, in 2016, Canada has also subscribed to the TPP, which included ISA on the traditional model.[42]

Arbitrators: The Perception of Lack of Control

Another concern often expressed concerning ISA under NAFTA Chapter 11 focuses on the arbitrators as such and, more precisely, on the lack of control over both the choice of arbitrators and their conduct. As far as arbitrators are at issue, articles 1124 and 1125 of NAFTA Chapter 11 are the governing provisions. Concerns regarding arbitrators are twofold: they encompass both concerns regarding the lack of full *governmental* control over the appointment and conduct of arbitrators and concerns related to the suitability of arbitrators to adjudicate investment disputes. Again, both NAFTA Chapter 11 tribunals and the NAFTA parties address these concerns.

The Practice of the NAFTA Tribunals Regarding Arbitrator Challenges

Several NAFTA tribunals have had to deal with requests relating to arbitrator challenges. Such cases include *SD Myers, Inc v Canada*;[43] *The Loewen Group Inc v United States*;[44] *Fireman's Fund Insurance Co v Mexico*;[45] *Methanex Corp v United States*;[46] *Canfor Corp v United States*;[47] the Softwood Lumber Consolidated Proceeding;[48] *Corn Products International, Inc v Mexico*;[49] *Grand River Enterprises Six Nations v United States*;[50] and, more recently, in *Vito G Gallo v Canada*.[51]

In *SD Myers*, arbitrator Bob Rae resigned from the tribunal the day after the secretary-general of ICSID informed both the tribunal and the disputing parties that Rae's challenge would be upheld

39 See CETA, *supra* note 35, arts 8.30, 8.44(2).
40 See EC, Commission, *Transatlantic Trade and Investment Partnership,* 16 September 2015, Ch II (Investment), s 3(4) (Investment Court System), online: <trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf>.
41 See *Free Trade Agreement between the European Union and the Socialist Republic of Vietnam* (not yet entered into force), s 3(4) (Resolution of Investment Disputes; Investment Tribunal System), online: <investmentpolicyhub.unctad.org/Download/TreatyFile/3563>.
42 See *Trans-Pacific Partnership Agreement*, 4 February 2016, Ch 9, s B (Investor-State Dispute Settlement), online: <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
43 *SD Myers, Inc v Canada*, Partial Award, 13 November 2000 (UNCITRAL).
44 *The Loewen Group Inc v United States*, Award, 26 June 2003, ICSID Case No ARB(AF)/98/3 [*Loewen*].
45 *Fireman's Fund Insurance Co v Mexico*, Award, 17 July 2006, ICSID Case No ARB(AF)/02/1.
46 *Methanex Corp v United States,* Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (UNCITRAL).
47 *Canfor Corp v United States*, Submission of Canfor Corporation Opposing Request of United States for Consolidation of the Claims of Canfor Corporation, Tembec Inc. et al and Terminal Forest Products LTD (UNCITRAL) at paras 12, 22ff, online: <www.state.gov/documents/organization/51403.pdf>.
48 *Canfor Corp v United States; Tembec v United States;* and *Terminal Forest Products Ltd v United States*, Order of the Consolidation Tribunal, 7 September 2005 (UNCITRAL) at para 8, online: <www.italaw.com/sites/default/files/case-documents/ita0115.pdf>.
49 *Corn Products International, Inc v Mexico*, Award, 18 August 2009, ICSID Case No ARB(AF)/04/1.
50 *Grand River Enterprises Six Nations, Ltd v United States*, Award, 12 January 2011 (UNCITRAL).
51 *Vito G Gallo v Canada*, Award, 15 September 2011, PCA Case No 55798 (UNCITRAL).

unless he discontinued his activities as a registered lobbyist in connection with the Softwood Lumber Agreement. In *Loewen*, arbitrator Yves Fortier, Q.C., resigned from the tribunal because of a merger of the arbitrator's firm with a law firm that had previously acted in connection with the corporate investor's bankruptcy reorganization. In *Methanex*, arbitrator Christopher, while rebutting the facts alleged by the investor, resigned to avoid the issue being a distraction for both the tribunal and the parties. In *Canfor*, reports indicate that the challenge of the proposed nomination of Mr. McKenna on grounds of conflict of interest was successful. In addition, in the same proceedings, Mr. Harper resigned from the tribunal because of concerns related to his involvement in litigation by Harvard University against the United States as a member of the board of overseers of the university. In *Corn Products International*, Manuel Tron submitted his resignation after the investor alleged that he had acted as counsel in another case challenging the exact same measure. The tribunal first gave the parties the opportunity to make submissions on this issue. In *Gallo*, arbitrator J. Christopher Thomas, Q.C., resigned after the deputy ICSID secretary-general decided that the arbitrator had to choose to continue to advise Mexico in light of its past and present work for the respondent or to serve as an arbitrator in the present case.

In *Fireman's Fund*, Andreas Lowenfeld, whose nomination was challenged by Mexico, continued to act as an arbitrator. However, arbitrator Francisco Carrillo Gamboa resigned when it became evident that an opinion his firm had given might be relevant to the arbitration and raised concerns of conflict of interest. In *Grand River Enterprises Six Nations*, the respondent requested the resignation of arbitrator James Anaya but the challenge was ultimately dismissed.

In light of this case law, in the vast majority of cases involving the challenge of an arbitrator, either the arbitrator was dismissed by the relevant arbitration institution or they voluntarily resigned from the tribunal, which suggests that arbitrators and administering institutions are responsive to challenges based on conflict of interest and issues related to the suitability of arbitrators to arbitrate a given dispute.

The Reaction in the Context of NAFTA to Concerns Related to Arbitrators

The parties to NAFTA did not alter the agreement with respect to arbitrators when they issued the FTC's Notes of Interpretation. The notes are silent on issues related to the appointment of arbitrators and to their suitability or independence. It is noteworthy, however, that outside the NAFTA context, arbitral institutions reacted to these concerns by revising their rules,[52] as did the United States and Canada in recent model agreements, as illustrated below.

The US Model BIT and the Canadian Model FIPA Regarding Concerns Related to Arbitrators

In recent agreements both the United States and Canada have taken into account the necessity to ensure enhanced control over the appointment process of arbitrators. That is why Canada's Model FIPA contains more detailed provisions concerning the appointment of arbitrators, specifying the criteria for the selection of arbitrators[53] as well as the means of controlling their conduct. This includes the establishment of a code of conduct for arbitrators to which the parties have to agree.[54] The US Model BIT, on the other hand, provides that in disputes involving financial services, "[i]n the appointment of all arbitrators not yet appointed to the tribunal, each disputing party shall take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to the particular sector of financial services in which the dispute arises shall be taken into account in the appointment of the presiding arbitrator."[55]

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52 In this regard, see UNCITRAL Arbitration Rules 2010 (New York: United Nations, 2011), art 6(7); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 575 UNTS 159, 17 UST 1270; Can TS 2013 No 24 (entered into force 14 October 1966), art 14(1) [ICSID Convention]; and International Bar Association, "Guidelines on Conflicts of Interest in International Arbitration (2014)", online: <www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.

53 See Canadian Model FIPA, *supra* note 34, art 29(2)(a).

54 See e.g. *ibid*, art 29(2): "2. Arbitrators shall … (c) comply with any Code of Conduct for Dispute Settlement as agreed by the Commission."

55 "2012 US Model Bilateral Investment Treaty: Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment", art 20(3)(c)(i) [US Model BIT], online: <www.state.gov/documents/organization/188371.pdf>.

CETA on the Concerns Related to Arbitrators

In the recent CETA entered into between Canada and the European Union, the parties stress the importance of the independence of arbitrators, the need to appoint arbitrators who have expertise that would enable them to efficiently arbitrate a given dispute, and also provide for a code of conduct for arbitrators.[56] CETA also includes detailed provisions dealing with the appointment of arbitrators. In this regard, like NAFTA, it provides for the constitution of a roster of arbitrators.[57] However, CETA's provision is more exhaustive and supplemented by article 8.44 of the same chapter, which provides that:

> 2. The Committee on Services and Investment shall, on agreement of the Parties, and after completion of their respective internal requirements and procedures, adopt a code of conduct for the Members of the Tribunal to be applied in disputes arising out of this Chapter, which may replace or supplement the rules in application, and may address topics including:
>
> (a) disclosure obligations;
>
> (b) the independence and impartiality of the Members of the Tribunal; and
>
> (c) confidentiality.
>
> The Parties shall make best efforts to ensure that the code of conduct is adopted no later than the first day of the provisional application or entry into force of this Agreement, as the case may be, and in any event no later than two years after such date.

Judicial Review and Control of Proceedings

A final procedural concern regarding ISA focuses on the uncertainty of judicial review of NAFTA Chapter 11 tribunal decisions, concerns over the control of proceedings and the lack of an appeal mechanism. This is manifested both in the context of review under the New York Convention, where the grounds for review are very narrow, as well as the widespread desire to develop a full-scale appellate process in the future.

Reactions to the Concerns Regarding Judicial Review in the Context of NAFTA

In the *Metalclad* case, Canada took a particularly strong and critical position by requesting a strict level of judicial review of Chapter 11 awards. Canada stressed that, "The NAFTA architecture indicates that the awards of Chapter Eleven tribunals about public measures are not supposed to be worthy of judicial deference and not supposed to be protected by a high standard of review. NAFTA Chapter Eleven Tribunals do not exhibit the features of a specialised or expert administrative tribunal. Chapter Eleven tribunals are currently appointed ad hoc and for single cases. There is no Chapter Eleven secretariat or in-house specialists or other institutional hallmark of expertise or special authority."[58]

While this argument raises questions as to Canada's good faith in the performance of its treaty obligations and as to its respect for the treaty when urging its own courts to second-guess the merits of a Chapter 11 award,[59] the underlying argument is that developed democracies share a strong commitment to the rule of law and efficient judicial systems that should be able and allowed to exercise such a review in appropriate circumstances. To manifest its dissatisfaction, Canada challenged the controversial *Bilcon* arbitral award before the Federal Court of Canada in June 2015.[60]

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56 See CETA, *supra* note 35, arts 8.30, 8.44(2).

57 See *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289, 605 (entered into force 1 January 1994), art 1124 and CETA, *supra* note 35, art 8.27.

58 *Mexico v Metalclad Corp*, 2001 BCSC 1529 (Outline of Argument of Intervenor, Attorney General of Canada at para 25).

59 On this issue, see Ranieri, *supra* note 28 at 414–415.

60 Canada, NAFTA, Ch 11, Investment, Cases Filed Against the Government of Canada, Clayton/Bilcon v. Government of Canada, online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng>.

Reaction to the Concerns Regarding Judicial Review in the US Model BIT

In response to concerns focusing on the review of decisions of NAFTA Chapter 11 tribunals and the general debate concerning the legitimacy of ISA,[61] in particular in the context of ICSID in which the issue is actually being debated,[62] the United States has provided in its more recent investment agreements for the possibility of negotiating the creation of an appellate body. In particular, the US Model BIT, in contrast to the Canadian Model FIPA, provides that "In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29."[63]

Reactions to the Concerns Regarding Judicial Review and the Control of Proceedings in FTAs and CETA

In recent free trade agreements (FTAs), both Canada and the United States envisage several mechanisms to respond to concerns regarding judicial review and the control of arbitral proceedings.

Creation of an Appeal Mechanism

In several FTAs (such as the US-Korea,[64] US-Peru[65] and US-Panama[66] FTAs), the United States has included an annex permitting the negotiation of such an appellate body in the three years after the entry into force of the FTAs in question. Such provisions are less frequent in Canadian international investment agreements (IIAs) but an example can be found in the Canada-Korea FTA.[67] Regarding CETA, the parties provided for the creation of such an appellate mechanism in the agreement itself with respect to investor-state disputes in article 8.28(1): "An Appellate Tribunal is also established to review awards rendered under this Section." The principle of an appeal, which is grafted on to the existing arbitral procedures, is thus clearly framed by the text, but the procedures and composition of the appeal mechanism have yet to be fully determined.[68] This important feature of CETA's investment chapter responds to many criticisms that have been formulated concerning the absence of an appeal process in traditional procedures.

It is also noteworthy that, in 2002, efforts were made by the ICSID Secretariat to modify the ICSID Convention provisions that provide for annulment of ICSID awards on limited grounds, but the idea was dropped after member states did not embrace it. Nothing came of these efforts at the time, but some governments, including Canada and the United States, are willing to see a revival of the attempt to shift from an annulment to an appeals process.

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61 See e.g. Sachet Singh and Sooraj Sharma, "Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap", Utrecht J Intl Eur L at 99–101, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2219248>; Donald McRae, "The WTO Appellate Body: A Model for an ICSID Appeals Facility?" (2010) 1:2 J Intl Dispute Settlement 371; United Nations Conference on Trade and Development (UNCTAD), "Reform of Investor-State Dispute Settlement: In Search of a Roadmap", IIA Issues Note No 2, June 2013.

62 Jessi Patton, "A Case for Investor-State Arbitration Under the Proposed Transatlantic Trade and Investment Partnership" (2014) 4:1 Arb Brief 75 at 88–91 ("Although the U.S. and EU have taken significant steps to create a more transparent, fair, and effective ISDS system, challenges and concerns remain regarding arbitrators' impartiality and independence, forum shopping, consistency of arbitral decisions, and a lack of a review system. These challenges have prompted further debate regarding a number of alternatives the U.S. and EU have addressed and may consider when negotiating the TTIP agreement. These options include…the creation of an appellate mechanism…. An investment appellate body at the international level could…enhance the consistency, predictability, and perceived impartiality of decisions rendered by arbitral tribunals" at 88–89 [footnote omitted]); Sachet Singh & Sooraj Sharma, *supra* note 61 at 99–101. See also Donald McRae, "The WTO Appellate Body: A Model for an ICSID Appeals Facility?" (2010) 1 J Intl Dispute Settlement 371.

63 US Model BIT, *supra* note 55, art 28(10).

64 *Free Trade Agreement Between the United States of America and the Republic of Korea*, 30 June 2007 (entered into force 15 March 2012), Annex 11-D (Possibility of a Bilateral Appellate Mechanism), online: <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

65 *United States-Peru Trade Promotion Agreement*, 12 April 2006 (entered into force 1 February 2009), Annex 10-D (Appellate Body or Similar Mechanism), online: <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

66 *United States-Panama Trade Promotion Agreement* (entered into force 31 October 2012), Annex 10-D (Possibility of a Bilateral Appellate Mechanism), online: <https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>. See also the *United States-Singapore Free Trade Agreement* (entered into force 1 January 2004) art 15.19, online: <https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text> and the *United States-Morocco Free Trade Agreement*, 15 June 2004 (entered into force 1 January 2006), Annex 10-D, online: <https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text>.

67 *Canada-Korea Free Trade Ageement*, 22 September 2014 (entered into force 1 January 2015), Annex 8-E (Possibility of a Bilateral Appellate Mechanism), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/toc-tdm.aspx?lang=eng>.

68 CETA, *supra* note 35, art 8.28(1).

Prior Screening of Arbitral Claims in CETA

Canada, with its partner, the European Union, has also introduced procedures in CETA to enhance the control of the parties over investors' claims *en amont* (i.e., at the beginning of proceedings) via a screening mechanism of claims by arbitral tribunals or state parties. In this regard, CETA provides in article 8.18(3) of Chapter 8 that "an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process" and in article 8.1 that a covered investment must be "made in accordance with the applicable law at the time the investment is made." These provisions thus provide tools to arbitral tribunals willing to dismiss cases in which investments have been undertaken in an unlawful manner.

In addition, CETA also provides for such "screening mechanisms" under Chapter 8, articles 8.32 and 8.33, that aim to bar the access to ISA if claims are "manifestly without legal merit" and if claims are "unfounded as a matter of law,"[69] provisions that are further strengthened by the "loser pays" principle.[70]

Exclusion of Contractual Claims in CETA

As a means of controlling arbitral proceedings, the parties to CETA decided not to include an umbrella clause in the agreement, thus avoiding the circumvention of domestic courts for purely contractual claims. The absence of an umbrella clause means that purely contractual claims cannot be brought under CETA. Chapter 8, article 8.18(1), of CETA confirms and provides that

> 1. Without prejudice to the rights and obligations of the Parties under Chapter Twenty-Nine (Dispute Settlement), an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation under:
>
> (a) Section C, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment; or
>
> (b) Section D:
>
> where the investor claims to have suffered loss or damage as a result of the alleged breach.

CONCERNS RELATED TO THE SUBSTANTIVE STANDARDS OF PROTECTION UNDER NAFTA: REACTIONS OF THE NAFTA PARTIES

The Evolving Nature of the Traditional Standards of Protection under NAFTA

Scholars and observers often refer to the "broad," "vague" or "uncertain" provisions of Chapter 11 that seem inherent in NAFTA Chapter 11.[71] The breadth and vagueness of NAFTA Chapter 11 language, coupled with the non-availability of the *travaux préparatoires* to NAFTA,[72] inevitably lead to a considerable degree of flexibility for tribunals. Therefore they have a large margin of appreciation concerning the scope of their jurisdiction with respect to the scope of the chapter's coverage and, as illustrated below, the scope of each of the central standards of protection — thus threatening predictability in ISA under NAFTA Chapter 11. Predictability "is very important to its users because it creates confidence in the system."[73]

This critique of the expansive interpretation of NAFTA Chapter 11 provisions finds its roots in the broadly drafted articles of NAFTA Chapter 11, such as article 1139, the language of which is "unmistakably broad."[74] There has been considerable public pressure and strong criticisms of the broadness of NAFTA

69 *Ibid*, arts 8.32(1), 8.33(1).
70 *Ibid*, art 8.39(5).
71 Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment* (Winnipeg, Canada: International Institute for Sustainable Development, 1999) at 6, 8, 15, 18–19, 44, 60.
72 See Rajeev Sharma, "The Jurisprudence of NAFTA Article 1106: The Prohibition Against Performance Requirements" in Todd Weiler, ed, *NAFTA – Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley, NY: Transnational Publishers, 2004) ("[u]nless the NAFTA governments have a change of heart and release whatever formal or informal *travaux preparatoires* may be available… we will remain in the hands of tribunals on a case-by-case basis") at 92.
73 Schneider, *supra* note 5 at 710.
74 Atik, *supra* note 4 at 147.

Chapter 11. In the United States, for instance, public pressure aroused concern in Congress. In August 1996, five members of Congress wrote to Ambassador Charlene Barshefsky, at the time United States Trade Representative (USTR), to express their concerns about Chapter 11 and the manner in which it was being used by corporations (more precisely, by Methanex) to challenge environmental regulations. In their letter, the congressmen expressed their position in the following manner: "We didn't think anyone believed that the expropriation protections in the NAFTA would be used to challenge environmental regulations in the way Methanex has."[75]

These concerns were raised in 1996 and again in 2001, and the NAFTA parties took concrete measures to respond to these criticisms by issuing the FTC's Notes of Interpretation. The Notes of Interpretation were designed to respond to the call of the congressmen that "the USTR should enter into negotiations with its NAFTA partners to clarify definitions of expropriation, fair and equitable treatment, and national treatment, as well as to ensure greater disclosure and consultation for pending NAFTA cases."[76]

The Practice of the NAFTA Tribunals Regarding the Minimum Standard of Treatment

While the expropriation provision of NAFTA Chapter 11 (article 1110) is certainly one of the most discussed in investment arbitration under NAFTA,[77] article 1105 of NAFTA, which provides for the minimum standard of treatment, is probably the standard of protection that has proven to be the most controversial as a consequence of its broad and undefined language. Despite the enhanced precision provided by the FTC's Notes of Interpretation (see below), controversy remains as to the interpretation and application of this provision. Even after the provision was clarified in the Notes of Interpretation, tribunals still found ways to ensure a certain degree of flexibility of interpretation and to render the understanding and application of the standard uncertain. In the *Mondev* case, for instance, while the tribunal did not follow the lead of the *Pope & Talbot* tribunal that questioned the legitimacy of the FTC's Notes of Interpretation, it still took a strong stand against the understanding of the standard of article 1105 as being fixed in time. The *Mondev* tribunal concurred with the *Pope & Talbot* tribunal in holding that the fair and equitable treatment (FET) standard of protection is evolutionary and not limited to what was initially described as the fair and minimum standard of treatment in the *Neer* decision.[78]

The *Mondev* tribunal was of the opinion that, "[t]o the modern eye, what is unfair and inequitable need not equate with the outrageous or the egregious. In particular, a state may treat foreign investments unfairly and inequitably without necessarily acting in bad faith."[79]

However, while acknowledging the evolutionary aspect of the standard, the *Mondev* tribunal also cautioned that a tribunal "may not apply its own idiosyncratic standard of what is 'fair' or 'equitable,' without reference to established sources of law."[80] In *UPS*, the tribunal considered the scope of the minimum standard of treatment "first, under customary international law and, second, under relevant treaty provisions (touching in that context on the significance of the Free Trade Commission's Interpretation)."[81] The *ADF* tribunal adopted the same approach as the *Mondev* tribunal and relied on the FTC's Notes of Interpretation while emphasizing that the standard is not fixed in time and expands beyond what was established in the *Neer* case.[82] In the *Loewen* case, the tribunal tackled, among other

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75 Letter of members of Congress Miller, Waxman, Pelosi, Starck and Dixon to USTR, 6 August 1996, as cited in Ranieri, *supra* note 28 at 407, n 24.

76 *Ibid* at 407.

77 Controversy surrounds the notion of "indirect expropriation" for two main reasons. First, the terms used by this provision are not defined by the agreement. Indeed, the notions of "tantamount to nationalization or expropriation," "due process" or "public purpose" that are used in article 1110 of NAFTA Chapter 11 are not clearly defined, which raises the issue of the delimitation between, on the one hand, lawful and non-compensable regulatory action which limits the future conduct of investors and, on the other hand, indirect expropriation. A second critique that has been argued concerning NAFTA Chapter 11's expropriation provision focuses on the fact that the notion of "regulatory taking" is essentially a US term that is not to be found in the domestic legal systems of either Canada or Mexico (US Constitution, Fifth Amendment: "No person shall … be deprived of … property, without due process of law; nor shall private property be taken for public use, without just compensation.").

78 The *Neer* tribunal stated, "The propriety of government acts should be put to the test of international standards. The treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of government action so far short of international standards (that every reasonable and impartial man would readily recognize its insufficiency." *Neer v Mexico,* Decision on Merits, 15 October 1926, 4 RIAA 50 at para 4.

79 *Mondev International Ltd v United States*, Award, 11 October 2011, ICSID Case No ARB(AF)/99/2 at para 116. See also *supra* note 78 ("the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s") at para 123).

80 *Ibid* at para 119.

81 *United Parcel Service of America Inc v Canada*, Award on Jurisdiction, 22 November 2002 (UNCITRAL) at para 83.

82 *ADF Group Inc v United States*, Award, 9 January 2003, ICSID Case No ARB(AF)/00/1 at paras 183–186.

issues, the divergent positions of previous tribunals on the meaning of "international law" and "full protection and security." In this regard, the tribunal stated that:

> [t]he effect of the Commission's interpretation is that "fair and equitable treatment" and "full protection and security" are not free-standing obligations. They constitute obligations only to the extent that they are recognized by customary international law. Likewise, a breach of Article 1105(1) is not established by a breach of another provision of NAFTA. To the extent, if at all, that NAFTA tribunals in Metalclad Corp v. United Mexican States ICSID Case No. ARB(AF)/97/1 (August 30, 2000), S.D. Myers, Inc. v. Government of Canada (Nov. 13, 2000) and Pope & Talbot, Inc. v. Canada, Award on the Merits, Phase 2 (April 10, 2001) may have expressed contrary views, those views must be disregarded.[83]

The *Waste Management II* tribunal, for its part, emphasized the flexible nature of the standard when observing that "[e]vidently the standard [i.e., article 1105 of NAFTA] is to some extent a flexible one which must be adapted to the circumstances of each case."[84]

The flexible and evolutionary aspect of the standard was further emphasized in subsequent cases, including in *Gami Investments, Inc v Mexico*,[85] *Cargill v Mexico*,[86] *Merrill & Ring v Canada*,[87] *Melvin J. Howard, Centurion Health Corp & Howard Family Trust v Canada*,[88] *Chemtura v Canada*,[89] *Grand River Enterprises Six Nations v United States*,[90] *Mobil v Canada*,[91] *Apotex Inc v United States*,[92] and *Apotex Holdings Inc v United States*.[93]

In the *Bilcon* decision,[94] the latest decision to date that deals with an article 1105 claim, the tribunal heavily relied on the previously quoted approach adopted by the *Waste Management* tribunal.[95] The *Bilcon* tribunal barely mentioned the narrow interpretation by the tribunal in *Glamis*,[96] the last case dealing with an article 1105 claim before *Bilcon*, which insisted on the applicability of the *Neer* standard.[97] While the decision on *Glamis* seemed to finally provide a definitive understanding of the standard of protection, surprisingly, the *Bilcon* tribunal adopted yet another approach to the same standard. The *Bilcon* tribunal did not follow the strict interpretation of the standard of article 1105 adopted by the *Glamis* tribunal,[98] but rather adopted a broad approach to the same standard by emphasizing its evolutionary and "not frozen in time" nature.[99] It is noteworthy, in addition, that the decision in *Bilcon* was a majority decision, which illustrates, again, the sensitivity of the issue surrounding the understanding of this standard. The dissenting arbitrator, Donald McRae, took a strong stand against the majority's expansive approach concerning the understanding and application of article 1105 and observed that, despite recognizing the high threshold of article 1105, the majority found that it was breached on the basis of their own understanding of the notion of "community values" (or "core values")[100] and on the mere basis of a "*potential* violation of Canadian law."[101]

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83 Loewen, *supra* note 44 at para 128.
84 *Waste Management, Inc v Mexico ("Number 2")*, Award, 30 April 2004, ICSID Case No ARB(AF)/00/3 at paras 98–99 [*Waste Management*].
85 *Gami Investments, Inc v Mexico*, Final Award, 15 November 2004 (UNCITRAL).
86 *Cargill, Inc (US) v Mexico*, Award, 18 September 2009, ICSID Case No ARB(AF)/05/2.
87 *Merrill & Ring* Award, *supra* note 16.
88 *Howard v Canada*, Order for the Termination of the Proceedings and Award on Costs, 2 August 2010, PCA Case No 2009-21.
89 *Chemtura Corp v Canada*, Award, 2 August 2010 (UNCITRAL).
90 *Grand River Enterprises Six Nations, Ltd v United States*, Award, 12 January 2011 (UNCITRAL).
91 *Mobil Investments Canada Inc v Canada*, Decision on Liability and Principles of Quantum, 22 May 2012, ICSID Case No ARB(AF)/07/4.
92 *Apotex Inc v United States*, Award on Jurisdiction and Admissibility, 14 June 2013 (UNCITRAL).
93 *Apotex Holdings Inc v United States*, Award, 25 August 2014, ICSID Case No ARB(AF)/12/1.
94 *Clayton v Canada*, Award on Jurisdiction and Liability, 17 March 2015, PCA Case No 2009-04 [*Bilcon* Award on Jurisdiction and Liability].
95 *Waste Management, supra* note 84 at paras 98–99.
96 *Bilcon* Award on Jurisdiction and Liability, *supra* note 94 at para 434ff.
97 *Glamis Gold, Ltd (Can) v United States*, Award, 8 June 2009 (UNCITRAL).
98 *Ibid*.
99 *Bilcon* Award on Jurisdiction and Liability, *supra* note 94 at para 43. NAFTA tribunals have, however, tended to move away from the position more recently expressed in *Glamis* and rather move toward the view that the international minimum standard has evolved over the years toward greater protection for investors. Thus, the NAFTA tribunal in *ADF Group* in 2003 held that the customary international law referred to in article 1105(1) is not "frozen in time" and that the minimum standard of treatment does evolve.
100 *Clayton v Canada*, Award on Jurisdiction and Liability, 10 March 2015, PCA Case No 2009-04, McRae, dissenting, at para 3ff.
101 *Ibid* at para 43 [emphasis added].

These cases illustrate a certain ambivalence by some NAFTA tribunals toward the NAFTA parties' attempt to limit the scope of FET through the FTC's Notes of Interpretation. Indeed, while NAFTA tribunals repeatedly accepted that the standard of article 1105 solely refers to customary international law by application of the FTC's Notes of Interpretation, "they have taken a further step in concluding that the content of that standard cannot reasonabl[y] be informed by decades-old cases such as *Neer*"[102] and instead emphasized the evolutionary aspect of international customary law and thus of the content of FET.

The concern that there is a tendency among NAFTA Chapter 11 tribunals to broadly interpret standards of protection in favour of foreign investors finds its roots in this uncertainty. It has indeed been argued that "[e]ach provision is its own case as a textual matter; yet taken together they present a potential opportunity for a substantial enhancement of Chapter 11's reach, beyond the parties' respective original intent, and perhaps beyond the underlying consent of the respective polities."[103]

While the *Bilcon* case may be an isolated case with respect to its flexible interpretation of article 1105 when equating potential violations of domestic law to violations of NAFTA's investment protection standard under article 1105, no clear pattern of such specific behaviour on the part of the NAFTA tribunals can be discerned,[104] even in the previous cases that adopted a broad understanding of the same standard. However, the NAFTA parties still have concerns related to the expansionary interpretation and application of the standard as a result of this award.

The Reaction to Concerns Related to the Traditional Standards of Protection under NAFTA

To remedy the uncertainty surrounding the interpretation and application of traditional standards of treatment as illustrated above concerning the minimum standard of treatment protection, the three NAFTA parties used interpretation tools provided under NAFTA.[105] In 2001 the NAFTA parties issued the FTC's Notes of Interpretation and subsequently, in 2003, several joint statements clarifying, among other things, questions related to the transparency of proceedings and the status of *amicus curiae* under NAFTA Chapter 11 (see below).

The Notes of Interpretation took into account some of these concerns, but can be described as insufficient since, besides enhancing the transparency of NAFTA ISA proceedings,[106] the only provision that was formally clarified was article 1105.[107] Not only was this provision the only one the NAFTA parties sought to clarify but, as illustrated above, the NAFTA parties do not appear to have reached a sufficient level of precision and article 1105 remains a highly flexible and uncertain provision.[108] Concerns continue to be voiced as illustrated by recent letters from members of Congress and House Democrats to the USTR[109] and the reaction of Congress through the enactment of legislation.[110]

The US Model BIT and the Canadian Model FIPA Regarding the Traditional Standards of Protection Under NAFTA

As an answer to the concerns focusing on the uncertain interpretation and application of the traditional standards of treatment under NAFTA, the NAFTA parties, and in particular the United States and Canada, have subsequently adopted a more precise way of drafting international investment law provisions. As far as non-discrimination standards are at stake (articles 1102 to 1104 of NAFTA), while these provisions of NAFTA are not the most controversial, it is noteworthy that the Canadian Model FIPA includes annex III, clarifying the exceptions from most favoured nation (MFN) treatment and extends the scope of exceptions provisions to non-discrimination standards.[111] In addition, the US Model BIT

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102 Ian A Laird, "Betrayal, Shock and Outrage – Recent Developments in NAFTA Article 1105" in Todd Weiler, ed, *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley, NY: Transnational, 2004) at 71.

103 Atik, *supra* note 4 at 147 (footnote omitted).

104 It is noteworthy that in respect of Canada and the United States, the latter have never lost a NAFTA case, while Canada has only lost four cases in the more than 30 cases that were filed against it.

105 See NAFTA, *supra* note 57, art 1132 and US Model BIT, *supra* note 55, art 31.

106 See "The Reaction to Concerns Related to the Transparency of Proceedings," above, in the context of NAFTA.

107 See "The Practice of the NAFTA Tribunals Regarding the Minimum Standard of Treatment," above.

108 *Ibid*.

109 See House Democrats Call For USTR to Stop Using Distorted Data, Washington DC, online: <tonko.house.gov/press-releases/house-democrats-call-for-ustr-to-stop-using-distorted-data1/>.

110 See 19 USC § 3802(b)(3).

111 Canadian Model FIPA, *supra* note 34. See mainly articles 9 to 11.

provides for a largely modified minimum standard of treatment provision that was transformed into a lengthy and precise clause accompanied by annex A, confirming the parties' "shared understanding" of the term "customary international law."

As far as the indirect expropriation provision is at issue, both Canada and the United States have included detailed provisions on indirect expropriation in subsequent IIAs as illustrated by the clauses found in the Canadian Model FIPA and the US Model BIT. In particular, the Canadian Model FIPA[112] includes the lengthy annex B.13(1) on expropriation that defines what must be understood by "indirect expropriation," requiring a "fact-based inquiry" intended to determine whether a measure or series of measures constitute an indirect expropriation. It also enunciates cases in which measures that would otherwise qualify as an indirect expropriation are justified.

In a similar fashion, the US Model BIT 2012 provides in its annexes specific directions on how concepts used in the agreement must be understood. Accordingly, annex B provides clarity on how the expropriation provision (article 6) of the Model BIT must be understood and applied. The United States also included such enhanced precision concerning expropriation in FTAs negotiated after NAFTA[113] and these enhancements are also often the main point of extensive discussions in the context of agreements that are currently being negotiated, such as the TPP.[114]

Finally, it is noteworthy that both the US Model BIT (article 31) and the Canadian Model FIPA (article 41) provide, in a similar fashion to article 1132 of NAFTA Chapter 11, for the right of the parties to issue joint decisions on the interpretation of the annexes.

CETA on the Concerns Related to the Traditional Standards of Protection under NAFTA

CETA also adopts a more precise and restrictive mode of drafting the traditional standards of treatment and in several instances goes even further than the model BITs. Regarding the traditional non-discrimination standards (MFN and national treatment), CETA innovates through its MFN provision by providing two limitations to the standard. CETA first excludes the application of the MFN provision to "the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements."[115] In addition, the MFN provision of CETA's investment chapter is also limited by explicitly prohibiting the borrowing of substantive obligations from other IIAs, thus ensuring that the traditional standards of protection in CETA will be applied with their specific limitations.[116]

CETA also innovates as far as the standard of protection against unlawful expropriation is at issue. In this regard, CETA's drafters clarified the meaning of the expropriation provision in the investment chapter by including annex 8-A in the agreement, which, in a similar fashion to the US Model BIT and Canadian Model FIPA, aims to clarify the notions of direct and indirect expropriation, the test for the determination of whether a measure or series of measures constitutes an indirect expropriation, and the situation in which a measure or a series of measures that would otherwise qualify as indirect expropriations are justified.

The most striking effort to reach a higher degree of clarity lies, however, in CETA's FET provision (chapter 8, article 8.10), which can be described as an almost new version of the traditional standard of protection. In addition to the traditional wording of the FET provision, according to which "[e]ach

112 It is noteworthy that the approach adopted by the Canadian Model FIPA regarding its expropriation provision and, in particular, its enhanced precision, is essentially a codification of the US regulatory taking test developed in *Penn Central Transportation Co v New York (City of)* (1978) 438 US 104.

113 See e.g. *United States-Australia Free Trade Agreement* (entered into force 1 January 2005), Annex 11-B, online: <https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text>; *United States-Chile Free Trade Agreement* (entered into force 1 January 2004), Annex 10-D, online: <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>; *Dominican Republic-Central America Free Trade Agreement* (entered into force 2006 (United States, El Salvador, Guatemala, Honduras and Nicaragua), 2007 (Dominican Republic) and 2009 (Costa Rica)), Annex 10-C; *United States-Morocco Free Trade Agreement*, *supra* note 66, Annex 10-B; *United States-Korea Free Trade Agreement*, *supra* note 64, Annex 11-B; *United States-Peru Free Trade Agreement*, *supra* note 65, Annex 10-B; and *United States-Panama Trade Promotion Agreement*, *supra* note 66, Annex 10-B.

114 See *An Open Letter From Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement*, 8 May 2012, online: <https://tpplegal.wordpress.com/open-letter/>, and *House Democrats Call For USTR to Stop Using Distorted Data*, Washington DC, online: <tonko.house.gov/press-releases/house-democrats-call-for-ustr-to-stop-using-distorted-data1/>.

115 CETA, *supra* note 35, art 8.7(4).

116 *Ibid*.

Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment," article 8.10 provides in its second paragraph what must be understood as a breach of the FET standard. The new approach to the FET standard is especially characterized by the shift, for the first time in IIA practice, from an open-textured standard traditionally used in US investment agreements to a closed-list standard, generally favoured by the European Union. The parties effectively opted for legal certainty and predictability at the expense of the interpretative power of arbitral tribunals. It is also noteworthy that the full protection and security standard of protection, merged in article 8.10 with the FET standard of protection, was also clarified by referring explicitly only to "the Party's obligations relating to the physical security of investors and covered investments."[117]

Finally, the agreement, similarly to the US and Canadian Model BITs, also follows article 1132 of NAFTA by allowing the setting up of the Committee on Services and Investment that can "recommend to the CETA Joint Committee the adoption of interpretations of this Agreement."[118] In addition, CETA also allows specific powers of interpretation, as far as the understanding of the FET standard is at issue, by providing that "The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision."[119]

CONCERNS RELATED TO "REGULATORY CHILL": REACTIONS OF THE NAFTA PARTIES

Opponents of ISA under NAFTA Chapter 11 often argue that tribunals have decided too often in favour of investors, and this tendency is evidenced by the most recent Chapter 11 decision in *Bilcon*.[120] This concern is directly linked to the indeterminate nature of the text of Chapter 11 illustrated above, as it is on this basis that "[p]opular accounts depict claimants as villains who have pushed Chapter 11 beyond its intended scope, transforming a defensive tool into an offensive weapon that threatens the capacity of governments to regulate in the public interest."[121]

The reaction to concerns focused on regulatory chill by governments is the adoption of new ways of drafting investment treaties that are clearer and that provide for numerous exceptions, thus more clearly preserving the states' sovereign power to regulate in the public interest. However, it is important, especially in the aftermath of the *Bilcon* decision, to note the emphasis put by negotiators and drafters on exceptions focusing on the protection of a regulatory space that must be left for states to protect the public interest.

The Reaction in the Context of NAFTA to Concerns Related to Regulatory Chill

The United States and Canada have not taken explicit measures to answer concerns related to regulatory chill as they did, for example, in respect to concerns related to transparency via the FTC's 2001 Notes of Interpretation. However, it is noteworthy that the measures the NAFTA parties have taken in a variety of contexts, including the CETA and TPP texts, are designed to protect what can be described as the legitimate regulatory authority of states. Similarly, a way to answer such concerns can be seen in the use by the NAFTA parties of their interpretative powers under NAFTA. This power has been exercised and even more extensive powers are included in the CETA and TPP texts (see above).

The US Model BIT and the Canadian Model FIPA Regarding Concerns Related to Regulatory Chill

Beside the enhanced precision in the drafting of subsequent IIAs and the inclusion of an "interpretation clause" in such agreements (see above), the Canadian Model FIPA and the US Model BIT illustrate the will to provide more leeway to host states, where their sovereign power to regulate in the public interest is at issue, via the inclusion of different types of exceptions that can be found in both model

117 *Ibid*, art 8.10(5).
118 *Ibid*, arts 8.31(3), 8.44(3)(a).
119 *Ibid*, art 8.10(3).
120 It is noteworthy, however, that no clear pattern involving tribunals repetitively deciding in favour of investors can be discerned. See note 104, above.
121 Brower, *supra* note 15 at 59 (footnotes omitted).

BITs. Such exceptions ensure the right of derogation from the provisions of investment agreements in case the legitimate power of states to regulate is at issue.

Investment agreements now use a variety of exceptions, both general and specific. For example, the US Model BIT (2012) provides an essential security clause that applies to the entire agreement.[122] Similarly, the Canadian Model FIPA (2004) provides for a clause entitled "General Exceptions"[123] and a provision recognizing that "it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures."[124] Such general exceptions are often accompanied by specific exceptions that apply to specific provisions of the agreement. For example, article 7(2) of the Canadian Model FIPA provides that "[a] measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent" with the Model FIPA's provision on the prohibition of performance requirements.[125] The Canadian Model FIPA also borrows exceptions provided under the General Agreement on Tariffs and Trade (GATT) article XX and the General Agreement on Trade in Services article XIV.[126] It uses carve-outs,[127] statements of conformity with World Trade Organization (WTO) waivers[128] and "grandfathering clauses," and annexes listing non-conforming legislation.[129] Finally, both the US Model BIT and the Canadian Model FIPA also provide exceptions via the interpretation of GATT article XX to include worker or environmental protection[130] and statements of interpretation and application that provide binding guidelines on how to interpret specific provisions or the entire agreement in accordance with the necessity to protect diverse areas of public policy.[131]

CETA on Concerns Related to Regulatory Chill

The CETA investment chapter manifests the trend that consists of the broader inclusion of exceptions to existing standards of protection. Here, one notes a tendency to use lengthy and more detailed exception provisions both as to specific standards (specific exceptions) and to investment chapters of IIAs in general (general exceptions). Several types of exceptions can be identified in CETA: borrowing exceptions provided under GATT article XX;[132] the interpretation of GATT article XX to include environmental protection;[133] statements of interpretation and application that provide binding guidelines on how to interpret specific provisions or the entire agreement in accordance with the necessity to protect diverse areas of public policy;[134] carve-outs;[135] statements of conformity with WTO waivers;[136] "grandfathering clauses"; and annexes listing non-conforming legislation.[137]

CETA provides for public exceptions in most of its chapters, starting with the preamble, which states: "the Parties resolve to: … Recogniz[e] the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation." In addition, it also reaffirms the parties' commitment to protect and enhance values such as:

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122 See 2012 US Model BIT, *supra* note 55, art 18 and 2001 Finland Model BIT, art 14(1), online: UNCTAD <investmentpolicyhub.unctad.org/Download/TreatyFile/2843>.

123 Canadian Model FIPA, *supra* note 34, art 10.

124 *Ibid,* art 11. See also *ibid,* art 16 (Taxation Measures).

125 On exceptions clauses in investment agreements see generally Armand de Mestral, "Exceptions Clauses in the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada: A Model for Future 'Mega-regional' Agreements?" (2016) Transnational Dispute Management 1.

126 See Canadian Model FIPA, *supra* note 34, art 10.

127 See Canada Model FIPA, *supra* note 34, art 10, paras 2–6.

128 See Canadian Model FIPA, *supra* note 34, arts 10(7), 13(5).

129 See Canadian Model FIPA, *supra* note 34, annexes I and II.

130 See e.g. 2012 US Model BIT, *supra* note 55, arts 12 (Investment and Environment), 13 (Investment and Labor). See also Canadian Model FIPA, *supra* note 34, art 11.

131 See US Model BIT, supra note 55 (annexes A and B of the US Model BIT that respectively aim to confirm the "shared understanding" of the parties of the term "customary international law" and of the application of the expropriation provision (article 6)); and Canadian Model FIPA, *supra* note 34, Annex III.

132 See CETA, *supra* note 35, art 28.3(1).

133 *Ibid*; "The Parties understand that the measures referred to in Article XX (b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health. The Parties understand that Article XX(g) of the GATT 1994 applies to measures for the conservation of living and non-living exhaustible natural resources." By contrast with trade agreements that often do so both via explicit provisions and by providing that GATT Article XX should be interpreted in a manner to include such matters, investment agreements, which have only recently started to provide for the protection of such matters, often do so through separate provisions.

134 See e.g. CETA, *supra* note 35, arts 8.7, 8.10, Annex 8-A.

135 See e.g. *ibid*, art 13.16 (provides that "This Agreement does not prevent a Party from adopting or maintaining reasonable measures for prudential reasons").

136 See *ibid*, art 28.10.

137 CETA makes extensive use of such reservations by providing several hundred pages of reservations identified in the schedules of both the European Union and Canada, and so does NAFTA in its Annex I "Reservations for Existing Measures and Liberalization Commitments."

> [T]he right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity;
>
> …
>
> [L]abour and environmental laws and that enhance the level of labour and environmental protection, and building upon their international commitments on labour and environmental matters.[138]

It also contains a general exception chapter (Chapter 28) that includes exceptions applicable to the entire agreement, including the protection of public security, human, animal or plant life or health, and also other exceptions such as the protection of the privacy of the individual in relation to the processing and dissemination of personal data or the protection of "safety." Specific exceptions can be found in most chapters of the agreement and in the chapter on investment (Chapter 8) they can be found in article 8.5 on performance requirements, article 8.13 on financial transfers or article 8.2(3) (scope of application). CETA also contains chapters dedicated to trade and environment (Chapter 24) and trade and labour (Chapter 23), as well as a chapter focusing on trade and sustainable development (Chapter 22). In addition, numerous provisions in other chapters provide for exceptions to protect these values.[139] CETA also provides an important exception to the MFN principle that enables a party to derogate from the non-discrimination standard if it is necessary for the protection of public order, public health or public morality.

As emphasized above, CETA provides the parties with enhanced powers of interpretation of its provisions such that the parties are able to respond to unwanted interpretations by the investment tribunal. In particular, it provides that "The Parties agree to review the relation between intellectual property rights and investment disciplines within three years after entry into force of this Agreement or at the request of a Party. Further to this review and to the extent required, the Parties may issue binding interpretations to ensure the proper interpretation of the scope of investment protection under this Agreement in accordance with the provisions of Article 8.31.3."[140]

In addition, article 8.31 of the investment chapter provides the possibility for the Committee on Services and Investment to recommend that the Trade Committee adopt its interpretations of the agreement.[141]

Finally, it is noteworthy that the enhanced precision in the drafting of the traditional standards of treatment illustrated above also seeks to answer concerns regarding regulatory chill. CETA's expropriation provision should be highlighted for trying to ensure that regulations related to public policy do not qualify as expropriations.[142] The same reasoning was adopted concerning the FET provision of CETA in which the drafters deliberately attempted to clarify and, by doing so, limit the scope of the FET standard to avoid any broad interpretation of the latter to favour investors.[143]

FINAL THOUGHTS: THE WAY FORWARD

While the United States and Canada seem to have learned from the NAFTA experience and to have taken into account the concerns of the public in the drafting of their model BITs and subsequent FTAs, especially CETA, the question remains: what about NAFTA? The concerns are indeed still very much alive; the large number of claims filed in recent years continue to arouse public concern. One can thus ask: what could the NAFTA parties do to improve the investment regime under NAFTA? It is

138 It is noteworthy that cultural industries (and audio-visual services for the European Union) are also excluded from the scope of CETA's chapter on subsidies (Chapter 7). CETA, *supra* note 35.

139 See e.g. *ibid*, Preamble, art 8.4(2)(d).

140 *Ibid*, Annex 8-D (Joint Declaration Concerning Article 8.12.6).

141 See also *ibid*, art 8.44(3): "The Committee Services and Investment may, on agreement of the Parties, and after completion of their respective internal requirements and procedures: (a) recommend to the CETA Joint Committee the adoption of interpretations of this Agreement pursuant to Article 8.31.3."

142 *Ibid*, Annex 8-A(3): "For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."

143 It is noteworthy that the common and investor-friendly notion of "stability" is not present in the definition of what could constitute a breach of the standard.

interesting to analyze how the critics of NAFTA's Chapter 11 also criticized the attempted answer of the NAFTA parties, that is, the FTC's 2001 Notes of Interpretation. While the interpretation mechanism of NAFTA Chapter 11 through which the FTC issued the Notes of Interpretation undisputedly holds great potential regarding the improvement of the agreement, in practice the mechanism appears to some as a "quick-fix mechanism to rewrite the Parties' obligations without necessary formalities,"[144] thus running the risk of worsening the legitimacy crisis the whole Chapter 11 process was already facing.[145] Indeed, after the issuance of the Notes of Interpretation, the legitimacy of the FTC, being composed of the NAFTA parties themselves, came into question. Some scholars argued that the interpretative process undertaken by the FTC "blatantly appears to favor the Parties"[146] and, rather than being used to enhance Chapter 11, has been "subverted by the Parties to exploit short-term self-interest."[147] Some have argued that the Notes of Interpretation, while aiming to bring enhanced precision to the text, in fact did nothing but exacerbate the lack of clarity in Chapter 11,[148] while others described them as masked amendments[149] of the original text.[150] It is clear, however, that the FTC should not be read in this manner. The legislative history of NAFTA Chapter 11 provided that the FTC should have a general power of interpretation of cases, whereas the final draft grants power to the FTC only to issue interpretative statements of a general application.[151] Accordingly, it has been observed that "[a] reasonable view is that the FTC is not empowered to resolve particular disputes."[152]

Similar questions may be asked in relation to the text of the TPP.[153]

In light of these considerations, the NAFTA parties seem to be trapped in a vicious circle, being confronted by a much-criticized NAFTA Chapter 11 and seeing their attempts to improve it criticized with the same conviction. While this paper aimed to analyze the reactions of the NAFTA parties to the main criticisms of ISA under NAFTA Chapter 11, it seems in fact to be raising another, more important question: is ISA under NAFTA an entirely satisfactory means of resolving investment disputes between developed democracies?

144 Ranieri, *supra* note 28 at 416.

145 Brower, *supra* note 15 ("[w]hile the use of binding interpretations holds great theoretical promise for enhancing the legitimacy of investor-state arbitration, the Free Trade Commission mechanism, as applied by the NAFTA Parties to date, lacks certain elements of legitimacy. The want of a pedigree represents the Free Trade Commission's most obvious, but least significant, shortcoming" at 78). See also Ranieri, *supra* note 28 (arguing that the interpretative process undertaken by the Free Trade Commission, which is composed of the NAFTA parties themselves, "blatantly appears to favor the Parties," and rather than being used to enhance Chapter 11, has been "subverted by the Parties to exploit short-term self-interest" at 416). Some argued that the Notes of Interpretation, while aiming to bring enhanced precision to the text, did in fact nothing but exacerbate the textual indeterminacy of Chapter 11 (Brower, *supra* note 15 ("these Notes contain significant ambiguities that merely increase the room for debate" at 78)), while others described them as masked amendments (See Laird, *supra* note 102 at 53, nn 3, 65)) of the original text (see Ranieri, *supra* note 28 at 417). It is clear however that the FTC is not allowed to do so and should not be able to do so, as illustrated by the legislative history of NAFTA Chapter 11 that provided in a first draft that the FTC has an overall interpretative power in Chapter 11 cases, whereas the final draft only grants the power to the FTC to issue interpretative statements of a general application (see Ranieri, *supra* note 28 at 417. See also Brower, *supra* note 15 at 85, n 259 ("a draft of Chapter 11 would have explicitly extended the Commission's adjudicative role to all interpretive questions in Chapter 11 disputes, because the final treaty text explicitly gives the Commission an adjudicative role only with respect to the interpretation of Annexes, and because it describes that role as 'further to' the Commission's power to issue interpretative statements of general application, the better view seems to be that this last power does not encompass the authority to resolve particular investment disputes.")). Accordingly, it has been observed that "[a] reasonable view is that the FTC is not empowered to resolve particular disputes"; Ranieri, *supra* note 28 at 417.

146 Ranieri, *supra* note 28 at 416.

147 *Ibid*. See also Brower, *supra* note 15 at 78–82.

148 Brower, *supra* note 15 ("these Notes contain significant ambiguities that merely increase the room for debate" at 78).

149 See Laird, *supra* note 102, at 53, nn 3, 65.

150 See Ranieri, *supra* note 28 at 417.

151 *Ibid*. See also Brower, *supra* note 15 at 85, n 259.

152 *Ibid.*

153 About ISA in the TPP, see Armand de Mestral, "Options Available to the Government of Canada to Respond to Public Concerns about the Propriety of Investor-State Arbitration between Developed Democracies", CIGI, CIGI Paper No 17, forthcoming 2016.

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