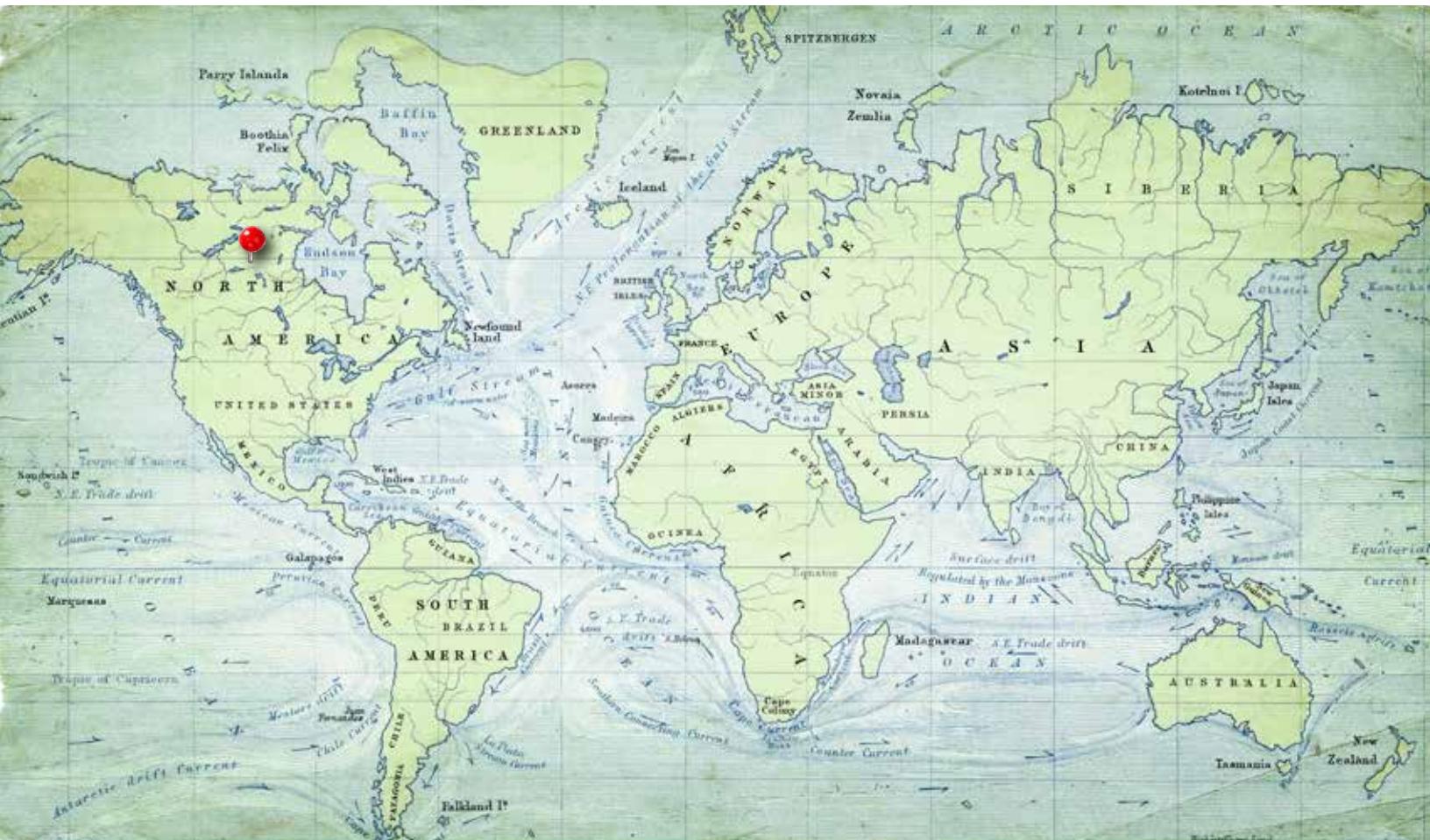


INVESTOR-STATE ARBITRATION SERIES  
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# AN EXPERIENCED, DEVELOPED DEMOCRACY: CANADA AND INVESTOR-STATE ARBITRATION

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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, Csóngor 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



Charles-Emmanuel Côté is a CIGI senior fellow and vice dean for Academic Affairs and Continuing Education, as well as full professor in the Faculty of Law at Laval University. He teaches courses on public international law, constitutional law, international investment law and World Trade Organization law. He is also director of the Summer School on International Investment Law, has led a seminar on international development law and is a co-director of the Centre for International and Transnational Law at Laval University.

Charles-Emmanuel holds a doctorate of civil law from McGill University. He has several professional memberships, including to the Canadian Council on International Law and the Society of International Economic Law. He has been a guest professor, notably at Bordeaux University, and institutional and constitutional policy adviser to the Government of Quebec.

## ACRONYMS AND ABBREVIATIONS

CETA	Comprehensive Economic and Trade Agreement
ECT	Energy Charter Treaty
EFTA	European Free Trade Association
EU	European Union
FCN	friendship, commerce and navigation
FET	fair and equitable treatment
FIPA	foreign investment promotion and protection agreement
FIRA	Foreign Investment Review Act
FIT	feed-in tariff
FTA	free trade agreement
GAC	Global Affairs Canada
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ISA	investor-state arbitration
JRP	joint review panel
MFN	most-favoured nation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
SOEs	state-owned enterprises
SSA	state-to-state arbitration
TPP	Trans-Pacific Partnership
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization



## EXECUTIVE SUMMARY

Canada has seen its position with investment agreements shift dramatically, from being a late bloomer to becoming a forerunner in investor-state arbitration (ISA). All 22 arbitration claims against Canada were brought by US investors, making Canada the developed democracy most experienced with ISA. Overall, when examined carefully, this experience is not as negative as one might think. The aggregate value of the claims is US\$8.1 billion, or 2.9 percent of all US investment in Canada, while total damages effectively awarded or agreed to in settlement so far is US\$147.5 million, or a mere 0.05 percent of all US investment. Most claims concern federal measures as opposed to provincial ones and, unsurprisingly, the huge majority of them are targeted at environmental measures, with a smaller share involving state-owned enterprises (SOEs) and public services.

Canada keeps pace with the case law in its treaty practice, constantly innovating in order to maintain regulatory space for governments while protecting foreign investors. Some problems do arise, however, in connection with the use of the most favoured nation (MFN) clause to circumvent treaty innovations, and with the fair and equitable treatment (FET) clause, which remains the main area of concern in terms of conflicting awards and split decisions of arbitral tribunals. Indirect expropriation has not been a concrete problem for Canada thus far, contrary to initial fears that environmental measures would become compensable with ISA.

The need for mechanisms to control ISA, however, is obvious. The power of contracting parties to adopt binding interpretation of investment agreements appears to be the most pragmatic means to address divergence in arbitral awards, while an appellate review mechanism seems more difficult to implement. Arbitral practice outside of Canada indicates that complex, massive or highly political disputes are probably not suitable for ISA, but more appropriate for state-to-state arbitration (SSA) or even diplomatic negotiation. A certain “re-politicization” of the settlement of some investment disputes might be needed for the system to keep its legitimacy and effectiveness. In the end, the looming question is that of the discriminatory nature of ISA. In the case of Canada, it seems clear that Canadian law sometimes offers no remedy equivalent to that provided to foreign investors under investment agreements. How long will the system tolerate less protection for national investors? This question will become more pressing with the rise of ISA between developed democracies.

## INTRODUCTION

A small Quebec mining company recently brought a CDN\$190 million legal action against the Government of Quebec before the Superior Court of the province. Strateco Resources Inc. attacked the refusal by the provincial authorities to issue permits necessary for the continuation of the Matoush uranium exploration project in northern Quebec.<sup>1</sup> Despite initial support from Quebec and approval by the Canadian Nuclear Safety Commission, the provincial government decided to suspend the project due to its lack of social acceptability. Had the mining company been a foreign investor coming from a country with which Canada has signed an investment agreement, it is most likely that an arbitral claim would have been raised. But a Quebec investor does not benefit from the protection of international investment law in its dealings with its home country and must revert to the remedies available under Canadian law. This case is a good illustration of the potential use or misuse of ISA in the settlement of investment disputes between developed democracies.<sup>2</sup>

Canada has been a late bloomer in international investment law. Up until the mid-1980s and the election of the Progressive Conservative government of Brian Mulroney, its general stance toward foreign investment tended to be negative. Massive amounts of US investment were injected into the Canadian economy after World War I, due to protectionist international trade laws and the need for foreign capital to develop Canada’s economic potential.<sup>3</sup> The control of the Canadian economy by US investors became an increasingly salient problem for the Canadian government and culminated in

<sup>1</sup> Paul Journet, “Incompétence radioactive”, *La Presse* (28 juillet 2015). See *Ressources Strateco c Québec (PG)*, 2015 QCCS 2443.

<sup>2</sup> For the purpose of this paper, developed democracies are Australia, Canada, the four member states of the European Free Trade Association (EFTA), the European Union (EU) and its 28 member states, Japan, New Zealand, South Korea and the United States (US).

<sup>3</sup> Ross Leckow & Ian A Mallory, “The Relaxation of Foreign Investment Restrictions in Canada” (1991) 6:1 ICSID Rev 1 at 3-4.

the adoption of the Foreign Investment Review Act<sup>4</sup> (FIRA) in the early 1970s.<sup>5</sup> The act established a restrictive process of governmental authorization for most inward foreign investment. Canada has also been reluctant to participate in international instruments relating to foreign investment, expressing reservations on initiatives by the Organisation for Economic Co-operation and Development (OECD) and abstaining from signature to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>6</sup> (New York Convention) or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States<sup>7</sup> (ICSID Convention).<sup>8</sup> Crucial industries such as transportation, energy or telecommunications were closed to foreign investment.<sup>9</sup> The Canadian government became an important economic operator through the establishment of a series of Crown corporations in multiple sectors of the economy, ranging from rail transportation to satellite technologies, a policy often expressed in terms of a choice between “the state or the United States.”

The successful challenge of the FIRA by the United States,<sup>10</sup> through the General Agreement on Tariffs and Trade (GATT),<sup>11</sup> together with a changing mood in the Canadian political landscape in the mid-1980s, resulted in a dramatic shift in policy toward foreign investment. The FIRA was repealed and replaced by less restrictive legislation, the Investment Canada Act,<sup>12</sup> which still requires governmental authorization for certain inward foreign investments. Massive privatizations of Crown corporations were orchestrated. Canada ratified the New York Convention.<sup>13</sup> The signature of a free-trade agreement (FTA) with the United States in the late 1980s was the apex of this policy shift. The Free Trade Agreement between the Government of Canada and the Government of the United States<sup>14</sup> (Canada-US FTA) included — for the first time in Canadian treaty practice — substantive obligations on the regulation and treatment of foreign investment.<sup>15</sup> Until then, Canada had only signed investment insurance agreements, by which it provided for subrogation of its investment insurance agency in the rights of Canadian investors before the national courts of host states.<sup>16</sup> It is significant that the first investment agreement signed by Canada was with the United States, another developed democracy. It is also noteworthy that the Canada-US FTA did not include ISA, but only state-to-state dispute settlement.

Soon after the coming into force of the Canada-US FTA in 1989, Canada started to sign its first foreign investment promotion and protection agreements (FIPAs), all of them with former Communist countries in Europe. These treaties — still in force today — were based on the draft OECD convention of 1967<sup>17</sup> and included ISA for the first time in Canadian treaty practice.<sup>18</sup> When the United States started to negotiate an FTA with Mexico in the early 1990s, Canada wanted to be included and these negotiations resulted in the conclusion of the North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States<sup>19</sup> (NAFTA), which superseded the Canada-US FTA.<sup>20</sup> NAFTA still included an investment chapter — Chapter 11 — but

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4 SC 1973-74, c 46.

5 Charles-Emmanuel Côté, “Le Canada et l’investissement direct étranger: entre ouverture et fermeture” in Mathieu Arès & Éric Boulanger, eds, *L’investissement et la nouvelle économie mondiale : Trajectoires nationales, réseaux mondiaux et normes internationales* (Brussels: Bruylants, 2012) 241 at 248–54 [Côté, “Canada”].

6 10 June 1958, 330 UNTS 39, Can TS 1986 No 43 (entered into force 7 June 1959, accession by Canada 12 May 1986) [New York Convention].

7 International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 160, Can TS 2013 No 24 (entered into force 14 October 1966, accession by Canada 1 December 2013) [ICSID Convention].

8 Côté, “Canada”, *supra* note 5 at 271–74.

9 Leckow & Mallory, *supra* note 3 at 4–5.

10 *Canada – Administration of the Foreign Investment Review Act (Complaint by the United States)* (1984), GATT Doc L/5504, 30th Supp BISD 140, online: <[www.wto.org/english/tratop\\_e/dispu\\_e/82fira.pdf](http://www.wto.org/english/tratop_e/dispu_e/82fira.pdf)>.

11 *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948).

12 RSC 1985, c 28 (1st Supp).

13 One should note, however, that ratification of the ICSID Convention occurred almost 30 years later, in 2013, due mainly to constitutional difficulties in implementing the treaty. See Charles-Emmanuel Côté, “Digest of International Economic Law in 2013/Chronique de droit international économique en 2013 – Investissement” (2013) 51 Can YB Int'l Law 397 at 405–428.

14 2 January 1988, Can TS 1989 No 3 (entered into force 1 January 1989, suspended 1 January 1994).

15 See, generally, Jean Raby, “The Investment Provisions of the Canada-United States Free Trade Agreement: A Canadian Perspective” (1990) 84:2 Am J Int'l L 394.

16 Côté, “Canada”, *supra* note 5 at 274–76.

17 Draft Convention on the Protection of Foreign Property, online: OECD <[www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf](http://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf)>.

18 See, generally, Robert K. Paterson, “Canadian Investment Promotion and Protection Treaties” (1991) 29 Can YB Int'l Law 373. FIPAs with Czech Republic, Latvia, Romania and Slovak Republic were replaced by new treaties to take into account their status as EU member states.

19 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [NAFTA].

20 Armand de Mestral, “The North American Free Trade Agreement: A Comparative Analysis” (1998) 275 Rec des Cours 229 at 252–54 [de Mestral, “NAFTA”].

with the addition of ISA for the first time in an investment treaty between developed democracies.<sup>21</sup> While the initial idea underlying this addition was that ISA was needed by Canadian and US investors in Mexico, it soon became clear that ISA would also be used by investors against Canada or the United States.<sup>22</sup> The unforeseen result of the inclusion of ISA in NAFTA is that Canada has become the developed democracy most experienced as respondent in investment disputes. These claims quickly raised awareness of the potentially disruptive effects of ISA on the regulatory activity of governments in legitimate public policy areas, such as environmental protection or health and safety, a fear for which the term “regulatory chill” was coined.

ISA was designed by the World Bank chiefly as a procedural tool to depoliticize the settlement of investment disputes.<sup>23</sup> The idea was that it is preferable not to let these disputes escalate into full-fledged international disputes, with the use of diplomatic protection by the home state of the foreign investor against the host state. When ISA is added to the substantive obligations provided for in investment agreements, it places a powerful remedy in the hands of foreign investors. They are granted an unconditional and immediate right to invoke the international responsibility of the host state for the breach of its treaty obligations. The application of treaty-based ISA against a developed democracy such as Canada somewhat obscures the original idea behind it. On the one hand, the “depoliticization” of the settlement of these disputes remains, but the need to resort immediately to an international dispute settlement process is questionable. Could not foreign investors trust Canadian law and Canadian courts to address their grievances in the same manner as a domestic company such as Suncor Energy must do?

The adequacy of ISA between developed democracies is a highly controversial issue in international investment law and policy at this time. Canada stands out as one of the developed democracies most experienced with ISA, since it has faced numerous arbitral claims, all of which were initiated by US investors under NAFTA. As of July 31, 2015, Canada topped the chart with 22 claims brought against it, followed closely by Mexico and the Czech Republic with 18 claims each.<sup>24</sup> Its situation provides first-hand information to the debate over the desirability of ISA between developed democracies. The aim of this paper is to assess the experience of Canada with ISA, through a review of the arbitral awards in which it was involved. The investment treaty practice of Canada is first analyzed in order to set the broader context of the paper. All the cases brought against Canada by US investors are then reviewed. In the last section, an attempt is made to draw lessons from the Canadian experience and to single out challenges for ISA between developed democracies.

## CANADA'S INVESTMENT TREATY PRACTICE

The investment treaty practice of Canada is divided between FIPAs and investment chapters in FTAs. A FIPA is a bilateral investment treaty negotiated on the basis of a model treaty. Three stages may be distinguished in the Canadian practice: the first FIPIAs were rudimentary treaties based on the OECD draft convention of 1967;<sup>25</sup> the second wave of FIPIAs were more sophisticated treaties based on the investment chapter of NAFTA; the third generation of FIPIAs are those based on the Canadian model FIPA published in 2004 and continuously updated since then, taking into consideration arbitral awards.<sup>26</sup>

<sup>21</sup> See, generally, Andrea K Bjorklund, “NAFTA Chapter 11” in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) 465 [Brown, *Commentaries*]; Meg N Kinnear, Andrea K Bjorklund & John FG Hannaford, eds, *Investment Dispute under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Alphen aan den Rijn: Kluwer Law International, 2006) (loose-leaf); Todd Weiler, *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley, NY: Transnational, 2004); JC Thomas, “Investor-State Arbitration under NAFTA Chapter 11” (1999) 37 Can YB Intl Law 99; J Anthony VanDuzer, “Investor-State Dispute Settlement under NAFTA Chapter 11: The Shape of Things to Come?” (1997) 35 Can YB Intl Law 263; Gary N Horlick & Alicia L Marti, “NAFTA Chapter 11B: A Private Right of Action to Enforce Market Access through Investments” (1997) 14 J Intl Arb 47.

<sup>22</sup> Charles-Emmanuel Côté, *La participation des personnes privées au règlement des différends internationaux économiques: L’élargissement du droit de porter plainte à l’OMC* (Brussels: Bruylants, 2007) at 266 [Côté, *Personnes privées*].

<sup>23</sup> Ibrahim FI Shihata, “Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA” (1986) 1 ICSID Rev 1; Côté, *Personnes privées*, *supra* note 22 at 251–52.

<sup>24</sup> Italaw, “Respondent States”, online: <[www.italaw.com/](http://www.italaw.com/)>. Notifications of intent to submit a claim that did not materialize in the actual filing of a claim are not included. The other developed democracies that have faced a claim as of 31 July 2015 are: Poland (13); Slovak Republic (10); Romania (9), the United States (9), Hungary (7), Spain (7), Lithuania (5), Bulgaria (4), Croatia (4), Estonia (3), Latvia (3), Slovenia (3), Germany (2), Australia (1), Belgium (1), France (1), Greece (1), and South Korea (1).

<sup>25</sup> *Supra* note 17.

<sup>26</sup> Canada, *Agreement between Canada and \_\_\_\_\_ for the Promotion and Protection of Investments* (6 July 2012) [restricted text, archived with the author] [Canada, *Model-FIPA*]; Côté, “Canada”, *supra* note 5 at 294–303. See, generally, Céline Lévesque & Andrew Newcombe, “Canada” in Brown, *Commentaries*, *supra* note 21 at 53.

As of July 31, 2015, 29 FIPAs had come into force, including seven with developed democracies, plus seven others that were signed with developing countries but are still not in force.<sup>27</sup> All FIPAs signed by Canada include ISA, whether they are concluded with developed democracies or not. None of the FIPAs that are currently under negotiation involves a developed democracy. All FIPAs currently in force with developed democracies are with current EU member states that were economies in transition after the fall of the Berlin Wall and the collapse of the Soviet Union: i.e., Czech Republic, Croatia, Hungary, Latvia, Poland, Romania and Slovak Republic. The FIPA program of Canada is currently targeted toward developing countries, especially in Africa.

FTAs are preferred by Canada to regulate its economic relationship with other developed democracies and they generally — but not always — have an investment chapter providing for ISA. Canada has concluded fewer FTAs than FIPAs. The negotiation is more cumbersome since they involve carefully crafted trade liberalization commitments. Eleven FTAs had come into force as of July 31, 2015, including three with developed democracies, plus another one that was suspended (i.e., the Canada-US FTA).<sup>28</sup> As already mentioned, the Canada-US FTA did have an investment chapter, but without ISA, while the Free Trade Agreement between Canada and the States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland)<sup>29</sup> has no investment chapter at all. However, NAFTA and the new Free Trade Agreement between Canada and the Republic of Korea<sup>30</sup> (Canada-South Korea FTA) do include investment chapters that provide for ISA. Three other FTAs were also recently signed by Canada, but are not yet in force, including two with developed democracies: the ambitious Canada-EU Comprehensive Economic and Trade Agreement<sup>31</sup> (CETA) and the Trans-Pacific Partnership<sup>32</sup> (TPP), both of which have well-known investment chapters providing for ISA. In addition, bilateral negotiations were launched in 2012 with Japan, but it is not clear whether ISA is also on the table and what will be the impact of the signature of the TPP on the talks.

Neither FIPAs nor FTAs are part of the law of Canada. The governing principle in this matter was stated by the Privy Council in the landmark *Labour Conventions*<sup>33</sup> case. A treaty duly concluded by Canada on the international plane must nevertheless be implemented by an act of Parliament or provincial legislature, in order to modify the law of the land. Implementing legislation is never adopted regarding FIPAs. The legal effects of FIPAs in Canadian law were examined by the Federal Court of Appeal in *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*.<sup>34</sup> The court ruled that the signing of a FIPA with China<sup>35</sup> did not affect, in any substantive way, the rights of the plaintiff in a manner that would be contrary to the duty of the Crown to consult with Aboriginal peoples of Canada. Conversely, FTAs are always implemented by legislation intended to bring the law into conformity with the trade commitments newly subscribed to. Nevertheless, the courts have systematically rejected the argument that these implementation acts would effectively incorporate FTAs as a whole in Canadian law.<sup>36</sup> In *Council of Canadians v Canada (AG)*,<sup>37</sup> the Ontario Court of Appeal applied the same reasoning to the investment chapter of NAFTA, ruling that foreign investors could not raise Canada's violation of its treaty obligations before Canadian courts. Since FIPAs and investment chapters of FTAs have no direct

27 A list of FIPAs signed by Canada or under negotiation may be found on the website of Global Affairs Canada (GAC) (formerly the Department of Foreign Affairs, Trade and Development), online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng)>.

28 A list of FTAs concluded by Canada or under negotiation may be found on the GAC website, online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng)>.

29 26 January 2008, Can TS 2009 No 3 (entered into force 1 July 2009).

30 22 September 2014, Can TS 2015 No 3 (entered into force 1 January 2015) [Canada-South Korea FTA], online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/08.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/08.aspx?lang=eng)>.

31 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union [and its Member States...]. Final CETA Text* (29 February 2016) [CETA], online: European Commission <[http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf)>. Translation of the legal text of the CETA English version into French and all other EU treaty official languages is under way.

32 4 February 2016, online: New Zealand Foreign Affairs and Trade <[www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership/](http://www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership/)> (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam).

33 *Canada (AG) v Ontario (AG)*, [1937] UKPC 6 (BAILII) at 5-6, [1937] AC 326.

34 2015 FCA 4, 379 DLR (4th) 737, aff'd 2013 FC 900, 438 FTR 210.

35 *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and the Reciprocal Protection of Investments*, 9 September 2012, Can TS 2014 No 16 (entered into force 1 October 2014).

36 *UL Canada Inc c Quebec (PG)*, [2003] RJC 2729 at para 84, 234 DLR (4th) 398 (Qc CA), aff'd 2005 SCC 10, [2005] 1 SCR 143, 250 DLR (4th) 193; *Pfizer Inc v Canada*, [1999] 4 FC 441 at para 45, 171 FTR 211, aff'd 250 N.R. 66, 1999 CanLII 8952 (FCA).

37 (2006), 277 DLR (4th) 527 (Ont CA), leave to appeal refused, 241 OAC 400 (note) (SCC), aff'd 2005 CanLII 28426 (Ont Sup Ct J).

effect in Canada, international arbitration is the only remedy available to foreign investors to invoke the treaty obligations against the country.

## US INVESTORS' ARBITRATION CLAIMS AGAINST CANADA

As mentioned above, Canada is undoubtedly at the forefront of investment dispute settlement. Its unique relationship with US investment is manifested in the regular use of ISA by US investors on the basis of NAFTA. As of July 31, 2015, Canada was involved in 11 cases based on NAFTA that are now closed, of which Canada won seven<sup>38</sup> and lost four.<sup>39</sup> Before reviewing them, it is worthwhile to put these claims in perspective with respect to the total stock of US investment in Canada, which amounted to US\$277 billion on December 31, 2014.<sup>40</sup> The aggregate value of the 11 claims of US investors against Canada is US\$2.2 billion, or 0.8 percent of all US investment in Canada.<sup>41</sup> This comparison is relevant since US investment in Canada is likely to contribute more to the Canadian economy than the amount of taxes paid to governments (both federal and provincial) by US investors. American investment fuels the Canadian economy with new money and contributes to the development of its full potential in multiple sectors. Thus, the total stock of US investment in Canada appears to be a better comparator than tax revenues. The comparison is even more striking when examining the actual amount of damages that were awarded against Canada or that it agreed to in settlement, a total of US\$147.5 million, or 0.05 percent of the total stock of US investment in Canada. It is also useful to note that four out of the 11 claims involved provincial measures, over which the federal government has little or no power, for a total amount of US\$1 billion, or 45 percent of all the claims. The only case involving a provincial measure in which Canada had to pay damages to the US investor was the result of an amicable settlement of US\$130 million.

The picture changes slightly when looking at the 11 cases that were pending against Canada as of July 31, 2015. The aggregate amount of the pending claims was US\$5.9 billion,<sup>42</sup> which means that the total of the 22 claims brought against Canada by US investors on the basis of NAFTA had reached US\$8.1 billion or 2.9 percent of all US investments in Canada. Five out of the 11 pending claims related to provincial measures, for a total amount of US\$1.7 billion or 29 percent of the claims pending against Canada. This indicates that provincial measures did not represent the most significant source of claims. Federal measures remained the main cause of investment disputes against Canada, both in terms of amount and frequency.

It should be mentioned that in addition to these 22 cases, Canada also received 15 notices of intent to submit a claim to arbitration, which is the first step for ISA following NAFTA Article 1119.<sup>43</sup> None of these notices materialized into arbitration. They are nevertheless part of the story of the NAFTA investment chapter and may have contributed to the fear of regulatory chill, given the pressure the notices of intent might have exerted on governments. It should be noted that NAFTA places no condition whatsoever, financial or otherwise, on the delivery of such notices of intent, so at this stage literally anyone can pretend to have a claim against Canada.

The experience of Canada shows that complaints brought by US investors have concerned mostly environmental regulations (10). The other complaints dealt with SOEs and public services (four); local development performance requirements (three); international trade law measures (two); direct expropriation (two); and taxation measures (one).<sup>44</sup>

<sup>38</sup> Including two amicable settlements in its favour and one termination of procedures by failure of the US investor to pay the needed deposit.

<sup>39</sup> Including two amicable settlements in favour of the US investors.

<sup>40</sup> Statistics Canada, *Table 376-0051 – International investment position, Canadian direct investment abroad and foreign direct investment in Canada, by country, annual (dollars)*, CANSIM Database. CDN\$361,372 million converted at the Bank of Canada exchange rate of 31 July 2015 (0.7665), giving US\$276,977 million.

<sup>41</sup> The amount of the claim in each case is based on the notice of arbitration. The claims made in Canadian dollars are converted into US dollars at the Bank of Canada exchange rate of the day. The notices of arbitration may be found on the GAC website, online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng)>.

<sup>42</sup> The amount of the claims in each case is based on the notice of arbitration or the notice of intent to submit a claim to arbitration where applicable. The claims made in Canadian dollars are converted into US dollars at the Bank of Canada exchange rate of the day. The notices of arbitration and notices of intent may be found on the GAC website, online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng)>.

<sup>43</sup> The notices of intent to submit a claim to arbitration may be found on the GAC website, online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng)>.

<sup>44</sup> This classification is not deemed to be definitive; it is based on what stands out as the dominant legal aspect.

## Claims against Environmental Regulations

### Partial Ban on Fuel Additive: *Ethyl Corp*

The very first claim brought under the investment chapter of NAFTA involved an environmental measure in the landmark case *Ethyl Corp v Canada (Ethyl)*.<sup>45</sup> The claim of US\$251 million by a US investor against a draft partial ban on a fuel additive caught many by surprise. The US investor alleged that Canada had breached the national treatment clause (article 1102), the performance requirements clause (article 1106) and the expropriation clause (article 1110). It is quite remarkable that one of the first ISA cases was launched against a developed democracy and involved an environmental measure that allegedly indirectly expropriated a foreign investor. *Ethyl* set the stage for the anti-ISA movement as early as the late 1990s. A closer look at the case shows that the arbitral tribunal never ruled on the merits, and that it improperly assumed jurisdiction. Article 1101(1) specifies that the investment chapter only covers “measures adopted or maintained,” but the US investor had filed its complaint while Parliament was still reading the bill intending to prohibit the export and interprovincial trade in a fuel additive. This could well be viewed as an abusive intervention in parliamentary debates. In addition, the claim was submitted to arbitration prior to the end of the six-month “freezing period” imposed by article 1120(1) between the events giving rise to the claim and the arbitration. Nevertheless, the tribunal assumed jurisdiction on the basis that the measure was in force and that six months had elapsed by the time it issued its award.<sup>46</sup> The ease with which the tribunal overlooked the fulfilment of the procedural conditions only added to the controversy associated with *Ethyl*. In the end, Canada preferred to settle the case for US\$13 million and withdrawal of its measure.<sup>47</sup> Adding to the pressure on Ottawa, only two weeks before the award on jurisdiction was issued, a panel had found the measure to be inconsistent with the Agreement on Internal Trade<sup>48</sup> signed between the federal government and all provincial governments.<sup>49</sup>

One can only speculate on what the tribunal might have ruled on the merits, given that the federal measure was awkwardly designed due to the constitutional division of power on trade regulation. If the fuel additive was dangerous, why was it still allowed to be marketed in each province? The main outcome of *Ethyl* was to raise the awareness of governments, civil society — and foreign investors — of the fact that Canada, despite being a developed democracy, can be sued for violation of NAFTA.<sup>50</sup> It gave birth to the idea that governments would be afraid to take legislative action in the general interest for fear of being sued, later characterized as regulatory chill.<sup>51</sup>

### Ban on Export of Toxic Waste: *SD Myers, Inc.*

*SD Myers, Inc v Canada*<sup>52</sup> involved a claim against an export ban on a hazardous waste by the federal government. The US investor owned a firm in Canada that purchased waste and shipped it to its waste disposal facility in the United States. While protecting the environment in a manner consistent with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal<sup>53</sup> (Basel Convention), by prohibiting export of hazardous waste, the measure was allegedly designed to favour the Canadian competitor of the US investor. Had the United States been party to the Basel Convention, the case would have rested on article 104, which gives primacy to the Basel Convention over NAFTA in case of inconsistency. The geographic reality of North America was that the US waste disposal facility was much closer to the location of most Canadian toxic waste purchased by the US investor than its Canadian competitor, which was located several thousands of kilometres

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45 Preliminary Tribunal Award on Jurisdiction, 24 June 1998 (UNCITRAL) (Arbitrators: Karl-Heinz Böckstiegel, pres, Charles N Brower, Marc Lalonde) [*Ethyl*], online: <[www.uncitral.org/transparency-registry/registry/data/can/ethyl\\_corporation.html](http://www.uncitral.org/transparency-registry/registry/data/can/ethyl_corporation.html)>.

46 *Ibid* at paras 69, 86-8.

47 De Mestral, “NAFTA”, *supra* note 20 at 362.

48 In force 1995. Consolidated Version, 2015, online: Internal Trade Secretariat <[www.ait-aci.ca/wp-content/uploads/2015/12/Consolidated-with-14th-Protocol-final-draft.pdf](http://www.ait-aci.ca/wp-content/uploads/2015/12/Consolidated-with-14th-Protocol-final-draft.pdf)>.

49 *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act* (12 June 1998), online: Internal Trade Secretariat <[www.ait-aci.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/8\\_eng.pdf](http://www.ait-aci.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/8_eng.pdf)>.

50 De Mestral, “NAFTA”, *supra* note 20 at 362–63.

51 Donald McRae, “Trade and Environment: Competition, Cooperation or Confusion?” (2003) 41 Alta L Rev 745 at 759; Lucien J Dooghe, “The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement” (2001) 38:3 Am Bus LJ 475 at 549–50.

52 Partial Award, 13 November 2000 (UNCITRAL) (Arbitrators: J Martin Hunter, pres, Edward C Chiasson, Bryan P Schwartz) [*SD Myers, Inc v Canada*], online: <[www.uncitral.org/res/transparency-registry/registry/data/can/s\\_d\\_myers\\_inc\\_html/myers-18.pdf](http://www.uncitral.org/res/transparency-registry/registry/data/can/s_d_myers_inc_html/myers-18.pdf)>.

53 22 March 1989, 1673 UNTS 57, Can TS 1992 No 19 (entered into force 5 May 1992, ratification by Canada 28 August 1992).

farther. The transportation of the toxic waste to the Canadian facility therefore posed more risk to the environment than its transportation to the US facility. The US investor claimed US\$53 million for the violation of the national treatment clause (article 1102), the fair and equitable treatment (FET) clause (article 1105), the performance requirements clause (article 1106) and the expropriation clause (article 1110). The arbitral tribunal easily concluded that the export ban violated article 1102, given the clearly protectionist objective of the measure.<sup>54</sup> Dealing with FET was more difficult and the tribunal split on the issue; the majority found that the violation of article 1102 was sufficient to also establish a violation of article 1105.<sup>55</sup> The majority did not find that the measure violated article 1106 by imposing a prohibited performance requirement,<sup>56</sup> but one arbitrator did.<sup>57</sup> The tribunal found no violation of article 1110, due to the temporary character of the export ban and based on a distinction between expropriation and regulation.<sup>58</sup> One of the issues raised by *SD Myers* was whether it was an investment dispute or a trade dispute. The tribunal found that a trade dispute could be at the same time an investment dispute and that NAFTA obligations were cumulative rather than mutually exclusive.<sup>59</sup> It even ventured further in proposing that a trade measure that would be justified by general trade exceptions could not be challenged under the investment chapter.

In a rare move in ISA, the NAFTA Free Trade Commission directly overruled the interpretation by the tribunal of article 1105 by adopting Notes of Interpretation of Certain Chapter 11 Provisions<sup>60</sup> (Notes of Interpretation) on the basis of articles 1131(2) and 2001(3). Nevertheless, the arbitral tribunal chose to ignore the Notes of Interpretation in its subsequent award on damages in which it found that Canada had to pay CDN\$6 million (US\$4 million) in compensation to the US investor.<sup>61</sup> Canada failed in its attempt to set aside the awards before the Federal Court of Canada.<sup>62</sup> *SD Myers* is a rare example where environment and investment protection converged against a clearly protectionist measure. Without ISA, it is unclear whether the US investor could have successfully challenged the measure before Canadian courts, since NAFTA has no direct effect in Canadian law.

### Ban on Pesticide: *Chemtura Corp*

An important case for the purpose of this paper is *Chemtura Corp v Canada (Chemtura)*,<sup>63</sup> which involved a claim of US\$100 million against the gradual ban on a pesticide by Canada. The product was already banned in the United States for health and safety reasons but a US investor claimed that the lengthy discussion the federal government had with the industry regarding a voluntary withdrawal of the pesticide violated the most-favoured nation (MFN) clause (article 1103), the FET clause (article 1105) and the expropriation clause (article 1110). The US investor initiated several challenges of the ban before the Canadian courts. The tribunal applied the Notes of Interpretation of the NAFTA Free Trade Commission on the interpretation of FET in finding that it is limited to the protection offered by customary international law.<sup>64</sup> At the same time, it found that the incorporation of custom is an open one, following its evolution. It found no evidence of bad faith or lack of due process on the part of the federal government.<sup>65</sup> Quite the contrary, it found that concerns about the pesticide were legitimate and that the regulatory body only facilitated an industry-led process.<sup>66</sup> Despite the opposition of all NAFTA parties to the argument, the tribunal refused to resolve the important issue of whether FET clauses with a wider scope, which were provided for in earlier Canadian FIPAs, can be imported into NAFTA via

54 *SD Myers*, Partial Award, *supra* note 52 at paras 255 and 256.

55 *Ibid* at para 268. One arbitrator, Mr. Chiasson, rejected the interpretation that violation of article 1102 automatically constituted a violation of article 1105 (*ibid* at para 267).

56 *Ibid* at paras 277–78.

57 *SD Myers, Inc v Canada*, Separate Opinion by Dr Bryan Schwartz, 12 November 2000 (UNCITRAL), [SD Myers, Separate Opinion], online: <[www.uncitral.org/res/transparency-registry/registry/data/can/s\\_d\\_myers\\_inc\\_html/myers-19.pdf](http://www.uncitral.org/res/transparency-registry/registry/data/can/s_d_myers_inc_html/myers-19.pdf)>.

58 *SD Myers*, Partial Award, *supra* note 52 at paras 287–88.

59 *Ibid*. at paras 294–98.

60 NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001) at para 2(3) [Notes of Interpretation], online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng)>.

61 *SD Myers, Inc v Canada*, Second Partial Award (Damages), 21 October 2002 (UNCITRAL), (Arbitrators: J Martin Hunter, pres, Edward C Chiasson, Bryan P Schwartz) [SD Myers, Second Partial Award], online: <[www.uncitral.org/res/transparency-registry/registry/data/can/s\\_d\\_myers\\_inc\\_html/myers-32.pdf](http://www.uncitral.org/res/transparency-registry/registry/data/can/s_d_myers_inc_html/myers-32.pdf)>.

62 *Canada (AG) v SD Myers, Inc*, 2004 FC 38, [2004] 3 FCR 368.

63 Award, 2 August 2010 (UNCITRAL) (Arbitrators: Gabrielle Kaufmann-Kohler, pres, Charles N Brower, James R Crawford) [*Chemtura*], online: Canada, International Affairs <[www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/chemtura-14.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/chemtura-14.pdf)>.

64 *Ibid* at paras 120–22.

65 *Ibid* at paras 138, 162, 179, 192.

66 *Ibid* at para 216.

the MFN clause.<sup>67</sup> The “substantial deprivation” test is an essential part of article 1110 in identifying whether an investment has been expropriated, which is to be assessed on a case-by-case basis rather than by checking if specific conditions are met.<sup>68</sup> In finding that the ban on the pesticide did not amount to an indirect expropriation, the tribunal ruled that there can be no substantial deprivation if a measure only affects a small part of the global business of the foreign investor in the host state.<sup>69</sup> In the end, it found that the ban on the pesticide was a legitimate exercise of “police power” that did not constitute an indirect expropriation.<sup>70</sup> *Chemtura* shows that the threshold for finding environmental measures to be an indirect expropriation is a high one.

### **Revocation of Environmental Approval: *Gallo***

The first case brought against a provincial measure was *Gallo v Canada*,<sup>71</sup> involving the revocation of an environmental approval by Ontario. A Canadian company had bought an abandoned mine with a view to using it as a waste disposal site, but the province adopted a law specifically revoking prior authorization and prohibiting this project, and offering some compensation to the company. The US investor claimed US\$355 million for breach of the FET clause (article 1105) and the expropriation clause (article 1110), but he was unable to convince the tribunal that he had acquired the company at the time of the alleged violation of NAFTA.<sup>72</sup> The question remains whether the compensation offered in this case was sufficient to prevent a breach of the expropriation clause of NAFTA.

### **Another Ban on Pesticide: *Dow AgroSciences***

The second claim against a provincial measure, *Dow AgroSciences LLC v Canada*,<sup>73</sup> was also unsuccessful. The US investor claimed CDN\$2 million (US\$1.6 million) for the breach of the FET clause (article 1105) and of the expropriation clause (article 1110) by a Quebec ban on certain pesticides. An amicable settlement was quickly reached between the disputing parties, by which the investor received no damages and withdrew its claim. Given the settlement and the general and bona fide nature of the ban, without any allegation of protectionism, it is most likely that the measure would have been found compatible with NAFTA. This case indicates again that the threshold for an environmental measure to constitute an indirect expropriation is a high one.

### **Environmental Zoning: *St Marys VCNA***

Another case involving a provincial environmental measure raised for the first time the crucial issue of application of the denial of benefits clause (article 1113), in *St Marys VCNA, LLC v Canada (St Marys VCNA)*.<sup>74</sup> The clause is directly targeted at the well-known business practice of “treaty shopping” through shell corporations. It allows Canada to deny the protection of NAFTA to shell corporations that are owned or controlled by investors of a third country that is not a party to NAFTA. It may be applied unilaterally regarding third countries with which Canada does not maintain diplomatic relations or against which it has imposed economic sanctions. Otherwise it may be applied in consultation with the NAFTA party concerned if the shell corporation has no substantial business activities in the NAFTA party where it is incorporated. The US investor brought a claim of US\$275 million against zoning measures by Ontario that restricted the exploitation of its aggregate quarry. It invoked violation of the national treatment clause (article 1102), the MFN clause (article 1103), the FET clause (article 1105) and the expropriation clause (article 1110). Canada invoked the denial of benefits clause prior to the arbitration proceedings, in its discussion with the US investor. Surprisingly, the US investor attacked the application of the clause before the Federal Court of Canada rather than the arbitral tribunal,<sup>75</sup> but an amicable settlement was reached before the hearing of the case. It is hard to see how the Federal Court could have ruled on the issue, since NAFTA has no direct effect in Canadian law. The US investor acknowledged that it was a shell corporation owned and controlled by a Brazilian corporation with no substantial business activities in the United States. *St Marys VCNA* shows that article 1113 gives clout

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<sup>67</sup> *Ibid* at para 235.

<sup>68</sup> *Ibid* at paras 242–49.

<sup>69</sup> *Ibid* at paras 263–66.

<sup>70</sup> *Ibid* at para 266.

<sup>71</sup> Award, 15 September 2011 (UNCITRAL) (Arbitrators: Juan Fernández-Armesto, pres, Jean-Gabriel Castel, Laurent Lévy) [*Gallo*, Award].

<sup>72</sup> *Ibid* at paras 324–30.

<sup>73</sup> Settlement Agreement, 25 May 2011 (UNCITRAL).

<sup>74</sup> Consent Award, 12 April 2013 (UNCITRAL) (Arbitrators: Michael Pyles, pres, Richard Stewart, Brigitte Stern).

<sup>75</sup> *St Marys VCNA v Canada (Minister of International Trade)* (30 March 2012), T-668-12 (FC) [Notice of application], online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0914.pdf>](http://italaw.com/sites/default/files/case-documents/ita0914.pdf).

to Canada in negotiating with foreign investors and that it constitutes a powerful tool to dismiss claims by shell corporations.

### **“Social Acceptability” in Environmental Assessment: *Clayton/Bilcon***

One of the most recent cases involving a Canadian environmental measure is set to be the new *Ethyl* in fueling the controversy over ISA between developed democracies. In *Clayton/Bilcon v Canada*,<sup>76</sup> a US investor claimed US\$188 million over the refusal of the federal and Nova Scotia governments to approve its quarry and marine terminal project, which was deemed to be contrary to “community core values.” The US investor argued that it was led to invest in Nova Scotia by an advertising campaign from the provincial government. The project was subject to federal and provincial environmental legislation, and the regulatory bodies chose to apply the more stringent process of the joint review panel (JRP), while it did not do so for similar projects of Canadian investors in the area. The process was allegedly filled with anti-American sentiment. The JRP did not apply the criteria normally imposed by the law to evaluate the “likely significant [adverse] effects after mitigation,” but preferred to base its recommendation on a new criteria of being contrary to “community core values.” Both governments followed the recommendation and the US investor chose not to challenge this new interpretation of the law before Canadian courts. It directly attacked the measure before a NAFTA tribunal, invoking the breach of the national treatment clause (article 1102), the MFN clause (article 1103) and the FET clause (article 1105). Most of the case deals with the proper interpretation of the FET clause in NAFTA. The tribunal noted divergence in arbitral awards regarding the relevancy of the *Neer*<sup>77</sup> case and the evolution of the minimum standard of treatment in customary international law.<sup>78</sup>

The tribunal in *Clayton/Bilcon* chose to follow the majority of NAFTA awards, considering that the content of the standard has evolved since *Neer* and that while the threshold to find a breach of customary law is still a high one, it is not as high as it was in *Neer* where only shocking or outrageous behaviour was envisaged.<sup>79</sup> It accepted the contemporary formulation of the standard in *Waste Management, Inc v Mexico*.<sup>80</sup> While agreeing unanimously on the law, the tribunal split on its application to the facts. The majority ruled that the conduct of the JRP was arbitrary and violated the FET clause, because the new criteria it applied had no legal basis in the legislation and the US investor received no prior notice informing him of the change.<sup>81</sup> One arbitrator took the opposite view and concluded that a potential violation of Canadian law, which was not established by Canadian courts, could not constitute a breach of customary law.<sup>82</sup> The majority also concluded that the differential and adverse treatment of the US investor violated national treatment, stressing that NAFTA trade exceptions are not applicable to the investment chapter,<sup>83</sup> a conclusion with which the dissenting arbitrator also disagreed.<sup>84</sup> The majority ultimately decided not to rule on the potential violation of MFN treatment,<sup>85</sup> while the dissenting arbitrator found no violation of the clause.<sup>86</sup> As of July 2016, the tribunal had not yet ruled on damages in a separate award.

Quite unsurprisingly, given the strong division of the arbitral tribunal, Canada applied to its Federal Court to set aside the award.<sup>87</sup> The arguments of Canada are that the award ruled on compliance with Canadian law and that it found that violation of Canadian law constituted a breach of NAFTA, two questions that would fall outside the jurisdiction of the tribunal. In addition, the award would conflict with public policy of Canada because the tribunal usurped the judicial review function of Canadian courts. *Clayton/Bilcon* is a vivid illustration not only of the elusive content of the FET clause, but

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76 Award on Jurisdiction and Liability, 17 March 2015, PCA Case No 2009-04 (UNCITRAL) (Arbitrators: Bruno Simma, pres, Donald McRae, Bryan Schwartz) [*Clayton/Bilcon*, Award].

77 *Neer v Mexico (United States v Mexico)* (1926), 4 RIAA 60 (General Claims Commission) [*Neer*], online: <[http://legal.un.org/riaa/cases/vol\\_IV/60-66.pdf](http://legal.un.org/riaa/cases/vol_IV/60-66.pdf)>.

78 *Clayton/Bilcon*, Award, *supra* note 76 at paras 434–35.

79 *Ibid* at para 444.

80 Award, 30 April 2004, ICSID Case No ARB(AF)/00/3 (ICSID Additional Facility) (Arbitrators: James Crawford, pres, Benjamin R Civiletti, Eduardo Magallón Gómez) [*Waste Management II*, Award] at paras 98–9, online: <[www.italaw.com/sites/default/files/case-documents/ita0900.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0900.pdf)>.

81 *Clayton/Bilcon*, Award, *supra* note 76 at paras 453–54, 532–35, 546–47, 572, 588–94.

82 *Clayton/Bilcon v Canada*, Dissenting Opinion of Professor Donald McRae, 10 March 2015 (UNCITRAL) at paras 33–43 [*Clayton/Bilcon*, Dissenting Opinion] at paras 33–34, online: [italaw <www.italaw.com/sites/default/files/case-documents/italaw4213.pdf>](http://www.italaw.com/sites/default/files/case-documents/italaw4213.pdf).

83 *Clayton/Bilcon*, Award, *supra* note 76 at paras 721–25.

84 *Clayton/Bilcon*, Dissenting Opinion, *supra* note 82 at para 53.

85 *Clayton/Bilcon*, Award, *supra* note 76 at para 730.

86 *Clayton/Bilcon*, Dissenting Opinion, *supra* note 82 at para 53.

87 *Canada (AG) v Clayton/Bilcon* (16 June 2015), T-1000-15 (FC) [Notice of Application], online: GAC <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton-notice-avis.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton-notice-avis.aspx?lang=eng)>.

perhaps more importantly of the difficulty in applying it to the facts and the serious risk of diverging interpretations that it poses. The dissenting arbitrator condemned the ruling of the majority in very strong words, prophesizing that “[o]nce again, a chill will be imposed on environmental review panels,” representing “a remarkable step backwards in environmental protection.”<sup>88</sup>

### **Moratorium on Energy Development: *Lone Pine Resources* and *Windstream Energy***

Two pending cases involve provincial moratoriums on the development of projects in the energy sector. In *Lone Pine Resources v Canada*,<sup>89</sup> the US investor claims CDN\$250 million (US\$240.6 million) because of the revocation without compensation of all mining rights for oil and shale gas exploration and development beneath the St. Lawrence River in Quebec. The provincial measure allegedly breached both the FET clause (article 1105) and the expropriation clause (article 1110). The argument on FET is that the measure was arbitrary, capricious and without justification, that it frustrated the legitimate expectation of the investor for a stable legal environment, and that it amounted to a denial of justice. Similar arguments are advanced in *Windstream Energy v Canada*,<sup>90</sup> concerning a moratorium imposed by Ontario on offshore wind projects. An additional argument of discriminatory treatment of the US investor is made, raising also an alleged breach of the national treatment clause (article 1102) and the MFN clause (article 1103). The US investor claims CDN\$475 million in damages. Both cases raise squarely the question of indirect expropriation by a general environmental measure.

### **Changes to Green Subsidies Program: *Mesa Power Group***

The last case is also pending and involves the Ontario Feed-in Tariff (FIT) Program, allowing the signing of long-term green energy purchased by the province at fixed tariffs, on the condition that local products are used in energy production. In *Mesa Power Group v Canada*,<sup>91</sup> a US investor owning four wind farms in Ontario claims CDN\$775 million (US\$730.9 million) because it was denied the opportunity to sign a FIT contract due to the change in implementation of the program by Ontario and the Ontario Power Authority, a provincial SOE. It invokes violation of the national treatment clause (article 1102), the MFN clause (article 1103), the FET clause (article 1105), the performance requirements clause (article 1106) and the SOEs clause (article 1503). *Mesa Power* also shows possible interconnections between trade and investment disputes, since Canada lost a case at the World Trade Organization (WTO) concerning the FIT program, on the ground that it violated WTO obligations on performance requirements.<sup>92</sup>

## **Claims against Public Services and SOEs**

### **Business Practices of Canada Post: *United Parcel Service of America***

The first case that involved public services and the behaviour of a Canadian SOE is *United Parcel Service of America Inc v Canada (United Parcel Service)*.<sup>93</sup> The nature of the case attracted a lot of interest within civil society and, in an important decision for transparency in ISA, the tribunal ruled that it had power to accept *amicus curiae* briefs.<sup>94</sup> This opening was used by third persons both opposing and supporting the US investor. The latter claimed US\$160 million against the activities of Canada Post in the parcel delivery business, and against a series of measures of the federal government in its dealing with Canada Post (a Postal Import Agreement, a Publication Assistance Programme and the application of customs law). The measures were allegedly in breach of the national treatment clause (article 1102), the MFN clause (article 1103) and the FET clause (article 1105), as well as the monopolies clause (article 1502) and the SOEs clause (article 1503). NAFTA does affirm the right of the parties to designate private or state monopolies, as well as to maintain or establish SOEs. However, parties must take measures to ensure that monopolies and SOEs act consistently with the investment chapter when they exercise regulatory,

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88 *Clayton/Bilcon*, Dissenting Opinion, *supra* note 82 at para 51.

89 Notice of Arbitration, 6 September 2013 (UNCITRAL), online: <[www.italaw.com/sites/default/files/case-documents/italaw1596.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf)>.

90 Notice of Arbitration, 28 January 2013 (UNCITRAL), online: [italaw <www.italaw.com/sites/default/files/case-documents/italaw1310.pdf>](http://italaw.com/sites/default/files/case-documents/italaw1310.pdf).

91 Notice of Arbitration, 4 October 2001 (UNCITRAL), online: [italaw <www.italaw.com/sites/default/files/case-documents/italaw1203.pdf>](http://www.italaw.com/sites/default/files/case-documents/italaw1203.pdf).

92 *Canada – Measures relating to the Feed-in Tariff Program (Complaint by the European Union)* (2013), WTO Doc WT/DS426/AB/R (Appellate Body Report), online: WTO <[docsonline.wto.org](http://docsonline.wto.org)>; *Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Complaint by Japan)* (2013), WTO Doc WT/DS412/AB/R (Appellate Body Report), online: WTO <[docsonline.wto.org](http://docsonline.wto.org)>.

93 Award on the Merits, 24 May 2007 (UNCITRAL) (Arbitrators: Kenneth Keith, pres, Ronald A Cass, L Yves Fortier) [UPS, Merits], online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0885.pdf>](http://www.italaw.com/sites/default/files/case-documents/ita0885.pdf).

94 *United Parcel Service of America v Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001 (UNCITRAL) (Arbitrators: Kenneth Keith, pres, Ronald A Cass, L Yves Fortier), online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0883.pdf>](http://www.italaw.com/sites/default/files/case-documents/ita0883.pdf).

administrative or other governmental authority. The failure to take such measures is actionable under the investment chapter by foreign investors. The tribunal declined jurisdiction on the initial broad claim of the US investor that all anti-competitive behaviour of Canada Post in breach of NAFTA was actionable under the investment chapter.<sup>95</sup> The claim had to be restricted to violation of the investment chapter and not of any provisions of NAFTA.

In its award on merits, the tribunal found that NAFTA created a *lex specialis* regarding rules of attribution in the law of state responsibility.<sup>96</sup> Monopolies and SOEs clauses in NAFTA altered customary rules in that respect so that conduct of Canada Post is not attributable to Canada. The tribunal split in applying the clauses to the facts, the majority ruling that the activities of Canada Post were commercial in nature; therefore, Canada had no obligation to take measures under articles 1502 and 1503.<sup>97</sup> The dissenting arbitrator found that some activities of the SOE were not commercial and were therefore covered by the clauses.<sup>98</sup> The majority also found no violation of national treatment by Canada, a conclusion with which the dissenting arbitrator disagreed. In reaching this conclusion, the majority considered that Canada Post and the US investor were not in like circumstances, international mail delivery and courier services being different activities.<sup>99</sup> The majority took the view that the Postal Import Agreement between Canada Post and the federal government was a procurement excluded from the national treatment clause by a reservation.<sup>100</sup> It also found that the Publication Assistance Program, by which subsidies were provided for periodicals mailed through Canada Post, was covered by the cultural industries exception in article 2106.<sup>101</sup> The broad interpretation given to the exception by the majority was opposed by the dissenting arbitrator.<sup>102</sup> The tribunal found no evidence of breach of FET; neither did it find evidence of any specific breach of the MFN clause, based on broader FET clauses in other FIPAs.<sup>103</sup>

*United Parcel Service* shows that the threshold is high in NAFTA for a US investor to successfully claim damages for the conduct of an SOE. It also indicates that the MFN clause could be used to claim a broader definition of FET (as provided for in other investment agreements), but not in the abstract and only in connection with concrete preferential treatment.

### Private Hospital Project: Centurion Health Corp

In *Centurion Health Corp v Canada*,<sup>104</sup> a US investor claimed that the conduct of the federal and provincial governments in managing the public health care system breached the national treatment clause (article 1102), MFN clause (article 1103), FET clause (article 1105), expropriation clause (article 1110), monopolies clause (article 1502) and SOEs clause (article 1503), in relation to a project to build and operate a private hospital in British Columbia. The arbitral proceedings were terminated by the tribunal, because of the default of the US investor to pay the needed deposit, despite its claim of US\$160 million. This case inconclusively raised the delicate issue of ISA and the participation of US investors in the public health care system in Canada.

### Metropolitan Transportation Planning: Detroit International Bridge Co

A record-breaking claim of US\$3.5 billion was brought in *Detroit International Bridge Co v Canada*,<sup>105</sup> against the alleged support by Canada to bridges between Detroit and Windsor competing with the Ambassador Bridge owned and controlled by a US investor. The majority of the tribunal declined jurisdiction over the case, because of the failure of the US investor to properly waive his rights to

95 *United Parcel Service of America v Canada*, Award on Jurisdiction, 22 November 2002 (UNCITRAL), (Arbitrators: Kenneth Keith, pres, Ronald A Cass, L Yves Fortier) at paras 69, 92–8, online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0884.pdf>](http://italaw.com/sites/default/files/case-documents/ita0884.pdf).

96 *UPS*, Merits, *supra* note 93 at paras 59–63.

97 *Ibid* at paras 68–78.

98 *United Parcel Service of America v Canada*, Separate Statement of Dean Ronald A Cass, 24 May 2007 (UNCITRAL) at para 169 [*UPS*, Separate Statement] at para 169, online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0885.pdf>](http://italaw.com/sites/default/files/case-documents/ita0885.pdf) [following Appendix].

99 *UPS*, Merits, *supra* note 93 at para 119.

100 *Ibid* at para 136.

101 *Ibid* at paras 137, 162.

102 *UPS*, Separate Statement, *supra* note 98 at paras 134–54.

103 *UPS*, Merits, *supra* note 93 at para 184.

104 Order for the Termination of the Proceedings and Award on Costs, 2 August 2010 (UNCITRAL) [corrected 9 August 2010] (Arbitrators: Peter Tomka, pres, Marjorie Florestal, Henri Alvarez) [*Centurion Health*], online: <[www.uncitral.org/res/transparency-registry/registry/data/can/centurion\\_health\\_corporation\\_.html/centurion-06.pdf](http://www.uncitral.org/res/transparency-registry/registry/data/can/centurion_health_corporation_.html/centurion-06.pdf)>, Correction of Order, August 9, 2010, online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0410.pdf>](http://italaw.com/sites/default/files/case-documents/ita0410.pdf).

105 Award on Jurisdiction, 2 April 2015, PCA Case No 2012-25, (UNCITRAL) (Arbitrators: Yves Derains, pres, Michael Chertoff, Vaughan Lowe) [*Detroit International Bridge*, Jurisdiction], online: [italaw <www.italaw.com/sites/default/files/case-documents/italaw4255.pdf>](http://italaw.com/sites/default/files/case-documents/italaw4255.pdf).

continue proceedings before US courts in conformity with article 1121.<sup>106</sup> The majority found that the only exception to this condition was for administrative relief sought before Canadian courts, not before US courts applying Canadian law. The dissenting arbitrator found that the litigation before US courts dealt with distinct measures even if they partook of the same global discriminatory scheme to which the measures attacked under NAFTA belonged.<sup>107</sup> This indicates that application of article 1121 to the facts may be a difficult task, which in turns lessens the predictability of ISA claims for Canada. This case also raised inconclusively the issue of the regulatory space of governments in road and transit construction projects, which generally involve massive investments. ISA remains open to the US investor, should it decide to abandon its claim before US courts.

### **Business Practices of BC Hydro: *Mercer International Inc***

The last case in this category is *Mercer International Inc v Canada (Mercer)*,<sup>108</sup> which involves a pending claim of CDN\$250 million (US\$252.9 million) by a US investor against differential electricity tariffs applied by British Columbia and BC Hydro, a provincial SOE. The US investor owns a pulp mill and biomass-based electricity generation facility in the province. His pulp mill is the only one in the province not to be given access to low electricity tariffs if it sells its self-generated electricity at market value. The measure would breach the national treatment clause (article 1102), MFN clause (article 1103), FET clause (article 1105) and SOEs clause (article 1503). The argument on FET refers to an unfair and inequitable change in the legal framework and to legitimate expectation of a stable business and legal framework. *Mercer* raises the issue of the responsibility of Canada for the conduct of an SOE that does not have a monopoly in the energy sector, since the pulp mill of the US investor is located in the territory not served by the SOE.

### **Claims against Local Development Requirements**

#### ***Mobil Investments Canada I***

Three closely related cases deal with local development requirements imposed by Canada. In *Mobil Investments Canada Inc v Canada (Mobil Investments Canada I)*,<sup>109</sup> US investors claimed US\$60 million because of the performance requirements imposed on the offshore oil industry to support local development in Newfoundland and Labrador. This policy is part of the Atlantic Agreement between the province and the federal government, by which they regulate jointly the exploration and development of offshore oil and gas resources near Newfoundland and Labrador. A reservation is included in NAFTA concerning the Atlantic Accord, in article 1108(1) and annex 1, by which Canada intended to protect its regulatory space to implement it. The reservation is subject to a grandfather clause having a “ratchet effect,” by which all new measures less incompatible with NAFTA reduce the regulatory space of Canada accordingly. The joint regulatory body approved the benefit plan of the US investors in which the actual amount to be reinvested in local development was not specified. A new directive was issued by the body in 2004 providing for higher local development reinvestment in the projects of the US investors. In their claim, the latter invoked a breach of the FET clause (article 1105), because of the instability in the regulatory framework; and of the performance requirements clause (article 1106), because of the obligation to prefer national products or services in reinvesting in local development. The tribunal unanimously ruled that FET in NAFTA is not a stabilization clause that would protect US investors against any legal change regarding their investment in Canada.<sup>110</sup> It followed several previous NAFTA awards in finding that customary international law does not protect legitimate expectations of foreign investors, but that their legitimate expectations are an element to take into account when assessing potential violation of FET, depending on whether the host state made representations of stabilization. No such representations having been made to the US investors, the tribunal concluded that there was no breach of article 1105. It also unanimously ruled that the obligation to reinvest in local

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106 *Ibid* at paras 318–20, 336.

107 *Detroit International Bridge Company v Canada*, Separate Dissenting Jurisdictional Statement of Michael Chertoff, 2 April 2015 (UNCITRAL) at para 1, online: [italaw <www.italaw.com/sites/default/files/case-documents/italaw4256.pdf>](http://italaw.com/sites/default/files/case-documents/italaw4256.pdf).

108 Request for Arbitration, 30 April 2012, ICSID Case No ARB(AF)/12/3 (Additional Facility) [*Mercer*], online: [italaw <www.italaw.com/sites/default/files/case-documents/italaw1508.pdf>](http://italaw.com/sites/default/files/case-documents/italaw1508.pdf) [redacted].

109 Decision on Liability and on Principles of Quantum, 22 May 2012, ICSID Case No ARB(AF)/07/4 (Arbitrators: Hans van Houtte, pres, Merit E Janow, Philippe Sands) [*Mobil Investments Canada I*, Liability], online: [italaw <www.italaw.com/sites/default/files/case-documents/italaw1145.pdf>](http://italaw.com/sites/default/files/case-documents/italaw1145.pdf) [redacted].

110 *Ibid* at paras 152–56, 171.

development was a performance requirement prohibited by article 1106.<sup>111</sup> The 2004 directive requires US investors to purchase goods produced and services provided in the Canadian territory.

The case rested on the interpretation to be given to the reservation of Canada regarding the Atlantic Accord and the tribunal split on this crucial issue. It must be underlined that Canada chose not to use the procedure in article 1132, following which it could have requested that the tribunal formally ask the NAFTA Free Trade Commission to issue a binding interpretation of the scope of the reservation. The majority found that new secondary legislation less incompatible with NAFTA also reduces the reserved regulatory space, even if subsequent secondary legislation more incompatible is still allowed by the reserved primary legislation.<sup>112</sup> Applied to the facts in *Mobil Investments Canada I*, it meant that although the reserved measure is the act implementing the Atlantic Accord, the approval of the benefit plan of the US investors meant that Canada could no longer impose the more stringent 2004 directive, even if the latter fell totally within the ambit of the implementation act. One arbitrator disagreed with this interpretation and found that only modification to the reserved implementation act itself could reduce the regulatory space of Canada.<sup>113</sup> The conclusion of the majority led to the odd result that the reservation of Canada does not have the same scope from one project to the other. *Mobil Investments Canada I* shows that even carefully tailored reservations can lead to equivocal interpretation by arbitral tribunals. This case may have significant consequences for public policies protected by a list of reserved measures in investment agreements. In an unpublished award, the tribunal would have ruled that Canada must pay CDN\$12.6 million for the losses incurred by the US investors between 2004 and 2012. Once again, in the face of a split arbitral tribunal, Canada applied to the Ontario Court of Justice to set aside the award on damages in *Mobil Investments Canada*, on the ground that the tribunal exceeded its jurisdiction by misinterpreting the reservation and allowing damages on that basis.<sup>114</sup>

### ***Mobil Investments Canada II and Murphy Oil Corp***

Two new pending claims were brought separately by the same US investors, for compensation of the losses they suffered since 2012, Canada not having withdrawn its measure. In *Mobil Investments Canada Inc v Canada (Mobil Investments Canada II)*,<sup>115</sup> the US investor claims CDN\$20 million (US\$16.1 million) in additional damages, while in *Murphy Oil Corp v Canada*,<sup>116</sup> the US investor claims CDN\$5 million (US\$4.4 million). Interestingly, these cases are among the first to be brought against Canada under the ICSID Convention. It means that Canada will not be able to challenge the award before Canadian courts as it did in *Mobil Investments Canada I*. These new cases also pose the risk of potential conflicts between three different arbitral tribunals regarding the same measure and the same facts, should the same arbitrators not be appointed.

## **Claims against International Trade Law Measures**

### **Spoils of Trade War: Pope & Talbot**

One of the first cases brought under NAFTA dealt with the implementation of the softwood lumber agreement signed by Canada and the United States, which was intended to settle their dispute on the international trade of this product.<sup>117</sup> In *Pope & Talbot v Canada*,<sup>118</sup> a US investor claimed US\$507 million against restrictions to the exportation of softwood lumber, following the agreement Canada signed in order to bring to an end the imposition of anti-dumping and countervailing duties by the United States. The restrictions only applied to lumber manufactured in four provinces. Under the agreement, Canada required a federal export permit and imposed an export fee once a specified quantity of lumber had been exported to the United States. The quotas of fee-exempted lumber were to be allocated by

<sup>111</sup> *Ibid* at para 246.

<sup>112</sup> *Ibid* at paras 343, 350, 355–56, 397–404, 409.

<sup>113</sup> *Mobil Investments Canada Inc v Canada* Partial Dissenting Opinion of Professor Philippe Sands, 17 May 2012, ICSID Case No ARB(AF)/07/4 at paras 30–33, online: [italaw <www.italaw.com/sites/default/files/case-documents/italaw1146\\_0.pdf>](http://italaw.com/sites/default/files/case-documents/italaw1146_0.pdf).

<sup>114</sup> *Canada (AG) v Mobil Investments Canada* (19 May 2015), CV-15-528498 (Ont Sup Ct J) (notice of application).

<sup>115</sup> *Mobil Investments Canada v Canada II*, 16 January 2015, Request for Arbitration, ICSID Case No ARB/15/6 [*Mobil Investments Canada II*], online: [italaw <www.italaw.com/sites/default/files/case-documents/italaw6213.pdf>](http://italaw.com/sites/default/files/case-documents/italaw6213.pdf).

<sup>116</sup> Notification of Intent to Submit a Claim to Arbitration under NAFTA Chapter Eleven, 16 January 2014.

<sup>117</sup> *Softwood Lumber Agreement between the Government of Canada and the Government of the United States*, 29 May 1996, Can TS 1996 No 16 (terminated). See, generally, Zhang Daowei, *The Softwood Lumber War: Politics, Economics, and the Long US-Canadian Trade Dispute* (Washington, DC: Resources for the Future, 2007).

<sup>118</sup> Interim Award, 26 June 2000 (UNCITRAL) (Arbitrators: Lord Devaïrd, pres, Murray J Belman, Benjamin J Greenberg) [*Pope & Talbot*, Interim Award], online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0674.pdf>](http://italaw.com/sites/default/files/case-documents/ita0674.pdf) [redacted].

Canada among the Canadian exporters. The measures taken by Canada allegedly breached the national treatment clause (article 1102), FET clause (article 1105), performance requirement clause (article 1106) and expropriation clause (article 1110). In its interim award, the tribunal found that the export control regime did not impose any prohibited performance requirement, nor did it constitute an indirect expropriation.<sup>119</sup> The tribunal considered that access to the US market constituted a proprietary interest susceptible of expropriation.<sup>120</sup> While the export control regime negatively affected the exports of the US investor, it did not interfere in its business activities to a degree sufficient to constitute an expropriation under international law. The tribunal rejected the argument of Canada that non-discriminatory use of its power to regulate could never constitute an expropriation, since such regulation may actually be an indirect expropriation.<sup>121</sup> The tribunal also ruled that the use of the words “tantamount to expropriation” did not mean to enlarge the definition of expropriation beyond that of customary international law.<sup>122</sup>

The crucial part of the case was addressed in the second award on merits, where the tribunal found no violation of national treatment, but did find a violation of FET.<sup>123</sup> The tribunal interpreted article 1105 as going beyond the minimum standard of treatment of customary international law, adding an element of fairness to it.<sup>124</sup> In reaching this conclusion, it remarked that limiting FET in NAFTA to customary international law could easily be circumvented by the use of the MFN clause to import broader FET provided for in other investment treaties of the NAFTA party.<sup>125</sup> Applying the broadly interpreted FET to the facts, the tribunal found only a minor violation of the clause in a verification review that was initiated by Canada after the US investor brought its claim under NAFTA. Before the tribunal could issue its award on damages, the NAFTA Free Trade Commission adopted its Notes of Interpretation in order to affirm what it considered the proper interpretation of the FET clause. The Notes of Interpretation rejected the broad interpretation chosen in *Pope & Talbot* and asserted that FET was limited strictly to the minimum standard of treatment of customary international law.<sup>126</sup> The arbitral tribunal was highly critical of the Notes of Interpretation but nevertheless revised its finding on FET, in contrast to the tribunal in *SD Myers*, which had simply ignored the Notes. The *Pope & Talbot* tribunal reached the same conclusion in finding that Canada had violated FET even in its restrictive scope as adopted by the NAFTA Free Trade Commission.<sup>127</sup> Canada was required to pay US\$0.5 million in damages to the US investor.<sup>128</sup> *Pope & Talbot* offers an example of an investment dispute that may arise in the context of a trade dispute. It fully exposes the problem of lack of predictability of the content of FET and raises the issue of the lawfulness and legal effects of notes of interpretation.

### **Log Export Regime: *Merrill & Ring Forestry***

*Merrill & Ring Forestry v Canada*<sup>129</sup> is the other case involving international trade law measures and it also concerns export measures imposed on the Canadian wood industry. A US investor claimed US\$25 million against the export regime applicable to logs harvested in British Columbia, which allegedly breached the national treatment clause (article 1102), MFN clause (article 1103), FET clause (article 1105), performance requirement clause (article 1106) and expropriation clause (article 1110). Exports from the province were subjected to a log surplus testing procedure that was viewed by the US investor as being unfair and not transparent. The arbitral tribunal dismissed the case on merits, finding no violation of national treatment since the same regulation applied to all foreign and Canadian investors.<sup>130</sup> In an important ruling for provincial governments, the tribunal found, in relation to article 1102, that treatment by the federal government cannot be compared to treatment by provincial governments, and that like treatment is between investors subject to the same regulation by the same jurisdictional

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119 *Ibid* at paras 76, 80, 105.

120 *Ibid* at para 94.

121 *Ibid* at para 99.

122 *Ibid* at para 104.

123 *Pope & Talbot v Canada*, Award on the Merits of Phase 2, 10 April 2001 (UNCITRAL) (Arbitrators: Lord Devaird, pres, Murray J Belman, Benjamin J Greenberg) [*Pope & Talbot*, Merits] at paras 104, 181, online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0678.pdf>](http://italaw.com/sites/default/files/case-documents/ita0678.pdf) [redacted].

124 *Ibid* at para 118.

125 *Ibid* at para 117.

126 *Notes of Interpretation*, *supra* note 60 at para 2(1).

127 *Pope & Talbot v Canada*, Award on Damages, 31 May 2002 (UNCITRAL) (Arbitrators: Lord Devaird, pres, Murray J Belman, Benjamin J Greenberg) [*Pope & Talbot*, Damages] at paras 58–66, online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0686.pdf>](http://italaw.com/sites/default/files/case-documents/ita0686.pdf).

128 *Ibid* at para 91.

129 Award, 31 March 2010 (UNCITRAL) (Arbitrators: Francisco Orrego Vicuña, pres, Kenneth W Dam, J William Rowley) [*Merrill & Ring*, Award], online: [italaw <www.uncitral.org/res/transparency-registry/registry/data/can/merrill\\_ring\\_forestry\\_1\\_p\\_html/merrill-09.pdf>](http://www.uncitral.org/res/transparency-registry/registry/data/can/merrill_ring_forestry_1_p_html/merrill-09.pdf).

130 *Ibid* at para 93–94.

authority.<sup>131</sup> The tribunal also found no violation of article 1106, the imposition of the use of the metric system not being a specifically prohibited performance requirement.<sup>132</sup> In contrast to *Pope & Talbot*, the tribunal found that potential contractual rights in the United States are not an investment, and therefore no expropriation is possible.<sup>133</sup> Significantly, the tribunal added that article 1110 is not an insurance policy guaranteeing best prices for exports and that the test of substantial deprivation proposed by *Pope & Talbot* was not met in the present case, since the simple fact that a business is regulated does not mean that it is expropriated.<sup>134</sup>

*Merrill & Ring* reopened the debate on FET in an odd way. The tribunal devoted lengthy discussion to article 1105, accepting that it is limited to customary international law, but put forward the opinion that customary law is not frozen since *Neer* and that the broad interpretation of FET is now part of customary law.<sup>135</sup> Having said that, the arbitrators could not agree on the actual content of FET, whether it has a low threshold of interference with business, or a higher threshold — but not as high as in *Neer* — of serious effect on business.<sup>136</sup> In a strange analytical loop, explained by the divided opinions of the arbitrators on the content of the clause, the tribunal concluded that there was no breach of FET since the US investor suffered no loss.<sup>137</sup> *Merrill & Ring* demonstrates that the law on the expropriation clause is quite well settled and that violation of this clause is subject to a high threshold, while the law on FET remains uncertain and the clause is difficult for arbitrators to apply.

## Claims against Direct Expropriation

### A Textbook Case: *AbitibiBowater*

Surprisingly enough for a developed democracy, Canada faced two cases involving direct expropriation without compensation. *AbitibiBowater v Canada*<sup>138</sup> is probably one of the best examples of the use of ISA between developed democracies. Despite commitments to the contrary, a US investor decided to close its pulp and mill facilities in Newfoundland and Labrador for business reasons. The provincial government retaliated by expropriating most of the rights and assets of the US investor in the province, without any immediate or real compensation.<sup>139</sup> An amicable settlement of CDN\$130 million (US\$130 million) was quickly reached between the investor and Canada, after the investor brought a claim of CDN\$500 million (US\$468 million) for breach of the national treatment clause (article 1102), MFN clause (article 1103), FET clause (article 1105) and expropriation clause (article 1110). It must be noted that under Canadian constitutional law, there is no protection against expropriation,<sup>140</sup> and, as previously mentioned, NAFTA article 1110 has no direct effect in Canadian law. Apart from a very unlikely use by the federal government of its obsolete power of disallowance of provincial laws within one year of their adoption,<sup>141</sup> or the use of its declaratory power to claim jurisdiction over local works and undertakings,<sup>142</sup> there were literally no remedies in Canadian law for the US investor against the expropriation by Newfoundland and Labrador. *AbitibiBowater* is a prime example of the use of ISA even between developed democracies. The only alternative in that case would have been the exercise of diplomatic protection by the United States against Canada with the politicization of the dispute that it would have entailed.

131 *Ibid* at paras 82, 89.

132 *Ibid* at para 116.

133 *Ibid* at para 141.

134 *Ibid* at paras 144–46.

135 *Ibid* at paras 193, 211–13.

136 *Ibid* at paras 245–46.

137 *Ibid* at para 266.

138 Consent Award, 15 December 2010 (UNCITRAL) (Arbitrators: Andreas Bucher, pres, Doak Bishop, Gavan Griffith) [*AbitibiBowater*, Consent Award].

139 *Abitibi-Consolidated Rights and Assets Act*, SNL 2008, c A-1.01. The original version of the act provided that the US investor shall be paid compensation “that may be determined by the method the Lieutenant-Governor in Council may determine” (*ibid* s 10(1)). After the filing of the claim under NAFTA, the act was amended to exclude compensation of the US investor.

140 See Peter W Hogg, *Constitutional Law of Canada* (Scarborough, Ont: Thomson Carswell, 2007) (loose-leaf) at section 29.5.

141 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 56, 90, reprinted in RSC 1985, Appendix II, No 5.

142 *Ibid* s 92(10)(c).

### A Less Obvious Case: *Eli Lilly and Co*

The second case is still pending and less straightforward. In *Eli Lilly and Co v Canada*,<sup>143</sup> a US investor claims CDN\$500 million (US\$484.5 million) against the withdrawal of patents for two pharmaceutical products by Canadian courts, on the basis of a new interpretation of the law that would be contrary to NAFTA Chapter 17 on intellectual property. The investor argues that the interpretation of the courts frustrated its legitimate expectation for a stable legal environment, and that it constituted a direct expropriation of its rights, contrary to the FET clause (article 1105) and the expropriation clause (article 1110). Central to the argument is the idea that the violation of Chapter 17 on intellectual property supports the existence of a breach of articles 1105 and 1110. One of the key issues that surfaces in *Eli Lilly* centres on the existence of an investment susceptible of expropriation: is the exclusive right to commercialize a patented pharmaceutical product in Canada an investment? Article 1139 does foresee that intangible property acquired or used for the purpose of economic benefit or other business purposes is an investment. Can a property right that should never have existed, according to this new interpretation of the law, still be expropriated and give rise to compensation under NAFTA?

### Claim against Taxation Measures

#### *Longyear LLC v Canada*

The latest case (as of July 31, 2015) against Canada involved a taxation measure for the first time. In *Longyear LLC v Canada (Longyear)*,<sup>144</sup> a US investor claimed US\$12 million for the breach of the national treatment clause (article 1102) and the MFN clause (article 1103) arising from its disqualification from Ontario's Managed Forest Tax Incentive Program, on the sole basis of its nationality. Despite the existence of a limited exception for taxation measures in NAFTA at article 2103, the investor was using the MFN clause to import into NAFTA the broader national treatment clauses in six FIPAs that do not include such an exception. *Longyear* brings to light the potential use of the MFN clause in circumventing the exceptions and reservations carefully crafted into an investment agreement. The US investor withdrew its claim on June 26, 2015, and the public record does not give any indication as to the possible settlement agreed to by Canada.<sup>145</sup>

## LESSONS FROM THE CANADIAN EXPERIENCE AND CHALLENGES AHEAD

The restriction of the regulatory space of federal and provincial governments is first and foremost the result of international obligations of Canada in FIPAs and FTAs. However, the actual effect of these obligations is felt concretely when a claim is brought against Canada by a foreign investor. Thus, ISA is essentially a mechanism of treaty implementation, by which foreign investors have the right to invoke state responsibility for internationally wrongful acts.<sup>146</sup> In the end, it is the intertwined effect of international obligations and private remedies that is the defining feature of ISA. In order to draw lessons from the Canadian experience with ISA, it is useful to separate substantive law issues from procedural ones. While they may be two sides of the same coin, the distinction allows a more precise assessment of the impact of ISA on the regulatory space of governments.

### Lessons on Substantive Law Issues

#### *Self-standing International Obligations*

It must be remembered that some basic legal obligations imposed by investment agreements are already binding on developed democracies in their mutual relationships. That is the case for FET when restricted to the minimum standard of treatment of customary international law. That is also the case for expropriation in general terms, following past controversies over the content of international custom

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143 Notice of Arbitration, 12 September 2013, ICSID Case No UNCT/14/2 (UNCITRAL) [*Eli Lilly*, Notice], online: [italaw <www.italaw.com/sites/default/files/case-documents/italaw1582.pdf>](http://www.italaw.com/sites/default/files/case-documents/italaw1582.pdf).

144 Notice of Arbitration, 20 May 2014 (UNCITRAL) [*Longyear*, Notice of Arbitration], online: [www.italaw.com/sites/default/files/case-documents/italaw3301.pdf> \[redacted\]](http://www.italaw.com/sites/default/files/case-documents/italaw3301.pdf).

145 *Longyear LLC v Canada*, Notice of Withdrawal of Claim, 26 June 2015 (UNCITRAL), online: [www.italaw.com/sites/default/files/case-documents/italaw4368.pdf>](http://www.italaw.com/sites/default/files/case-documents/italaw4368.pdf).

146 See, generally, Thomas W Wälde, "Investment Arbitration under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation" (1996) 12 Arb Intl 429.

in the bygone era of the New International Economic Order.<sup>147</sup> In addition, a series of performance requirements are already prohibited by WTO law, meaning that only WTO-plus prohibitions are new obligations on developed democracies.<sup>148</sup> Rights of admission and establishment for foreign investors are also envisaged in WTO law under the General Agreement on Trade in Services<sup>149</sup> (GATS) when commitments have been made regarding specific services that allow foreign suppliers to have a commercial presence. Non-discriminatory treatment is also guaranteed in principle by GATS, to all foreign suppliers for MFN treatment, and to those of liberalized services for national treatment. It should not be forgotten that old treaties of friendship, commerce and navigation (FCN) might still be in force; generally, these provide primarily for non-discriminatory treatment of nationals of each party. An FCN treaty was indeed the basis of the US claim against Italy at the International Court of Justice in the *ELSI*<sup>150</sup> case. Canada itself was bound by old FCN treaties signed by the United Kingdom with several developed democracies, some of which are still in force.<sup>151</sup> Thus, on the substantive plane, many obligations that may be imposed by investment agreements signed between developed democracies are not new.

### Equivocal Protection in Canadian Law

The next question that must be asked when looking at the legal impact of ISA is the extent to which the substantive protection guaranteed by investment agreements is already offered by Canadian law. This question has a direct bearing on procedural issues such as returning to a system where foreign investors must first exhaust local remedies, or abolishing ISA between developed democracies. Does Canadian law offer protection equivalent to FIPAs or FTAs? *AbitibiBowater* is a prime example showing that the answer is simply “no” in some circumstances. Investment agreements have no direct effect in Canadian law and private property has no constitutional protection in Canada. Further research is needed to study in more detail the protection of foreign investors and their property in Canadian law.<sup>152</sup> Except for possible distribution of power limits on the jurisdiction of provinces over aliens and their property, or non-discrimination guarantees possibly offered by the Canadian Charter of Rights and Freedoms,<sup>153</sup> there seem to be no limits on the ability of Parliament and legislatures to affect, at will, the rights of foreign investors. While the federal government is entrusted with certain extraordinary powers over provinces, such as the declaratory power or the disallowance power, use of these powers in the context of an investment dispute seems highly unlikely. It shows that investment agreements might be needed even between developed democracies, at least on the substantive plane.

### The Unlimited MFN Clause

A significant problem that emerges from the Canadian experience is that of the potential use of the MFN clause to claim better legal protection than is offered in other Canadian treaties. Unlimited scope of the MFN clause could make it almost illusory for Canada to keep control over its international obligations. American investors made such arguments in *United Parcel Service*<sup>154</sup> and *Chemtura*,<sup>155</sup> invoking the broader FET offered by earlier Canadian FIPAs. In *Longyear*,<sup>156</sup> the US investor is using the MFN clause to circumvent an exception for taxation measures in NAFTA not included in some FIPAs. So far, arbitral tribunals have been able to reach a decision in these cases without definitively ruling on

147 Andreas F Lowenfeld, *International Economic Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 489–93.

148 “Agreement on Trade-Related Investment Measures” in *Marrakesh Agreement establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 3 [*Marrakesh Agreement*], Annex 1A (entered into force 1 January 1995).

149 *Marrakesh Agreement*, *ibid*, Annex 1B.

150 *Case concerning Elettronica Sicula SpA (ELSI) (United States v Italy)* [1989] ICJ Rep 15.

151 Côté, “Canada”, *supra* note 5 at 269–70; DJ Albrecht, “Canadian Foreign Investment Policy and the International Politico-Legal Process” (1983) 21 Can YB Intl Law 149 at 153–54; E James Arnett, “Canadian Regulation of Foreign Investment: The Legal Parameters” (1972) 50 Can Bar Rev 213 at 230–32. Canada succeeded to FCN treaties signed by the United Kingdom with the United States (1794, partially in force), Sweden (1812, in force), Denmark (1814, in force), Norway (1826, in force), Switzerland (1856, in force), Russia (1859, terminated), Austria (1877, terminated), Korea (1894, terminated), Spain (1886, terminated), Greece (1887, terminated), Japan (1899, terminated), Portugal (1916, terminated), Latvia (1923, terminated), Finland (1924, terminated), Estonia (1926, terminated), Hungary (1927, terminated), Yugoslavia (1928, terminated), Romania (1931, terminated).

152 See Armand de Mestral & Robin Morgan, “Does Canadian Law Provide Remedies Equivalent to NAFTA Chapter 11 Arbitration?” CIGI, Investor-State Arbitration Series Paper No. 4, May 2016.

153 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See Charter s 15.

154 See UPS, Merits, *supra* note 93.

155 *Supra* note 63.

156 *Longyear*, Notice of Arbitration, *supra* note 144.

the issue, but refused to close the door when they were asked to do so by all NAFTA parties.<sup>157</sup> In *United Parcel Service*, the tribunal ruled that such a claim could not be made only in the abstract; evidence of concrete discriminatory treatment was needed.<sup>158</sup> In *Pope & Talbot*, however, the arbitral tribunal had adopted the abstract argument in reaching its initial conclusion that FET was not limited to customary international law in NAFTA.<sup>159</sup> This problem is not limited to treaties between developed democracies, but it makes it very difficult for a developed democracy to adapt its treaty practice to the developed or developing nature of the other party. The problem is so salient that the International Law Commission (ILC) has decided to resume its study of the topic after a hiatus of nearly 30 years. The ILC recently concluded its work on the topic at its 67th session in Geneva.<sup>160</sup> Its main conclusion is that states may circumscribe MFN clauses in order to limit their use to benefit from better legal protection offered in other treaties. Canada has already begun to tackle the issue in its recent treaty practice. It started to add an “anti-Maffezini” provision to its MFN clause, to prevent it from being applied to import more preferential dispute settlement provisions from other treaties.<sup>161</sup> In *Maffezini v Spain*,<sup>162</sup> the foreign investor was allowed to ignore the requirement of an 18-month waiting period before bringing its claim in order to benefit instead from the more favourable six-month period provided by another investment agreement. More recently, the ruling in *United Parcel Service*<sup>163</sup> has been codified in CETA, requiring specific evidence of discriminatory treatment when comparing provisions with those offering better treatment in another treaty: “Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute ‘treatment’, and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.”<sup>164</sup>

Recent evolution of international law seems to show that states may take back control over MFN clauses in their new investment agreements. However, the issue remains open with respect to treaties already into force.

### The Elusive FET Clause

Another significant problem revealed by the experience of Canada with ISA concerns the FET clause. First, serious controversies regarding the precise scope of the clause in NAFTA have regularly surfaced — even within the same tribunal. A well-known divergence emerged in the first years of NAFTA on the question of whether its FET clause went beyond the minimum standard of treatment of aliens and their goods under customary international law.<sup>165</sup> Another divergence arose around the question of whether the violation of another NAFTA provision or of any other international obligation of Canada automatically violated FET.<sup>166</sup> These issues were effectively addressed by the NAFTA Free Trade Commission in its Notes of Interpretation, which settled the law in determining that FET is restricted to the scope of international custom and that breach of another international obligation does not establish that there has been a breach of FET.<sup>167</sup> A new controversy surfaced in consequence of the Notes of Interpretation regarding the actual content of the minimum standard of treatment under customary international law. The majority of awards considered that incorporation of custom follows its evolution in contemporary international law and is not limited to the high threshold of the *Neer* case set in the 1920s,<sup>168</sup> nor to how it stood in 1994 when NAFTA entered into force.<sup>169</sup> However, tribunals may have

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157 *Chemtura*, *supra* note 63 at 235. See also *Apotex Holdings Inc v United States*, Award, 25 August 2014, ICSID Case No ARB(AF)12/1 (Arbitrators: VV Veeder, pres, J William Rowley, John R Crook) at para 9.71 [*Apotex Holdings*], online: [italaw.com/sites/default/files/case-documents/italaw3324.pdf](http://italaw.com/sites/default/files/case-documents/italaw3324.pdf).

158 *UPS*, Merits, *supra* note 93 at 184.

159 *Pope & Talbot*, Merits, *supra* note 123 at 117.

160 International Law Commission, 67th sess, *Final Report. Study Group on the Most-Favoured-Nation clause*, UN Doc A/CN.4/L.852 (29 May 2015) [mimeo limited], online: <http://legal.un.org/docs/?symbol=A/CN.4/L.852>.

161 See *Canada-South Korea FTA*, *supra* note 30, art 8.4 n 2; *CETA*, *supra* note 31, ch 8, art 8.7(4).

162 Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, ICSID Case No ARB/97/7 (Argentina-Spain BIT) (Arbitrators: Francisco Orrego Vicuña, pres, Thomas Buergenthal, Maurice Wolf) at para 39.

163 *Supra*, note 92.

164 *CETA*, *supra* note 31, ch 8, art 8.7(4).

165 See *Pope & Talbot*, Merits, *supra* note 123 at para 118; *SD Myers*, Separate Opinion, *supra* note 57 at paras 257–58. See also *Metalclad Corp v Mexico*, Award, 30 August 2000, ICSID Case No ARB(AF)/97/1 (Additional Facility) (Arbitrators: Elihu Lauterpacht, pres, Benjamin R Civiletti, José Luis Siqueiros) [*Metalclad*, Award] at paras 76, 99, online: [italaw.com/sites/default/files/case-documents/ita0510.pdf](http://italaw.com/sites/default/files/case-documents/ita0510.pdf); *Mexico v Metalclad Corp*, 2001 BCSC 664 at paras 65, 69, 89 BCLR (3d) 359, additional reasons 2001 BCSC 1529, 95 BCLR (3d) 169.

166 *SD Myers*, Partial Award, *supra* note 52 at paras 267–68.

167 *Notes of Interpretation*, *supra* note 60 at para 2.

168 *Neer*, *supra* note 77.

169 See *Chemtura*, *supra* note 63 at paras 120–22; *Clayton/Bilcon*, Award, *supra* note 76 at paras 434–44; *Merrill & Ring*, *supra* note 129 at paras 193, 211–13.

difficulty in agreeing on the exact scope of the contemporary minimum standard of treatment.<sup>170</sup> The net result of this open incorporation is the slow nullification of the Notes of Interpretation and renewed uncertainty as to the exact scope of FET in NAFTA. This result could already be anticipated in the reaction of the tribunal toward the Notes of Interpretation in *Pope & Talbot*, when it simply ruled that the measure at stake nevertheless constituted a breach of FET, even if restricted to customary law.<sup>171</sup> Secondly, even when there is a shared understanding of the legal content of the FET clause, it may be difficult for arbitrators to agree on its application to the facts of the case. The most serious case in this regard is *Clayton/Bilcon*, in which arbitrators radically disagreed as to whether the use of a new criterion in environmental assessment amounted to a breach of FET.<sup>172</sup> The end result is that the FET clause creates a serious lack of legal predictability for Canada in its dealings with US investors.

In the face of this lack of legal predictability, FET is invoked in various ways by foreign investors to support arguments that could otherwise not be made. Canada systematically refuses to include an umbrella clause or a stabilization clause in its investment agreements. Unsuccessful attempts were made by foreign investors to transform FET into an umbrella clause in cases of breach of their investments contracts.<sup>173</sup> A more recent trend consists of invoking FET in order to freeze the legal framework at the time the investment was made, to transform FET into a stabilization clause. This approach has been rejected so far by arbitral tribunals,<sup>174</sup> but continues to be made in pending cases.<sup>175</sup> The argument often presented is that the US investor has legitimate expectations that the legal framework related to its investment will not be amended. The door remains open for such an argument to be made under NAFTA, as shown in *Mobil Investments Canada I*, where the tribunal indicated that it could have been ready to accept it, had the US investor proven that specific promises of stabilization were made to him by Canadian authorities.<sup>176</sup> It remains unclear what exactly would constitute promises of stabilization internationally protected by FET.

After the adoption of the Notes of Interpretation, Canada systematically replicated their content in all its investment agreements.<sup>177</sup> However, CETA represents a significant shift in Canadian treaty practice regarding FET. The restriction to customary international law is abandoned and replaced by a clear attempt to define FET in more detail and to enhance legal predictability. CETA provides a list of behaviours incompatible with FET, and creates a mechanism to monitor the application of FET that could lead to adoption of a binding interpretation by the parties.<sup>178</sup> It also specifies that legitimate expectations of foreign investors may be a relevant factor in assessing a breach of FET, and that “full protection and security” of foreign investors and their investment only refers to their physical security.<sup>179</sup> CETA indicates that Canada has taken stock of the limits of its NAFTA approach with FET and is ready to move in another direction. It remains to be seen whether this new approach will bring greater legal predictability to FET. On the basis of previous experience, one may doubt that it will do so.

### ***Application of Denial of Benefits Clause***

The denial of benefits clause has proven useful in preventing a claim against Canada by a US investor. The clause has been applied only once so far, in *St Marys VCNA*, to deny benefits of NAFTA to a US corporation that was controlled by a Brazilian investor without any substantive business activities in the United States.<sup>180</sup> This case showed possible difficulties in choosing the right forum to invoke the clause or challenge its application. Canada invoked the clause outside of the arbitration proceedings and the US investor challenged the application of the clause before Canadian courts. The issue of retroactive application of the clause seems not to have been problematic in *St Marys VCNA*. Another potential difficulty is the impact of the MFN clause when other treaties do not include a denial of

170 See *Merrill & Ring*, *ibid* at paras 245–46.

171 *Pope & Talbot*, Damages, *supra* note 127 at paras 58–66. See also *Metalclad*, Award, *supra* note 165 at para 76.

172 *Clayton/Bilcon*, Award, *supra* note 76 at paras 453–54, 532–35, 546–47, 572, 588–94; *Clayton/Bilcon*, Dissenting Opinion, *supra* note 82 at paras 33–43.

173 See *Waste Management II*, *supra* note 80 at para 115. See, generally, Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) [Brownlie] at 546–50.

174 See *Mobil Investments Canada I*, Liability, *supra* note 109 at paras 152–56, 171; *Clayton/Bilcon*, Award, *supra* note 76 at para 572.

175 See *Mercer*, *supra* note 106; *Ely Lilly*, Notice, *supra* note 143.

176 *Mobil Investments Canada I*, “Liability”, *supra* note 109 at para 152.

177 See, for example, Canada, *Model-FIPA*, *supra* note 26, art 6.

178 *CETA*, *supra* note 31, ch 8, art 8.10(1), (2), (3).

179 *Ibid* art 8.10(5), (6).

180 See text accompanying note 74.

benefits clause. If one needed to be convinced of the usefulness of the clause, US investors were recently awarded US\$713 million against Venezuela in *Gold Reserve Inc v Venezuela*.<sup>181</sup> Thanks to a Canadian shell corporation that was set up precisely for this purpose, the US investor could benefit from the protection of the Canada-Venezuela FIPA (which did not include a denial of benefits clause), since there is no investment agreement between the United States and Venezuela.

Greater difficulties with the application of a similar clause in the Energy Charter Treaty<sup>182</sup> (ECT) appear from the Yukos trilogy, which involved expropriation of property of Russian oligarchs by the Putin regime,<sup>183</sup> in *Hulley Enterprises Ltd (Cyprus) v Russia*,<sup>184</sup> *Yukos Universal Ltd (Isle of Man) v Russia*<sup>185</sup> and *Veteran Petroleum Ltd (Cyprus) v Russia*.<sup>186</sup> In ruling that the clause had not been correctly applied in these cases, the tribunal found that since the clause had not been invoked prior to the claims, it could not be invoked retroactively in arbitration proceedings. The Cyprus and Isle of Man shell corporations in these cases were owned by Russian nationals through a complex corporate structure and they admittedly conducted no substantial business activities in Cyprus or the United Kingdom.<sup>187</sup> The tribunal refused to lift the corporate veil beyond the Cyprus and UK trusts and considered that the investors were EU nationals; it also concluded that even if it were to reach beyond to the Russian beneficiaries of the trusts, the clause could not be applied since Russia is not a “third state” under the ECT.<sup>188</sup> The tribunal awarded the investors a record-breaking US\$40 billion, US\$2 billion and US\$8 billion, respectively, illustrating the significance of its ruling on the application of the denial of benefits clause.<sup>189</sup>

If the denial of benefits clause appears to be an important tool to shield developed democracies from abusive claims, it is equally important to carefully address all aspects of its application explicitly in the clause itself. Moreover, if states wish to deny benefits from ISA to their own nationals, the clause will need to be amended accordingly. Otherwise, a more complex *lex generalis* argument could be made that in principle a state may not incur responsibility toward its nationals at international law.<sup>190</sup> This last issue sheds light on the discriminatory nature of international investment law.

### ***Difficulties with Delimiting Scope of Application***

An overlooked issue in international investment law is the potential legal difference between self-standing FIPAs and investment chapters embedded in FTAs. The experience with NAFTA shows that one of the consequences of the latter hypothesis could be a blurring of the scope of application of ISA. The teleological interpretation of an FTA might facilitate trade disputes to be clothed like investment disputes.<sup>191</sup> Could the notion of investment not be interpreted more generously in FTAs, given their overall objective to encourage trade and investment? One innovation of CETA could have an impact on this issue, with the addition of a generic definition of “investment” to the usual exemplative list in Canadian treaty practice: “[E]very kind of asset that an investor owns or controls, directly or indirectly,

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181 Award, 22 September 2014, ICSID Case No ARB(AF)/09/1 (Arbitrators: Piero Bernardini, pres, Pierre-Marie Dupuy, David AR Williams), online: italaw <[www.italaw.com/sites/default/files/case-documents/italaw4009.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw4009.pdf)>.

182 17 December 1994, 2080 UNTS 95, art 17 (entered into force 16 April 1998).

183 See, generally, Christine Ockrent, *Les Oligarques: Le système Poutine* (Paris: Robert Laffont, 2014) at 47–50; Richard Sakwa, *Putin and the Oligarch: The Khodorkovsky-Yukos Affair* (London: IB Tauris, 2014).

184 Interim Award on Jurisdiction and Admissibility, 30 November 2009, PCA Case No AA 226 (ECT, UNCITRAL) (Arbitrators: L Yves Fortier, chair, Charles Poncet, Stephen M Schwobel) [*Hulley Enterprises*, Interim Award] at paras 440, 455–58, online: italaw <[www.italaw.com/sites/default/files/case-documents/ita0411.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0411.pdf)>.

185 Interim Award on Jurisdiction and Admissibility, 30 November 2009, PCA Case No AA 227 (ECT, UNCITRAL) (Arbitrators: L Yves Fortier, chair, Charles Poncet, Stephen M Schwobel) at paras 441, 456–59 [*Yukos Universal*, Interim Award], online: italaw <[www.italaw.com/sites/default/files/case-documents/ita0910.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0910.pdf)>.

186 Interim Award on Jurisdiction and Admissibility, 30 November 2009, PCA Case No AA 228 (ECT, UNCITRAL) (Arbitrators: L Yves Fortier, chair, Charles Poncet, Stephen M Schwobel) at paras 497, 512–15 [*Veteran Petroleum*, Interim Award], online: italaw <[www.italaw.com/sites/default/files/case-documents/ita0891.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0891.pdf)>.

187 *Hulley Enterprises*, Interim Award, *supra* note 184 at para 460; *Yukos Universal*, Interim Award, *supra* note 185 at para 461; *Veteran Petroleum*, Interim Award, *supra* note 186 at para 517.

188 *Hulley Enterprises*, Interim Award, *supra* note 184 at paras 534–36, 543–45; *Yukos Universal*, Interim Award, *supra* note 183 at paras 535–37, 544–46; *Veteran Petroleum*, Interim Award, *supra* note 186 at paras 546–48, 555–57.

189 *Hulley Enterprises Ltd (Cyprus) v Russia*, Final Award, 18 July 2014, PCA Case No AA 226 (ECT, UNCITRAL) (Arbitrators: L Yves Fortier, chair, Charles Poncet, Stephen M Schwobel) at para 1888, online: italaw <[www.italaw.com/sites/default/files/case-documents/italaw3278.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw3278.pdf)>; *Yukos Universal Ltd (Isle of Man) v Russia*, Final Award, 18 July 2014, PCA Case No AA 227 (ECT, UNCITRAL) (Arbitrators: L Yves Fortier, chair, Charles Poncet, Stephen M Schwobel) at para 1888, online: italaw <[www.italaw.com/sites/default/files/case-documents/italaw3279.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf)>; *Veteran Petroleum Ltd (Cyprus) v Russia*, Final Award, 18 July 2014, PCA Case No AA 228 (ECT, UNCITRAL) (Arbitrators: L Yves Fortier, chair, Charles Poncet, Stephen M Schwobel) at para 1888, online: italaw <[www.italaw.com/sites/default/files/case-documents/italaw3280.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw3280.pdf)>.

190 See Brownlie, *supra* note 173 at 400; Côté, *Personnes privées*, *supra* note 22 at 157.

191 See *Vienna Convention on the Law of Treaties*, 13 May 1969, 1155 UNTS 331, art 31(1) (entered into force 27 January 1980).

that has characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”<sup>192</sup>

This generic definition could help to constrain the notion of investment. In *Cargill Inc v Mexico*,<sup>193</sup> the tribunal included upstream damages suffered by the US investor on US territory in the damages it awarded, seemingly crossing the line between trade and investment disputes.<sup>194</sup> Mexico tried unsuccessfully to have this part of the award set aside by Canadian courts.<sup>195</sup> Disputes involving primarily trade-related aspects of intellectual property are also brought into the realm of ISA, as in the pending case of *Eli Lilly*.<sup>196</sup> Arbitral tribunals have taken different views on the question of whether access to an export market and potential commercial transactions were investments or not, answering “yes” in *Pope & Talbot*<sup>197</sup> and “no” in *Merrill & Ring*.<sup>198</sup> Another issue that surfaced initially in NAFTA is that of the cumulative or mutually exclusive application of trade and investment obligations. Attempts by states to have a dispute excluded from ISA because it constituted a trade dispute all failed, on the basis that in principle the provisions of NAFTA are cumulative.<sup>199</sup> However, since NAFTA article 1112<sup>200</sup> gives primacy to trade chapters over the investment chapter “in the event of any inconsistency,” the possibility remains that a trade obligation might supersede an investment obligation in a specific case.

The related issue of applicability of trade exceptions of an FTA to the investment chapter has also emerged in NAFTA case law. Such exceptions allow a state to justify an otherwise inconsistent measure on the basis that it legitimately pursues a valid non-trade policy goal, such as health or environment protection. While the issue was never put squarely before an arbitral tribunal, contradictory answers were given in *SD Myers* and *Clayton/Bilcon*, the first admitting the possibility of trade exemptions being applicable to investment, but the second rejecting it.<sup>201</sup> Nevertheless, Canada has included trade exceptions directly in all its investment agreements since it issued its Model-FIPA in 2004.<sup>202</sup> The application of these exceptions so far has not been raised in any dispute subjected to ISA and it remains a rather isolated practice in international investment law, unlike the national security exception.<sup>203</sup> One of the problems raised by these exceptions is that they pretend to reduce the scope of self-standing international obligations, such as the minimum standard of treatment of customary international law. Canada has recently modified its approach in CETA, providing trade exceptions only for clauses on national treatment, MFN treatment, performance requirements and right of establishment, but not for FET and expropriation clauses.<sup>204</sup> This new approach reduces the regulatory space of governments, but is probably more consistent with self-standing international obligations of Canada and international practice in investment agreements.

Another issue that has emerged in relation to the scope of application of investment agreements is the impact of the concept of measures “relating to” a foreign investor or its investment that is provided in all Canadian treaties since NAFTA, but not in earlier FIPAs.<sup>205</sup> In *Methanex Corp v United States*,<sup>206</sup> this provision was key in the refusal of the arbitral tribunal to assume jurisdiction over the claim. The tribunal proposed a test to limit access to ISA, requiring that a “legally significant connection” exist

192 *CETA*, *supra* note 31, ch 8, art 8.1 “Definitions”.

193 Award, 18 September 2009, ICSID Case No ARB(AF)/05/2 (Additional Facility) (Arbitrators: Michael C Pyles, pres, David D Caron, Donald M McRae) at paras 154, 519–26, online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0133\\_0.pdf>](http://italaw.com/sites/default/files/case-documents/ita0133_0.pdf) [redacted].

194 See Céline Lévesque, “Digest of International Economic Law in 2009 – Investissement” (2010) 48 *Can YB Intl Law* 291 at 332–34.

195 *United Mexican States v Cargill Inc*, 2010 ONSC 4656 (Ont Sup Ct J), aff’d 2011 ONCA 622, 107 OR (3d) 528, leave to appeal refused 2012 CanLII 25159, 301 OAC 397 (note) (SCC).

196 *Eli Lilly*, Notice, *supra*, note 143.

197 *Pope & Talbot*, Interim Award, *supra* note 118 at para 94.

198 *Merrill & Ring*, Award, *supra* note 129 at para 141.

199 *Pope & Talbot*, Interim Award, *supra* note 118 at paras 25–26; *SD Myers*, Partial Award, *supra* note 52 at paras 292–95. See Charles-Emmanuel Côté, “Looking for Legitimate Claims: Scope of NAFTA Chapter 11 and Limitation of Responsibility of Host State” in Andrew Byrnes, Mika Hayashi & Christopher Michaelson, eds, *International Law in the New Age of Globalization* (Leiden: Martinus Nijhoff, 2013) at 389, 394–98 [Côté, “Scope”].

200 NAFTA, *supra* note 19.

201 *SD Myers*, Partial Award, *supra* note 52 at para 298; *Clayton/Bilcon*, Award, *supra* note 76 at para 721.

202 See Canada, *Model-FIPA*, *supra* note 26, art 18.

203 See, generally, Katia Yannaca-Small, “Essential Security Interests under International Investment Law” in *International Investment Perspectives 2007: Freedom of Investment in a Changing World* (Paris: OECD, 2007) 93.

204 *CETA*, *supra* note 31, ch 8, art 28.3.

205 See NAFTA, *supra* note 19, art 1101(1); Canada, *Model-FIPA*, *supra* note 26, art 2(1); *CETA*, *supra* note 31, art 8.2(1).

206 First Partial Award, 7 August 2002 (UNCITRAL) (Arbitrators: VV Veeder, pres, J William Rowley, Warren Christopher), online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0518.pdf>](http://italaw.com/sites/default/files/case-documents/ita0518.pdf).

between the damages suffered by the foreign investor and the challenged measure.<sup>207</sup> The problem with this interpretation is that it introduces an asymmetry between agreements that include such a clause and those that do not, such as earlier Canadian FIPAs. The *Methanex* doctrine was severely criticized by a non-NAFTA tribunal in *BG Group PLC v Argentina*<sup>208</sup> as being ill-founded and too restrictive. A similar result might have been reached on the basis of general rules of state responsibility and the absence of causal link between the damages suffered and the challenged measure.<sup>209</sup>

An important aspect of Canadian treaty practice in delimiting the scope of application of FIPAs and FTAs is the use of reservations. Article 1132 of NAFTA provides for a special procedure allowing a state to request a binding interpretation on the scope of a reservation to the NAFTA Free Trade Commission.<sup>210</sup> In *United Parcel Service*<sup>211</sup> and *Mobil Investments Canada*,<sup>212</sup> interpretation of reservations was at stake but Canada did not request a binding interpretation. This decision proved to be wrong in *Mobil Investments Canada I*, since Canada lost the case on this issue. The arbitral tribunal could not agree on the proper interpretation to be given to the reservation, and Canada now challenges the award in Canadian courts.<sup>213</sup> It appears that Canada should request binding interpretation at the outset of arbitral proceedings, since its regulatory space is often carefully tailored with reservations.

### ***Exaggerated Fear of Expropriation Clause***

Another lesson to be drawn from the Canadian experience with ISA in terms of substantive law is that the fear of the expropriation clause and especially of indirect expropriation is probably exaggerated. Canada has never lost a case on the basis of indirect expropriation thus far. Arbitral tribunals have gradually imposed a very high threshold for a governmental measure to constitute an indirect expropriation. In *Pope & Talbot*, the tribunal ruled that the words “tantamount to expropriation” did not mean to enlarge the definition of expropriation beyond that of customary international law.<sup>214</sup> In *Chemtura*, the tribunal found that an environmental measure could not be an indirect expropriation if it only affected a small part of the global business of the foreign investor in the host state.<sup>215</sup> In *Merrill & Ring*, the tribunal ruled that the expropriation clause is not an insurance policy guaranteeing best prices for exports and that the simple fact that a business is regulated does not mean that it is expropriated.<sup>216</sup> Finally, in *Methanex*, a case where the respondent state was the United States, the tribunal has also raised the threshold of indirect expropriation very high: “But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.”<sup>217</sup>

These cases echo Canadian treaty practice post-NAFTA. An interpretative provision is now usually included in FIPAs and FTAs, evidence that a general, bona fide, non-discriminatory measure pursuing a valid public policy purpose should normally not constitute an indirect expropriation: “Except in rare circumstances, such as when a measure or a series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-

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207 *Ibid* at para 147.

208 Final Award, 24 December 2007 (Argentina-United Kingdom BIT, UNCITRAL), (Arbitrators: Guillermo Aguilar Alvarez, pres, Albert Jan van den Berg, Alejandro M Garro) at paras 223–33.

209 “Draft Articles on Responsibility of States for Internationally Wrongful Acts”, art 31 [Draft Articles] in “Report of the Commission to the General Assembly on the work of its fifty-third Session”, UN Doc A/56/10 in *Yearbook of the International Law Commission 2001*, vol II, part 2, UNDOC.A/CN.4/SER.A/2001/Add.1 (Part 2) (New York: UN 2007) at 26), online: <[http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_2001\\_v2\\_p2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf)>; Côté, “Scope”, *supra* note 199 at 420–22.

210 NAFTA, *supra* note 19.

211 See *UPS*, Merits, *supra* note 100 and accompanying text.

212 See *Mobil Investments Canada I*, Liability, *supra* note 109 and accompanying text.

213 See text accompanying note 112.

214 *Pope & Talbot*, Interim Award, *supra* note 118 at para 104.

215 *Chemtura*, *supra* note 63 at paras 263–66.

216 *Merrill & Ring*, Award, *supra* note 129 at paras 144–46.

217 *Methanex Corp v United States*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (UNCITRAL) (Arbitrators: VV Veeder, pres, J William F Rowley, W Michael Reisman) part IV, ch D at para 7 [*Methanex*, Final Award], online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0529.pdf>](http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf).

discriminatory measure of a Party that is designed and applied to protect legitimate public welfare objectives, such as health, safety, and the environment, does not constitute indirect expropriation.”<sup>218</sup>

The expropriation clause nevertheless proved to be useful in *AbitibiBowater*,<sup>219</sup> where direct expropriation was at stake, without remedies in Canadian law. The combination of this clause and ISA in this case helped to prevent politicization of the dispute between Canada and the United States, an example of the system working at its best—even between developed democracies. Although *Gallo*<sup>220</sup> was dismissed on a jurisdictional basis, it showed that the expropriation clause could be used by a US investor to challenge the amount of compensation received from governmental authorities following a lawful expropriation. Such challenge would highlight the discriminatory nature of ISA and international investment law, expropriated Canadian investors not having a similar chance to claim more compensation.

### **Relaxed Rule on Attribution of the Conduct of SOEs**

Under customary international law, the conduct of an SOE is directly attributable to the state when it is empowered to exercise elements of governmental authority and it acts in that capacity.<sup>221</sup> The conduct of the SOE is thus considered to be the conduct of the state. *United Parcel Service* has shown that this rule has been altered by NAFTA. The conduct of an SOE is never attributable to the parties in such circumstances. It is replaced by the triggering of an obligation of the parties to take measures to ensure that their SOE acts consistently with the investment chapter. For the conduct of an SOE to give rise to damages, it must have acted in the exercise of governmental authority. But it is only the failure of the party to take appropriate measures that is compensable under NAFTA, not breach of the investment chapter itself. The practice so far indicates that it might not be easy to determine whether an SOE acts in a purely commercial or in a governmental capacity. One may speculate that the identification of appropriate measures will also not be easy. These relaxed rules of attribution are significant for Canada, where major federal or provincial Crown corporations still play a key role in various sectors of the economy.

## **Lessons on Procedural Issues**

### **The Need for Control Mechanisms**

The first lesson on procedural issues to be drawn from the Canadian experience with ISA is that the arbitration process does need various control mechanisms. Basic characteristics of ISA, such as abandonment of the rule of exhaustion of local remedies, unconditional access to arbitration, lack of a permanent forum and of an appeal procedure all militate for mechanisms to control ISA pre- and post-arbitration. When looking at control of access to ISA, *Ethyl* revealed that arbitral tribunals could overlook the failure by the foreign investor to respect jurisdictional conditions of NAFTA.<sup>222</sup> In most subsequent cases, however, tribunals showed more respect for those conditions.<sup>223</sup> Canada has recently introduced an “anti-*Ethyl*” clause that forces arbitral tribunals to not allow claims to proceed when jurisdictional conditions are not met.<sup>224</sup> New provisions also force arbitral tribunals to suspend the proceedings and to rule on preliminary objections against claims manifestly without legal merit or unfounded as a matter of law.<sup>225</sup> Another problem with access to ISA is the unconditional right of foreign investors to notify Canada of their intention to bring a complaint to arbitration.<sup>226</sup> This notice of intent process is unregulated, less than transparent and might be exercised purely to exert undue pressure on governmental or democratic processes. It may also have contributed to unduly alarming civil society on the perils of ISA. CETA replaces notice of intent with a compulsory consultation procedure, which seems to fit better the need of governments to have early warning on potential claims, and help to prevent disputes and to deter frivolous claims in demanding more active participation on the part of

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218 Canada, *Model-FIPA*, *supra* note 26, Annex B.10(c).

219 See *AbitibiBowater*, Consent Award, *supra* note 138.

220 See *Gallo*, Award, *supra* note 71.

221 “Draft Articles”, *supra* note 209, art 5.

222 *Ethyl*, *supra* note 45 at paras 86–88.

223 See, for example, *Detroit International Bridge*, Jurisdiction, *supra* note 105 at paras 318–20, 336; *Apotex Holdings*, *supra* note 157 at para 7.9; *Waste Management, Inc v Mexico*, Arbitral Award, 2 June 2000, ICSID Case No ARB(AF)/98/2 (Additional Facility) (Arbitrators: Bernardo M Cremades, pres, Keith Hightet, Eduardo Siqueiros T) at para 17, online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0892.pdf>](http://italaw.com/sites/default/files/case-documents/ita0892.pdf).

224 See *CETA*, *supra* note 31, ch 8, art 8.22(4).

225 *Ibid* arts 8.32, 8.33.

226 See *NAFTA*, *supra* note 19, art 1119; Canada, *Model-FIPA*, *supra* note 26, art 22(2)(c).

foreign investors.<sup>227</sup> Financial control has also proven to be useful in preventing potentially abusive claims. Arbitration rules usually require at some point a deposit or advance payment from disputing parties for the tribunal to proceed with the case.<sup>228</sup> *Centurion Health Corp* shows one instance in which arbitration came to a full stop due to failure of the US investor to pay the needed deposit.<sup>229</sup> Another useful financial tool to deter abusive claims is allocation of costs against foreign investors, which may reach significant amounts, as in *Methanex*, where the losing Canadian investor was obliged to pay nearly US\$4 million in costs to the United States.<sup>230</sup> Allocation of costs to the US investor was also used in *Ethyl* to sanction non-observance of jurisdictional conditions.<sup>231</sup>

Control mechanisms are also needed to address the problem of divergence between arbitral awards. The Canadian experience shows that in addition to external divergence between different arbitral tribunals, this problem also concerns internal divergence among arbitrators sitting on the same tribunal. Arbitrators may be divided on key issues in a case, as in *SD Myers, Mobil Investments Canada, Clayton/Bilcon* or *Detroit International Bridge*. Such internal divergence may seriously impair the persuasive authority of the award on other tribunals. It may also lessen its authority on the state against which it was issued: Canada has systematically challenged arbitral awards before Canadian courts when it lost and the arbitral tribunal was not unanimous. It remains to be seen whether the loss by Canada of the ability to challenge awards before Canadian courts in ICSID arbitration will make it more difficult to build such a case. The legal basis for annulment of ICSID awards by ad hoc committee seems slightly more limited than for setting aside awards by judicial courts, since no argument of contravention to public order may be made against ICSID awards as opposed to non-ICSID awards.<sup>232</sup> More research would be useful to assess precisely the impact of the ICSID Convention on the ability for governments to successfully set aside awards.

As for external divergence, the problem remains difficult to address absent any appellate review. Such a mechanism runs contrary to the very nature of arbitration, which is supposed to be a confidential, neutral and final alternative to lengthy judicial procedures.<sup>233</sup> However, international practice shows that an orthodox conception of commercial arbitration is inappropriate for ISA, which raises purely public international law disputes. An obvious example in this respect is the WTO dispute settlement mechanism, which introduced an appellate review for reports of ad hoc panels as an essential complement to their quasi-automatic jurisdiction that was introduced with the requirement of a consensus of WTO members to refuse the establishment of a panel and the adoption of panel and Appellate Body reports.<sup>234</sup> The idea of introducing appellate review of arbitral awards is regularly put forward — by authors, states and even by ICSID — but serious work on the issue had not really started until very recently.<sup>235</sup> CETA introduces two major innovations in ISA, reminiscent of the WTO dispute settlement mechanism: it establishes a standing tribunal and a standing appellate tribunal, the members of which are appointed solely by Canada and the European Union — not by investors.<sup>236</sup> The key difference between annulment and appellate review is the power of the appellate tribunal to rectify simple errors of law. In addition, another laudable attempt is made in CETA to address the issue of

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227 CETA, *supra* note 31, arts 8.19, 8.22(1)(d).

228 See UNCITRAL Arbitration Rules (with new Article 1, paragraph 4, as adopted in 2013). UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (New York: UN, 2014), Arbitration Rules, art 43, online: <[www.uncitral.org/pdf/english/texts/arbitration/arbitration-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/arbitration-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf)>; ICSID, *Administrative and Financial Regulations*, in ICSID Convention, Regulations and Rules (Washington, DC: ICSID, 2006) 51, Regulation 14(3), online: <[https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)>.

229 *Centurion Health*, *supra* note 104.

230 *Methanex*, Final Award, *supra* note 217, Part 4 at para 13.

231 *Ethyl*, *supra* note 45 at para 88.

232 ICSID Convention, *supra* note 7, art 52; UNCITRAL Model Law on International Arbitration (1985) with amendments as adopted in 2006 (Vienna: UN, 2008) art 34. See Armand de Mestral, “L’annulation des sentences arbitrales ‘investisseur-État’ en vertu de la Loi-type au Canada et du régime CIRDI” in Frédéric Bachand & Fabien Gélinas, eds, *D’une réforme à une autre. Regards croisés sur l’arbitrage au Québec* (Cowansville, Que: Yvon Blais, 2013) 189.

233 See René David, *L’arbitrage dans le commerce international* (Paris: Economica, 1982) at 16–32.

234 “Understanding on Rules and Procedures Governing the Settlement of Disputes”, art 17, in *Marrakesh Agreement*, Annex 2, *supra* note 148; Côté, *Personnes privées*, *supra* note 22 at 71.

235 See United States, 2012 US Model Bilateral Investment Treaty, art 28(10), online: State Department <[www.state.gov/documents/organization/188371.pdf](http://www.state.gov/documents/organization/188371.pdf)>; ICSID, *Possible Improvements of the Framework for ICSID Arbitration*. ICSID Secretariat Discussion Paper (22 October 2004) at Annex on “Possible Features of an ICSID Appeals Facility”, online: ICSID <<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>>. See also Joachim Karl, “An Appellate Body for International Investment Disputes: How Appealing is it?”, *Columbia FDI Perspectives*, No 147 (11 May 2015); Anna Joubin-Bret, “Why We Need a Global Appellate Mechanism for International Investment Law”, *Columbia FDI Perspectives*, No 146 (27 April 2015).

236 CETA, *supra* note 31, ch 8, art 8.27, 8.28.

external divergence, in enjoining arbitral tribunals to stay their proceedings when similar proceedings are pending pursuant to another investment agreement, or at least to take them into account.<sup>237</sup> The introduction of appellate review in CETA raises many legal issues, notably that of its consistency with the ICSID Convention. It represents, nevertheless, a step in the right direction.

The best mechanism currently available to address the issue of internal or external divergence of awards is adoption of binding interpretation by the parties to the investment agreement. It was used successfully by the NAFTA Free Trade Commission with the Notes of Interpretation to clarify the scope of FET in NAFTA.<sup>238</sup> Similar binding interpretations were adopted by the Canada-Chile Free Trade Commission.<sup>239</sup> Arbitral tribunals have generally agreed to apply the Notes of Interpretation, if not always gracefully: see, for example, *Pope & Talbot*, where the tribunal openly questioned the lawfulness of their adoption; or *SD Myers*, where the Notes were simply ignored.<sup>240</sup> Some questions remain open regarding the legal effects of such binding interpretation: what is their effect on arbitration pending when they are adopted? What is their effect on past arbitration? Could not a state legitimately refuse to execute an award rendered in contravention of the newly established interpretation? What is the difference between interpretation and modification of the treaty? Who should assess the lawfulness of the use of binding arbitration? The arbitral tribunal in *ADF Group Inc v United States*<sup>241</sup> convincingly addressed some of these issues: “A principal difficulty with the Investor’s submission is that such a theory of implied or incidental authority, fairly promptly, will tend to degrade and set at naught the binding and overriding character of FTC interpretations. Such a theory also overlooks the systemic need not only for a mechanism correcting what the Parties themselves become convinced are interpretative errors but also for consistency and continuity of interpretation, which multiple ad hoc arbitral tribunals are not well suited to achieve and maintain.”<sup>242</sup>

The Canadian experience shows that power to adopt binding interpretation, despite its limitations, is a useful — if not an essential — tool for ISA. It should be part of all investment agreements between developed democracies.

### ***The Limits of Privatization of Investment Dispute Settlement***

The idea that ISA should be limited to real “private” claims does not flow from Canadian experience. Indeed, no fundamentally “polycentrical” disputes,<sup>243</sup> i.e., disputes that would involve a complex nexus of private and public interests, were submitted to ISA against Canada. However, it stems from Canadian treaty practice that there must be limits to privatization of investment dispute settlement. How exactly these limits should be placed is no easy task.

An interesting feature of all Canadian FIPAs and FTAs since NAFTA is the inclusion of a mechanism to request consolidation of similar complaints before a special tribunal, in order to avoid multiplication of cases raising the same questions of law or facts.<sup>244</sup> This consolidation clause is a departure from purely private dispute settlement, since the foreign investor or (most likely) the respondent state may force different disputing parties (most likely foreign investors) to join together. The consolidation tribunal, if it accepts jurisdiction over the claims, trumps previously established tribunals in each individual claim. The consolidation clause may also act as a control mechanism to avoid external divergence between arbitral awards. It has never been invoked by Canada, but has been invoked once by the United

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237 *Ibid* at ch 8, art 8.24.

238 See text accompanying note 60.

239 Canada-Chile Free Trade Commission, *Notes of Interpretation of Certain Chapter G Provisions* (31 October 2002), online: GAC <[www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/ccftacommission.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/ccftacommission.aspx?lang=eng)>; Canada-Chile Free Trade Commission, *Interpretation of Article G-10* (5 April 2010), online: GAC <[www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/interpretation-indirect.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/interpretation-indirect.aspx?lang=eng)>.

240 *Pope & Talbot*, Damages, *supra* note 127 at paras 58–66; *SD Myers*, Second Partial Award, *supra* note 61. See, for example, *Clayton/Bilcon*, Award, *supra* note 76 at paras 429–30; *Mondev International Limited v United States*, Award, 11 October 2002, ICSID Case No ARB(AF)/99/2 (Arbitrators: Ninian Stephen, pres, James Crawford, Stephen M Schwebel) at para 125, online: [italaw <www.italaw.com/sites/default/files/case-documents/ita1076.pdf>](http://italaw.com/sites/default/files/case-documents/ita1076.pdf).

241 Award, 9 January 2003, ICSID Case No ARB(AF)/00/1 (Additional Facility) (Arbitrators: Florentino P Feliciano, pres, Armand de Mestral, Carolyn B Lamm). It is interesting to note that the president of the arbitral tribunal, Florentino Feliciano, is a former member and chairman of the appellate body of the WTO.

242 *Ibid* at para 177.

243 See Lon L Fuller, “The Forms and Limits of Adjudication” (1978) 92:2 Harv L Rev 353 at 393–95.

244 See *NAFTA*, *supra* note 19, art 1126; Canada, *Model-FIPA*, *supra* note 26, art 28; *CETA*, *supra* note 31, art 8.43. Informal consolidation of claims may also be voluntarily agreed to by disputing parties, without reference to the consolidation clause. See *The Canadian Cattlemen for Fair Trade v United States*, Award on Jurisdiction, 28 January 2008 (UNCITRAL) (Arbitrators: Karl-Heinz Böckstiegel, pres, James Bacchus, Lucinda A Low) at para 6, online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0114.pdf>](http://italaw.com/sites/default/files/case-documents/ita0114.pdf).

States<sup>245</sup> (successfully) and once by Mexico<sup>246</sup> (unsuccessfully). Consolidation of claims challenges some traditional rules of arbitration, such as confidentiality of proceedings and consent of disputing parties.

So far, Canada has not been involved in complex or massive claims or in claims of a highly political nature. The objective of ISA to depoliticize investment dispute settlement may not be sustainable in such disputes. “Re-politicization” of settlement of these investment disputes could be a better solution. SSA is already available in all investment agreements.<sup>247</sup> It has so far been used very rarely in international investment law. In *Italy v Cuba*,<sup>248</sup> claims in the name of Italy and in the name of Italian nationals were intertwined. Significantly, the majority of the tribunal found that the rule of exhaustion of local remedies remains applicable in SSA for claims of private persons espoused by their state of nationality.<sup>249</sup> Given the scarcity of cases in this area, the interplay between SSA and ISA continues to raise legal issues.<sup>250</sup> Diplomatic negotiation may also allow more effective settlement of complex, massive or highly political claims, in the form of a lump sum agreement. One advantage of diplomatic settlement would be to avoid issuance of unenforceable awards and secure payment of damages. One should not forget the practical limit put on ISA by public international law and immunities on property of a state.<sup>251</sup> Execution of an award may be difficult and could, in the end, trigger SSA, as foreseen by many investment agreements.<sup>252</sup> The massive and unprecedented claims brought against Argentina in relation to the financial crisis it went through in the early 2000s is a prime example of the limits of privatization of investment dispute settlement. Sovereign debt and monetary crisis, added to claims by remote foreign investors, led to issuance of unenforceable awards and undermined the legitimacy of ISA.<sup>253</sup> The recent trend in Canadian treaty practice is to exclude sovereign debt disputes from the realm of ISA.<sup>254</sup> Similarly, the sheer scale of damages awarded in the Yukos trilogy raises questions about the limits of privatization of investment dispute settlement.<sup>255</sup> Should damages that can be claimed in ISA remain unlimited? Or are investment disputes becoming in essence politicized beyond a certain amount, surpassing the annual budget of some sovereign states, or the costs of organizing the Olympic Games? Could not a monetary cap be applied to ISA, beyond which SSA would be the only remedy available? Apart from the jurisdictional questions already discussed in relation to the Yukos cases, was this dispute not first and foremost an internal Russian political dispute? The logic of ISA would entail that the United Kingdom or Cyprus will want to initiate SSA or impose counter-measures against Russia if it persists in refusing to enforce the awards. How realistic is this scenario when the real interests at stake are those of Russians against Russia?

Another interesting facet of re-politicization of investment dispute settlement is the exclusion of some disputes from ISA in Canadian treaty practice. The pre-investment phase seems particularly susceptible to re-politicization. Canada systematically shields from both ISA and SSA all decisions of

<sup>245</sup> *Canfor Corp v United States; Tembec v United States; Terminal Forest Products Ltd v United States*, Order of the Consolidation Tribunal, 7 September 2005 (UNCITRAL, 1976) (Arbitrators: Albert Jan van den Berg, pres, Armand LC de Mestral, Davis R Robinson), online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0115.pdf>](http://italaw.com/sites/default/files/case-documents/ita0115.pdf).

<sup>246</sup> *Corn Products International, Inc v Mexico; Archer Daniels Midland Company v Mexico*, Order of the Consolidation Tribunal, 20 May 2005 (UNCITRAL) (Arbitrators: Bernardo M Cremades, pres, Arthur W Rovine, Eduardo Siqueiros), online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0242.pdf>](http://italaw.com/sites/default/files/case-documents/ita0242.pdf).

<sup>247</sup> See *NAFTA*, *supra* note 19, art 2008; Canada, *Model-FIPA*, *supra* note 26, art 38; *CETA*, *supra* note 31, ch 29.

<sup>248</sup> Final Award, 1 January 2008 (Cuba-Italy BIT) (Arbitrators: Yves Derains, pres, Attila Tanzi, Naciso Cobo-Roura) (in French), online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0435\\_0.pdf>](http://italaw.com/sites/default/files/case-documents/ita0435_0.pdf). See also *Ecuador v United States*, Award, 29 September 2012 (Ecuador-US BIT) [unpublished]. Another case involving Peru against Chile has been brought on the basis of the Chile-Peru BIT in 2003, but was not pursued by Peru after the issue at stake became moot. See Anthea Roberts, “State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority” (2014) 55:1 Harv Int'l LJ 1 at 8.

<sup>249</sup> *Italy v Cuba*, Preliminary Award, 15 March 2005, PCA Case No. 2012-5 (Cuba-Italy BIT) (Arbitrators: Yves Derains, pres, Attila Tanzi, Olga Miranda Bravo) (in French) at paras 86–91, online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0434\\_0.pdf>](http://italaw.com/sites/default/files/case-documents/ita0434_0.pdf).

<sup>250</sup> See Côté, *Personnes privées*, *supra* note 22 at 257–60.

<sup>251</sup> See *United Nations Convention on Jurisdictional Immunities of States and their Property*, 2 December 2004, arts 18–21 in GA Res 59/38, Annex, UNGAOR, 59th sess, Supp No 49, UN Doc A/59/49 (not entered into force), online: [italaw <https://treaties.un.org/doc/source/RecentTexts/English\\_3\\_13.pdf>](https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf); ICSID Convention, *supra* note 7, art 55.

<sup>252</sup> See *NAFTA*, *supra* note 19, art 1136(5); ICSID Convention, *supra* note 7, art 27; *CETA*, *supra* note 31, ch 8, art 8.42.

<sup>253</sup> See, for example, *Abaclat v Argentina*, Decision on Jurisdiction and Admissibility, 4 August 2011, ICSID Case No ARB/07/5 (Argentina-Italy BIT) (Arbitrators: Pierre Tercier, pres, Georges Abi-Saab, Albert Jan van den Berg), online: [italaw <www.italaw.com/sites/default/files/case-documents/ita0236.pdf>](http://italaw.com/sites/default/files/case-documents/ita0236.pdf); *Abaclat v Argentina*, Dissenting Opinion, Georges Abi-Saab, 4 August 2011, ICSID Case No ARB/07/5 (Argentina-Italy BIT), online: [italaw <www.italaw.com/sites/default/files/case-documents/italaw4085.pdf>](http://italaw.com/sites/default/files/case-documents/italaw4085.pdf); Paolo Di Rosa, “The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues” (2004–2005) 38 U Miami Inter-Am L Rev 41.

<sup>254</sup> *CETA*, *supra* note 31, Annex 8-B, “Public Debt”; Canada, *Model-FIPA*, *supra* note 26, art 18(3). See Elizabeth L Broomfield, “Reconciling IMF Rules and International Investment Agreements: An Innovative Derogation for Capital Controls”, *Columbia FDI Perspectives*, No 78 (10 September 2012).

<sup>255</sup> See text accompanying note 182.

Investment Canada with respect to acquisition of Canadian enterprises by foreign investors.<sup>256</sup> A new, similar approach is applied to the pre-investment phase in CETA, meaning that violation of the rights of admission and establishment, national treatment clause, MFN clause or performance requirements clause at this stage may not be submitted to ISA, but only to SSA.<sup>257</sup> Application of this exclusion will force arbitral tribunals to refine the respective legal scope of pre- and post-investment stages.

### **Clarifying the Role of Provinces?**

Claims against provincial measures have not been a problematic issue so far for Canada. However, with five pending claims amounting to more than US\$1.7 billion in damages, the need to clarify the role of provinces might soon be felt. Allocation of damages and costs to provinces was put on the table by Prime Minister Stephen Harper himself in the context of *AbitibiBowater*.<sup>258</sup> Management of cases involving provincial measures might also need to be formalized by an intergovernmental agreement, as was done for the United Nations Human Rights Committee or NAFTA side agreements on labour or environmental protection.<sup>259</sup> Recent adoption of a regulation on similar issues by the European Union in relation to its member states might serve as an inspiration for Canada on that matter.<sup>260</sup> Naturally, comparison with the European Union has its limits, since Canadian provinces are not sovereign states and there is no problem of multiple responsibility at international law for Canada in this respect.

### **Need for Institutionalization of ISA?**

A last lesson to be drawn from Canadian experience with ISA is that the process is perhaps ripe for institutionalization. A certain “de-arbitralization” and judicialization of ISA is noticeable in Canadian treaty practice. Canada has been a proponent of publicity and transparency of ISA, as well as of the power of arbitral tribunals to accept *amici curiae* briefs.<sup>261</sup> One remaining problem is the lack of a unique institution that gathers information on ISA, even for Canada. The United Nations Conference on Trade and Development (UNCTAD) does a splendid job at monitoring international investment agreements, but it does not deal specifically with ISA.<sup>262</sup> There are competing public and private international organizations keeping records of arbitration instituted under their rules, such as ICSID, UNCITRAL, the Permanent Court of Arbitration and the International Chamber of Commerce. It is surprising that the most unified and complete sources on ISA are private websites and databases. For instance, the Government of Canada does not keep a public record of arbitrations initiated by Canadian investors on the basis of Canadian FIPAs or FTAs. A public international organization officially entrusted with keeping complete records of all ISA arbitrations could be a first pragmatic institutional step preceding a move to instituting appellate review of arbitral awards. ICSID would appear to be a natural choice for this task. Developed democracies should play an important role in this institutionalization of ISA, which might, in the end, enhance its legitimacy.

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256 See *NAFTA*, *supra* note 19, Annex 1138(2); Canada, *Model-FIPA*, *supra* note 26, art 41; *CETA*, *supra* note 31, Annex 8-C.

257 *CETA*, *supra* note 31, ch 8, art 8.18.

258 See Bertrand Marotte & John Ibbitson, “Provinces on Hook in Future Trade Disputes: Harper,” *The Globe and Mail* (26 August 2010), online: <[www.theglobeandmail.com/report-on-business/provinces-on-hook-in-future-trade-disputes-harper/article1378647/](http://www.theglobeandmail.com/report-on-business/provinces-on-hook-in-future-trade-disputes-harper/article1378647/)>.

259 *Canadian Intergovernmental Agreement on North American Agreement on Labour Cooperation*, 10 February 1997, online: Labour Program <[www.labour.gc.ca/eng/relations/prov\\_terr/naalc.shtml](http://www.labour.gc.ca/eng/relations/prov_terr/naalc.shtml)>; *Accord intergouvernemental canadien concernant l'Accord nord-américain de coopération dans le domaine de l'environnement entre le gouvernement du Québec et le gouvernement du Canada*, 2 December 1996, online: SAIC <[www.saic.gouv.qc.ca/affaires-intergouvernementales/ententes-intergouvernementales/index.asp](http://www.saic.gouv.qc.ca/affaires-intergouvernementales/ententes-intergouvernementales/index.asp)>; *Entente Canada-Québec par échange de lettres concernant les modalités et le mécanisme de participation du Québec à la mise en œuvre du Pacte international relatif aux droits civils et politiques et du Protocole facultatif concernant les droits civils et politiques*, 18 May 1976, online: SAIC <[www.saic.gouv.qc.ca/affaires-intergouvernementales/ententes-intergouvernementales/index.asp](http://www.saic.gouv.qc.ca/affaires-intergouvernementales/ententes-intergouvernementales/index.asp)>. See Réal Forest, “Quelques aspects de la mise en oeuvre au Canada des pactes de l’ONU relatifs aux droits de l’homme” (1981) 12 RGD 375.

260 EC, *Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party*, [2014] OJ, L 257/121, online: <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=uriserv:OJL\\_2014\\_257\\_01\\_0121\\_01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=uriserv:OJL_2014_257_01_0121_01.ENG)>.

261 See Canada, *Model-FIPA*, *supra* note 26, art 31-32; *CETA*, *supra* note 31, ch 8, art 8.36; NAFTA Free Trade Commission, *Statement of the Free Trade Commission on Non-Disputing Party Participation* (7 October 2003), online: GAC <[www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf)>; NAFTA Free Trade Commission, *Joint Statement* (16 July 2004), online: GAC <[www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/JointStatement.aspx?lang=en](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/JointStatement.aspx?lang=en)>; Canada, *Settlement of Disputes between a Party and an Investor of Another Party* (7 October 2003), online: GAC <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta-transparency-alena-transparence.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta-transparency-alena-transparence.aspx?lang=eng)>; J Anthony VanDuzer, “Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation” (2007) 52:4 McGill LJ 681.

262 UNCTAD, “Investment Policy Hub”, online: <<http://investmentpolicyhub.unctad.org/IIA>>.

## CONCLUSION

As the host state that has, thus far, faced the highest number of investment claims, the experience of Canada should not be missed in the debate over the adequacy of ISA between developed democracies. A close look at all the cases brought under NAFTA by US investors shows that the outcome is <sup>3</sup>not as negative as might be expected. The main areas of concern are the interpretation and application of the MFN and FET clauses, as well as the lack of adequate control mechanisms to address internal and external divergences between awards. The role of provinces in ISA has not been problematic so far, but the need for an intergovernmental understanding dealing with the issue is likely to become more pressing over time. Canada is constantly adapting its treaty practice to the evolution of case law and the challenges of ISA. CETA represents an important step forward in this regard, especially with the introduction of a standing tribunal and of an appellate review process. With CETA, Canada remains at the forefront of innovation in international investment law.

Discrimination between foreign and national investors remains a common feature of ISA on both substantive and procedural planes. While the issue has not yet emerged in the debate over ISA, it will likely do so sooner than later. How long will the current system continue to offer stronger protection to foreign investors? Why should a US or EU investor have better international legal protection in Canada than a Canadian investor such as Strateco Resources? Introduction of ISA between developed democracies could bring this fundamental question into focus. It remains to be seen whether the answer will be that ISA is not needed between developed democracies or, on the contrary, that ISA should also be available to national investors against their own state. The analogy with the evolution of the international law of human rights may be instructive in this matter.<sup>263</sup>

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263 See, generally, Monica Pinto, “De la protection diplomatique à la protection des droits de l’homme” (2002) 106 RGDIP 513. While initially interested in protecting aliens against abuses of the state, international law after World War II abolished the distinction between aliens and nationals in order to protect fundamental rights of all human beings against those abuses — especially by their own state of nationality.

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