Influences on the Canadian FIPA Model
and the US Model BIT:
NAFTA Chapter 11 and Beyond

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INTRODUCTION

In 2004, Canada and the United States made public their model bilateral investment treaties (BITs). It was the first time that Canada publicized its template for the negotiation of foreign investment protection and promotion agreements (FIPAs).¹ For the United States, it was a revision to the 1994 model BIT.² Both models cover the standard provisions that are found in BITs, including definitions, scope, national treatment, most-favoured-nation treatment, minimum standard of treatment, expropriation, performance requirements, transfer of funds, exceptions, investor-state arbitration as well as state-state dispute settlement procedures.³ They also cover some new ground. The models also have in common their length and complexity.⁴

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⁴ The Canadian FIPA Model, supra note 1, contains five sections, fifty-two articles (including seven footnotes) and five annexes, for a total of forty-nine pages. The
Generally speaking, this article is interested in exploring influences on the model BITs. The most direct influence on the Canadian and US models is Chapter 11 (Investment) of the North American Free Trade Agreement (NAFTA) — not only the text but also the experience with cases under the chapter. In a number of instances, provisions are identical or present only minor change from Chapter 11. Other provisions include specific answers to the discrete problems that have been raised in Chapter 11 cases. In addition, there are more important changes, which typically concern

US Model BIT, supra note 2, contains three sections, thirty-seven articles (including eighteen footnotes) and four annexes, for a total of forty pages. The models analyzed in this article are those as of 2004, unless specified.

5 North American Free Trade Agreement, 17 December 1992, Can. T.S. 1994 No. 2, § 2 I.L.M. 250 (entered into force 1 January 1994) [NAFTA]. According to DFAT, "[1]n 2005, Canada updated its FIPA model to reflect, and incorporate the results of, its growing experience with the implementation and operation of the investment chapter of the NAFTA. The principal objectives of this exercise were: to enhance clarity in the substantive obligations; to maximize openness and transparency in the dispute settlement process; and to discipline and improve efficiency in the dispute settlement procedures. Canada also sought to enhance transparency in the listing of reservations and exceptions from the substantive disciplines of the Agreement." See <http://www.dfait-maeci.gc.ca/tna-nac/fipa-en.asp>. See also M. Rinnear and B. Hansen, "The Influence of NAFTA Chapter 11 in the BITs Landscape" (2005) 19 J. Int’l L. & Pol’y 101 at 115. In addition, a number of provisions find their source in other NAFTA chapters, for example, Chapter 2 (General Definitions), Chapter 15 (Competition Policy, Monopolies, and State Enterprises), Chapter 18 (Publication, Notification, and Administrative Laws), and Chapter 21 (Exceptions).


6 For example, Canadian FIPA Model, supra note 1 at Articles 41-45, which mirror Articles 1132-36 of NAFTA, supra note 5.

7 For example, Canadian FIPA Model, supra note 1 at Article 261(5), which provides that failure by a disputing investor to meet the conditions precedent to submission of a claim to arbitration nullifies the consent given by the state. Contradictory decisions were rendered on this issue in Ethyl Corp. v. Government of Canada, Award on Jurisdiction, UNCITRAL (24 June 1998) [Ethyl]; and Waste Management Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2 (ICSID Add. Fac.) (2 June 2000) [Waste Management]. See also C. Lévesque, "Investor-State Arbitration under NAFTA Chapter 11: What Lies beneath Jurisdictional Challenges" (2002) 17 ICSID Rev.-FILJ 320.

issues that have raised controversies under NAFTA. The focus in this article is on these changes. However, even though many of these problems have come to light in the context of NAFTA Chapter 11 cases, the solutions to these problems are found in a number of places. Thus, this article will explore the influence on the model FIPA and BIT of (1) the NAFTA Free Trade Commission’s (FTC) interpretation and statements; (2) the World Trade Organization’s (WTO) law and cases; and (3) US domestic law and principles.

The Canadian and US models were developed at a time of tremendous evolution in international investment law. Globally, over 2,000 BITs had been signed, and the number of disputes under BITs had literally exploded in previous years. In North America, NAFTA Chapter 11 had provided over five years of experience with awards and many ongoing cases. Both Canada and the United States had been on the receiving end of many claims, most of them made by American investors in Canada and by Canadian investors in the United States.

In Canada, the FIPA model was developed after a hiatus of several years. In comparison to other G-8 countries, Canada joined the trend late (the first FIPA dates back to 1989) and has signed few agreements (twenty-two are currently in force). Only one award

A number of websites provide online access to awards of investment arbitration tribunals, including the International Center for Settlement of Investment Disputes (ICSID), <http://www.worldbank.org/icsid/cases/cases.htm>; A. Newcombe, <http://ita.law.uvic.ca/>; and T. Grierson-Weiler and I. Laird, <http://investmentclaims.com/>. For NAFTA Chapter 11 cases, the best sources are the member government websites, which are listed in note 9, as well as T. Grierson-Weiler, <http://www.investmentclaims.com/>.


made public thus far has been rendered under a FIPA.11 The publication of the model in 2004 signaled a renewed interest in the program. Negotiations were entered into, or renewed, with China, India, and Peru.12 Canada and Peru signed the first FIPA negotiated under the model in November of 2006.13 Other negotiations are underway with Jordan, and exploratory discussions are being held with Indonesia, Vietnam, and Kuwait.14

In the United States, the model was also drafted after a "stock taking" period of several years, during which time no BITs were signed, and it followed the adoption of the 2002 Bipartisan Trade Promotion Authority Act (TPA).15 The negotiating objectives concerning investment contained in this legislation include the so-called "no greater rights" mandate.16 The TPA states:

Recognizing that United States law on the whole provides a high level of protection for investment, consistent with or greater than the level required by international law, the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice."17


Ironically, this mandate is reminiscent of the Calvo doctrine to which the United States was fervently opposed in the late nineteenth and early twentieth centuries. This doctrine, stands, among others, for the principle that "aliens are not entitled to rights and privileges not accorded to nationals, and that therefore they may seek redress for grievances only before the local authorities." See D.R. Sheen, The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy (Minneapolis: University of Minnesota Press, 1955) at 19. See J.E. Alvarez, who refers to the "Calvo-like" concerns expressed by the US Congress in J.E. Alvarez, "The Emerging Foreign Direct Investment Regime" (2005) 99 Am. Soc'y Int'l L. Proc. 94 at 96; and Kinnear and Hansen, who refer to the fact that "the political climate was shifting towards a U.S-style Calvo doctrine," in Kinnear and Hansen, supra note 5 at 108.

11 EnCan Corporation v. Republic of Ecuador, LCIA Case UN3481, UNCITRAL (3 February 2008). In this case, the tribunal determined that it only had jurisdiction to rule on the expropriatory nature of the taxation measure in question. The majority of the tribunal rejected the Canadian corporation's claim. Other cases under Canadian FIPAs are underway.


13 See Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments, 14 November 2006, <http://www.dfait-maeci.gc.ca/tna-nac/documents/Canada-Peru_en06-en.pdf> [Canada-Peru FIPA]. This agreement generally follows the Canadian FIPA model. However, negotiations have led to the inclusion of provisions relating to "legal stability agreements" and some clarifications, for example, on the temporal scope of application of the FIPA and on the meaning of "public purpose" in the expropriation provision. Some new language appears on taxation matters and submission of a claim to arbitration. One notable addition is Annex B.4, which clarifies that dispute resolution procedures are excluded from the application of the most-favoured-nation (MFN) provision of the FIPA. This is a response to the line of cases following Emilio Augustin Mogesini v. Kingdom of Spain, infra note 137.


15 Bipartisan Trade Promotion Authority Act, 2002, Pub.L. 107-210 (107th Cong., 2nd Sess.), Division B, Title XXI, Sec. 2101 and ff. [TPA]. The TPA was formerly


signed several free trade agreements (FTAs) containing investment chapters.19

Within this context and drawing from the experience with NAFTA Chapter 11 cases, this article identifies, for each of the three sources of influence, one substantive and one procedural example that particularly demonstrates these influences. In some cases, an influence has affected the US model but not the Canadian model, and vice versa. Areas of convergence as well as divergence are highlighted. The article raises a number of questions of interpretation and systemic issues that relate to these developments.

The first part of this article analyzes the impact on the model treaties of the NAFTA FTC’s interpretation and statements. It considers, first, the influence on the minimum standard of treatment obligation and, second, on confidentiality and transparency. The second part explores the impact of WTO law and cases on the models, beginning first with the influence on the national treatment and general exceptions provisions and then following this discussion with a consideration of the possibility of an appellate mechanism. The third part of the article studies the impact of US domestic law and principles on the US model BIT and even on the Canadian FIPA model. It considers the influence on the provisions relating to indirect expropriation and then covers objections to jurisdiction and admissibility.

Influence of the NAFTA FTC’s Interpretation and Statements

Under NAFTA Chapter 11, “[a]n interpretation by the [Free Trade] Commission of a provision of this agreement shall be binding on a Tribunal established under this Section.”20 The instances in which the FTC has made use of this authority have had a marked influence on the model treaties, most notably on the definition of the minimum standard of treatment and on the confidentiality and transparency of the arbitral proceedings.

20 See United States Trade Representative (USTR), <http://www.ustr.gov/Trade_Agreements/Section_Index.html>

21 See NAFTA, supra note 5 at Article 1105(1). The Free Trade Commission (FTC) is composed of cabinet-level representatives of the NAFTA parties (Article 2001).

MINIMUM STANDARD OF TREATMENT

In the context of NAFTA Chapter 11, the minimum standard of treatment provision has been a treasure trove of arguments for investors. All of the cases that have led to a final award thus far have included a claim of violation of this provision.21 Article 1105 (Minimum Standard of Treatment) states: “1. Each Party shall accord to investments of investors of another Party in accordance with international law, including fair and equitable treatment and full protection and security.” Issues of content and threshold of application came to the fore early, and, at times, the debates have taken unexpected turns. For example, did the reference to “international law” in Article 1105 encompass all sources of international law as provided for in Article 98 of the Statute of the International Court of Justice (ICJ)? Was the word “including” used in an additive sense? Would a violation of another provision of Chapter 11 also constitute a violation of Article 1105?22

Apparently dissatisfied with the findings of the tribunals, the NAFTA parties issued an interpretation of the minimum standard of treatment provision in July 2001.23 It states:

Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of another Party.


23 See, for example, Pope & Talbot Inc v. The Government of Canada, Award on the Merits of Phase 2, UNCITRAL (10 April 2001), at paras. 105–11 [Pope and Talbot, Phase 2]; and S.D. Myers Inc v. Government of Canada, Partial Award, UNCITRAL (15 November 2000), at paras 264–68 [S.D. Myers, Partial Award]. See also Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1 (ICSID Add. Fac.) (30 August 2000) [Metalclad]. For a description of the tribunals’ holdings, see Kinnear, Bjorklund and Hannaford, supra note 5 at 1105:8–28.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

Following this interpretation, tribunals still had to determine on a case-by-case basis the content and threshold of application of the "customary international law minimum standard of treatment of aliens." In this context, they generally recognized the high threshold that is applicable while affirming the evolutionary nature of the standard. 24 A level of uncertainty, therefore, unavoidably remains. 25 In 2004, a tribunal attempted a synthesis, but the suggested standard is sufficiently general to permit a great deal of flexibility in its application.26

24 Much of the debate centred on the Neer standard, established by the Mexico-United States mixed Claims Commission in the 1920s, which set a high threshold for protection. The decision concerned the physical security of aliens in this case, Mr. Neer a US citizen who had been killed in Mexico. See L.F.H. Neer and Paula Neer (USA) v. United Mexican States, General Claims Commission, 4 R.I.A.A. 60 (1926) (15 October 1926). On the evolutionary nature of the standard and rejection of the Neer standard as a benchmark, see ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1 (ICSID Add. Fac.) (9 January 2003), at paras. 179–181 (ADF); and Mondex International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2 (ICSID Add. Fac.) (11 October 2002) at paras. 114–115 (Mondex). For a more recent award, see also International Thunderbird Gaming Corporation v. The United Mexican States, Arbitral Award, UNCITRAL (26 January 2006), at paras. 192–201 (Thunderbird).

25 See Kinneir, Bjorklund and Hannaford, supra note 5 at 1105:28–43.

26 See Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, [ICSID Add. Fac.] (30 April 2004) [Waste Management II]: "The search here is for the Article 1105 standard of review, and it is not necessary to consider the specific results reached in the cases discussed above. But as this survey shows, despite certain differences of emphasis, a general standard for Article 1105 is emerging. Taken together, the S.D. Meyers, Mondex, ADF, and Loren cases suggest the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety — as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant" (at para. 98).

Both Canada and the United States have incorporated the substance of the FTC interpretation in their model treaties. The United States, however, has gone further by providing more guidance with respect to the content and interpretation of the standard. More generally, changes in the wording of the standard over time, as compared to previous FIPAs and BITs, have raised a number of interpretation issues. Article 5 of the US model BIT, after providing for the essence of the standard in line with the FTC interpretation, states "for greater certainty" that the obligation to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law [emphasis added].

Annex A entitled "Customary International Law" further provides that

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex A [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 ... the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens" [emphasis added].

First, it should be noted that the reference to due process is in line with the TPA mandate: "[S]earching to establish standards for fair and equitable treatment consistent with United States legal principles and practice, including the principle of due process." 28 However, a will to maintain the international law frame of reference is also noticeable. If the clarifying language of Article 5 appears to
favour procedural due process guarantees, the same cannot be said of the last sentence of the annex, which reduces the “certainty.” Second, the introduction in the annex of a (first-year text book) definition of customary international law probably aims to rid the awards of idiosyncratic decisions and demand more rigour from the tribunals. In the end, this ambivalent provision, with its clarifying language and interpretative annex, reflects the process by which it was attained — inter-departmental negotiations, fed by consultations with environmental and labour groups as well as companies.

Contrary to what has happened with respect to the expropriation provision, which is discussed later in this article, Canada did not follow the clarification path of the United States. Since both models provide at their core for the application of the “customary international law minimum standard of treatment of aliens” (consistent with the FTC interpretation), it will be interesting to see whether parallels are drawn between the two.

Also of interest is the impact of changes in the wording over time between different FIPAs (or BITs). Most FIPAs signed by Canada include a provision for the protection of investments, which stipulates that “[e]ach Contracting Party shall accord investments or returns of investors of the other Contracting Party (a) fair and equitable treatment in accordance with the principles of international law, and (b) full protection and security.” Others present a close variation of this provision, where both “fair and equitable treatment” and “full protection and security” are subjected to the principles of international law. In another twist, one FIPA refers both to international and national legislation, providing for the precedence of the former in case of conflict. In yet another version, the protection standard appears without any reference to international law.

It is common for parties to a dispute to compare and contrast treaty language in their arguments. In the last example, a very strong case could be made by an investor that the standard adopted is an autonomous treaty standard, devoid of the high threshold set by customary law. It could be argued that the absence of any reference to international law was purposeful in order to avoid the difficulties associated with the definition of the minimum standard of treatment. Even for the other formulations, investors could argue that “international law” must mean something different than

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30 On possible readings of the provision and annex, see Gantz, supra note 15 at 72-87.


35 A case in point is Saluka Investments BV (The Netherlands) v. The Czech Republic, Partial Award, UNCITRAL (17 March 2006) [Saluka], where the tribunal had to determine the meaning of a provision that did not refer to international law. It stated: “Whichever the difference between the customary and the treaty standards may be, this Tribunal has to limit itself to the interpretation of the ‘fair and equitable treatment’ standard as embodied in Article 5.1 of the Treaty. That Article omits any express reference to the customary minimum standard. The interpretation of Article 5.1 does not therefore share the difficulties that may
the customary international law minimum standard of treatment of aliens," otherwise the parties could have stated so, as Canada did in the FIPA model.58 In return, Canada would likely argue that the new language only came as a response to the misinterpretation of tribunals — that the intention was the same all along.57

At the end of the day, some of the difficulties described in the interpretation of the minimum standard of treatment provisions in different treaties may turn out to be more apparent than real. Three arbitral "trends" point in this direction. First, a number of tribunals are putting aside the legal nuances presented to them and deciding that, in the end, in considering the particular facts at issue, the result would be the same whether autonomous or customary standards were to be applied.59 Second, a number of tribunals are giving credence to the argument that the texts of the thousands of BITs in existence worldwide constitute customary international law. As such, some sort of unified, modern definition of the fair and equitable standard can be deduced from the practice of states.60 Third, a number of tribunals are hanging their legal hat, so to speak, on the concept of "legitimate expectations"40 and thus

shall not apply to treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into [force] of this Agreement.

58 The award in Pope and Talbot could be seen as a precursor of this approach (see Pope and Talbot Inc. v. Canada, Award in Respect of Damages, UNCITRAL (31 May 2002)), at paras. 65 [Pope and Talbot, Damages]. See Azurix, supra note 36 at para. 364 and ff. Along these lines, see CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8 (15 May 2005) at para. 984 [CMS]. On the different standards and practice of Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, UNCITRAL (1 July 2004), at para. 189-91 [Occidental]; and Saluka, supra note 35 at para. 291 and ff.

59 Again, the award in Pope and Talbot could be seen as a precursor, as its reasoning privileges the formulation of BITs generally over the text of NAFTA Chapter 11 (see Pope and Talbot, Phase 2, supra note 22 at para. 110-18 and Pope and Talbot, Damages, supra note 35 at paras. 58-62). The tribunal in Mondros, supra note 24, also highlights that the more than 2,000 BITs in existence “almost uniformly provide for fair and equitable treatment of foreign investments.” And concludes that “[i]n the Tribunal’s view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law” (at para. 167). See also CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, Final Award, UNCITRAL (14 March 2003), at paras. 497-98, in the context of a discussion of exemption in cases of expropriation. See also A.F. Lowenfeld, “Investment Agreements and International Law” (2002) 48 Colum. J. Transnat’l L. 135 at 149-50; S. M. Schwelb, “The Influence of Bilateral Investment Treaties on Customary International Law” (2004) 98 Am. Soc’y Int’l. L. Proc. 27 at 72-73, and Salicuse and Sullivan, supra note 18 at 112-15. This issue is obviously very controversial, see, for example, the US rejoinder in Glansia Gold Ltd v. United States of America, (1 March 2007) at 142 and ff. [Glansia], which provides a strong rebuttal.

40 Ironically, support for this approach is often linked to the award in Metalclad, supra note 22, which raised controversy over its use of "transparency" as a standard.

57 In the context of NAFTA, this issue came up when investors argued the application of the MFN treatment (Article 1105) to benefit from allegedly more favourable provisions found in BITs signed by the United States and FIPAs signed by Canada, respectively. In United Postal Service of America Inc. v. Government of Canada, Government of Canada, Counter-Memorial (Merits Phase) (22 June 2005), at para. 1009 and ff [UPS-Counter-Memorial], Canada argued: "There is no difference in the standards of treatment afforded under NAFTA Article 1105 and the 16 FIPAs (signed after NAFTA)—both accord the customary international minimum standard of treatment" (at para. 1006). See also US arguments in ADF, supra note 24: "The Respondent rejects the Investor’s reading of the ‘fair and equitable’ language in the U.S.-Albania and U.S.-Estonia treaties. Although there are textual differences between NAFTA Article 1105(1) on the one hand, and Article II(3)(a) and (b) of the U.S.-Albania and the U.S.-Estonia treaties on the other hand, the Respondent argues vigorously that the two treaties have much the same effect as Article 1105(1) of NAFTA as construed in the FTC interpretation of 31 July 2001" (at para. 197; see also para. 178). See also discussion in Pope and Talbot, Phase 2, supra note 22 at para. 117. See Kinneas, Bjorklund, and Hannaford, supra note 5 at 11090-92. Annex III of the Canadian FIPA Model, supra note 1, on exceptions from MFN treatment, provides that "Article 4

56 Similar reasoning can be found in Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12 (14 July 2006) [Azurix], where the tribunal interpreted yet another formulation of the standard from the US-Argentine BIT: "Investment shall at all times be accorded fair and equitable treatment — and shall in no case be accorded treatment less than required by international law.” It held that "[t]he interpretation of the FTC or the examples of FTAs adduced by the Respondent may be evidence of a significant practice by one of the parties to the BIT, but the Tribunal has difficulty in reading it in the text of the BIT which governs these proceedings. The fact that the FTC interpreted Article 1105 in relation to a tribunal’s different understanding of this article and that, in recent agreements, the correlative clause has been drafted to reflect the interpretation of the FTC’s interpretation show that the meaning of that article and similar clauses in other agreements could reasonably be understood to have a different meaning” (at para. 362). See also C. Schreuer, “Fair and Equitable Treatment in Arbitral Practice” (2005) 6 J. of World Investment and Trade 357 at 360. See also Ganze, supra note 15 at 796, who raises similar issues in regard to the interpretation of NAFTA Chapter 11.

55 In the context of restrictive, similar reasoning can be found in the context of the NAFTA, for example in the interpretation of the minimum standard of treatment in the context of a discussion of the interpretation of 31 July 2001 (at para. 130). The Tribunal would not accept that the intent was the same all along — but in the end, in considering the particular facts at issue, the result would be the same whether autonomous or customary standards were to be applied. Second, a number of tribunals are giving credence to the argument that the texts of the thousands of BITs in existence worldwide constitute customary international law. As such, some sort of unified, modern definition of the fair and equitable standard can be deduced from the practice of states. Third, a number of tribunals are hanging their legal hat, so to speak, on the concept of "legitimate expectations" and thus

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58 The award in Pope and Talbot could be seen as a precursor of this approach (see Pope and Talbot Inc. v. Canada, Award in Respect of Damages, UNCITRAL (31 May 2002)), at paras. 65 [Pope and Talbot, Damages]. See Azurix, supra note 36 at para. 364 and ff. Along these lines, see CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8 (15 May 2005) at para. 984 [CMS]. On the different standards and practice, see also CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, Final Award, UNCITRAL (14 March 2003), at paras. 497-98, in the context of a discussion of exemption in cases of expropriation. See also A.F. Lowenfeld, "Investment Agreements and International Law" (2002) 48 Colum. J. Transnat’l L. 135 at 149-50; S. M. Schwelb, "The Influence of Bilateral Investment Treaties on Customary International Law" (2004) 98 Am. Soc’y Int’l. L. Proc. 27 at 72-73, and Salicuse and Sullivan, supra note 18 at 112-15. This issue is obviously very controversial, see, for example, the US rejoinder in Glansia Gold Ltd v. United States of America, (1 March 2007) at 142 and ff. [Glansia], which provides a strong rebuttal.

40 Ironically, support for this approach is often linked to the award in Metalclad, supra note 22, which raised controversy over its use of "transparency" as a standard.
In particular, the tribunal primarily relied on the general NAFTA objective of “transparency” to make its finding, since Chapter 11 does not contain a transparency provision. See paras. 96–101. See the judicial review process by BCSC Supreme Court Judge Tysoe in United Mexican States v. Metalclad Corp., 2001 BCCA 664 at paras. 67–72 (Metalclad, judicial review). Teemed is also often used as a “precedent,” although its broad declaration of principles on legitimate expectations is basically justified with a general reference to “good faith.” See Texas-New Mexican Irrigation District v. The United Mexican States, ICSID Case No. ARB(AF) / 00/2 (ICSID Add. Fac.) (9 May 2003), at paras. 153–54 at Teemed. Tribunals in shockingly similar, supra note 38, at paras. 185–86, and CMS, supra note 35. The tribunal in Saluka, supra note 35, also referred to Teemed, and exposed the concept, although it warns of the risks in this concept too far (at paras. 304–5). A detailed analysis of this trend to use investors’ legitimate expectations as a predominant factor in BIT interpretation is beyond the scope of this article. However, it can be noted that the use of this concept thus far is consistent with the use of “teemed” (see FIPA Model, supra note 1 at Article 150, and the Model BIT, supra note 2 at Article 90(8), include similar mechanisms. The FIPA model (as well as model BIT) goes one step further than Article 1131(2) of NAFTA, however, adding to the binding character that “any award under this Section shall be consistent with such interpretation,” This language appears to be a response to the debates in Pope and Talbot Case. For one thing, the FTC interpretation was issued after the findings on the merits but before the damages were awarded in the case. More importantly, the FTC interpretation on its face disavowed the tribunal’s interpretation of Article 1109. It is in this context that the tribunal had to weigh the impact of the interpretation on its decision. In particular, the tribunal questioned whether what the FTC had done was more akin to an amendment of the provision than an interpretation. In the end, the tribunal stated that it did not need to answer this question, but, if it had to, it would have ruled the July “interpretation” an amendment (see Pope and Talbot, Damages, supra note 38 at para. 47). Later awards distanced themselves from this line of thought by holding the interpretation valid. See, in particular, ADF, supra note 24 at paras. 177. See also discussion in Morden, supra note 24 at paras. 100–25; and Methane Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, UNCITRAL (3 August 2005), at part II, chapter B, paras. 11–21 and at part IV, chapter C, paras. 10–27 (Methane, Final). See Gantz, supra note 15 at 699–700, 716–24, 727, and 754; Franck, supra note 23 at 1804–5; and C.N. Brower, C.H. Brower, and J.K. Sharpe, “The Coming Crisis in the Global Adjudication System” (2003) 9(4) Arb. Int’l at 439–55.

40 Conflicts of interest such as the chairperson of the NAFTA panels are likely to give rise to a conflict of interest. See also discussion in Morden, supra note 24 at paras. 100–25; and Methane Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, UNCITRAL (3 August 2005), at part II, chapter B, paras. 11–21 and at part IV, chapter C, paras. 10–27 (Methane, Final). See Gantz, supra note 15 at 699–700, 716–24, 727, and 754; Franck, supra note 23 at 1804–5; and C.N. Brower, C.H. Brower, and J.K. Sharpe, “The Coming Crisis in the Global Adjudication System” (2003) 9(4) Arb. Int’l at 439–55.


42 providing a malleable and fact-based interpretation device that sidesteps some of the arguments over the standard’s content.41 In the end, it may be that the content of the FTC interpretation on the minimum standard, which is now contained in the Canadian model, is somewhat “passed.” This conclusion highlights a diffi-

43 The adoption of different treaty language might only compound the difficulties that are highlighted in regard to changes in wording over time. The use of interpretation statements, while provided for in the model, has also shown its limitations.48

CONFIDENTIALITY AND TRANSPARENCY

In the confines of international commercial arbitration, confidentiality and secrecy were traditionally held to be benefits. In the context of NAFTA Chapter 11, however, these characteristics of arbitration soon became a liability. Secretive tribunals were accused of deciding public interest questions behind closed doors.46 The
FTC played a key role in buttressing the transparency and openness of Chapter 11 and was helped along the way by some of the tribunals' decisions.

The first move by the commission came in July 2001 when it confirmed that "[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal."44 The second move came in October 2003 when the FTC recognized the discretion of tribunals to entertain submissions by non-disputing parties (or amici) and provided procedural recommendations for tribunals. The commission's joint statement was followed by statements from Canada and the United States on open hearings, in which they consented and committed to seeking investor's and tribunal's consent, as applicable, to hearings that were open to the public.45

In reaching these milestones, the NAFTA parties were helped along the way by tribunals. Notably, in January 2001, the tribunal in *Methanex Corporation v. United States of America* was the first to accept, in principle, the participation of amici through written submissions.46 In so doing, it recognized the public interest in this arbitration as well as the potential benefit for the Chapter 11 arbitration process of being perceived as more transparent.47 Later, the tribunal also ordered that the hearings on the merits be open to the public.48 Shortly following suit, the tribunal in *United Postal Service of America Inc. v. Government of Canada* pronounced itself in favour of amici submissions in October 2001 and held open hearings in the spring of 2002.49

The Canadian FIPA model builds on the FTC statements by affirming the discretion of tribunals to entertain amici submissions and adopting the procedures for submissions that it had recommended in the context of NAFTA.50 It goes further towards encouraging openness by providing at Article 38 for public access to hearings and documents:

1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera ...
2. All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.
3. Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information.51

These provisions place the FIPA model at the forefront of transparency and openness in investment arbitration. Neither the International Center for Settlement of Investment Disputes (ICSID) Arbitration Rules or the Additional Facility Rules of ICSID nor the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules go as far. While the recently modified ICSID rules give discretion to tribunals to accept written submissions by amici, they still provide, in effect, a veto right for

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44 FTC Interpretation, supra note 23.
45 The Canadian statement, 7 October 2003, <http://www.dfait-maeci.gc.ca/nafta-alena/open-hearing-en.asp> reads: "Having reviewed the operation of arbitration proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, Canada affirms that it will consent, and, upon election, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information, including business confidential information. Canada recommends that tribunals determine the appropriate logistical arrangements for open hearings in consultation with disputing parties. These arrangements may include, for example, use of closed-circuit television systems, Internet webcasting, or other forms of access."
46 See *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, UNCITRAL (15 January 2001) [Methanex, Amicus]. Actual submissions were made by a number of amici in March 2004. See Mann, supra note 30 at 11-13.
47 *Methanex, Amicus*, supra note 46 at para. 49.
48 This was done through live, closed circuit television. See Mann, supra note 30 at 12.
50 See Canadian FIPA Model, supra note 1 at Article 59 and Annex C-39.
51 Ibid. at Article 38.
partners over open hearings and the publication of awards.\textsuperscript{52} The UNCITRAL Arbitration Rules, which are currently under review, are not expected to break new ground in terms of transparency, in large part due to the fact that they are primarily used between private parties in a commercial setting.\textsuperscript{53}

At the forefront, however, might not be where some of Canada's negotiating partners want to be.\textsuperscript{54} For example, the 2003 Indian Model BIT provides for investor-state arbitration under the ICSID Arbitration Rules, the ICSID Additional Facility Rules, and the UNCITRAL Arbitration Rules, but adds nothing in terms of transparency or openness.\textsuperscript{55} Similarly, recent agreements signed by China generally refer to arbitration under the ICSID Convention and ad hoc arbitration (unless the parties agree otherwise), which is to be established under the UNCITRAL Arbitration Rules.\textsuperscript{56} These provisions would seem to imply that both countries have chosen to rely on the content of the applicable rules in matters of procedures.

This situation raises questions regarding the use of "models" in BIT negotiations. From the Canadian government's perspective, the "approach" of the model FIPA should remain intact even after negotiations with partners.\textsuperscript{57}

The new model serves as a template for Canada in discussions with investment partners on bilateral investment rules. As a template, the provisions contained therein remain subject to negotiation and further refinement by negotiating parties. Thus, although all FIPAs can be expected to follow this approach, it is highly unlikely that any two agreements will be identical.\textsuperscript{58}

Arguably, India and China, which had signed over fifty and one hundred BITs respectively as of June 2006,\textsuperscript{59} do not follow a similar "approach" to Canada in terms of transparency. Is Canada able to retreat from the values it has held out in public as being important?\textsuperscript{59}

52 See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965 [ICSID Convention]. Its most recent set of rules and regulations took effect in 2006 (the rules and regulations are available at www.worldbank.org/icsid). On submissions by non-disputing parties, see ICSID Arbitration Rules, Rule 37; and ICSID Additional Facility Rules, Article 41. On open hearings, the rules have been modified from the 2003 version, since the parties' consent has been replaced by the possibility of an objection ("Unless either party objects..."). Proposals were made to remove the effective party veto, but it was not retained. See ICSID Arbitration Rules, Rule 32 and ICSID Additional Facility Rules, Article 39. On the publication of awards by ICSID, the rule of party consent has been maintained. The rule on publication of excerpts was modified to provide that: "The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal" (ICSID Arbitration Rules, Rule 48(4)). See also ICSID Additional Facility Rules, Article 53. Both sets of rules were amended and effective as of 10 April 2006. See also ICSID, "Possible Improvements of the Framework for ICSID Arbitration," ICSID Secretariat Discussion Paper, 22 October 2004, <http://www.worldbank.org/icsid/highlights/DiscussionPaper.pdf> [ICSID, Discussion Paper]; ICSID, "Suggested Changes to the ICSID Rules and Regulations," Working Paper of the ICSID Secretariat, 12 May 2005, <http://www.worldbank.org/icsid/highlights/050420-sgmanual.pdf> [ICSID, Working Paper].


55 In the case of UNCITRAL, the model does modify the rules regarding appointing authority, appointment time, and the rendering of the award. See Indian Model BIT, Article 9(3)(c). See also Article 9 of the Hungary-India BIT, 9 November 2003, which differs in some ways from the model, but not in matters of transparency of the dispute resolution procedures. See UNCTAD, "BITs Database," supra note 10.

56 See, for example, the "second generation" BITs signed by China with the Netherlands (2001), Germany (2003), and Finland (2004), which replaced the treaties signed in the 1980s. The China-Finland BIT does contain a "transparency provision," but it does not enhance transparency in the dispute resolution process (see Article 9 and 11). In the case of the China-Madagascar BIT (2003), international arbitration is contemplated under the ICSID Convention only. See UNCTAD, "BITs Database," supra note 10.


58 See UNCTAD, "BITs Database" supra note 10.

59 See IISD, "Canada Encountering Static," supra note 54. See the model's presentation on the DFAIT website, <http://www.international.gc.ca/tna-nac/what_
Canada may not be willing to compromise. More generally, the fact that the core of the FIPA model (or US model BIT) may not be negotiable raises the issue of asymmetry in investment agreements signed between developed and developing countries.

The US model BIT follows a similar path as Canada’s regarding amici, public access to documents, and open hearings. With respect to amici, the model provides that “[t]he tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party” but does not include the procedure found in the FTC statements. As for access to documents, the US model may be more stringent than the Canadian model since it does not provide that the disputing parties can agree not to make all documents available. In addition, it provides more detailed procedures for dealing with protected information.

In conclusion, the direction taken by Canada in its FIPA model, towards more transparency and openness, may not be shared by many of its negotiating partners. This is an area, however, where the underlying values of the FTC statements may prevail in the long run. First, Peru did agree to the Canadian model’s obligations in this area. And if, as it appears thus far, the United States succeeds in convincing its many negotiating partners to include transparency provisions in BITs and FTAs, Canada will surely reap the benefits of the ripple effect that is created.

The Influence of WTO Law and Cases

The Canadian FIPA model contains several direct references to WTO law. What is of more interest, however, are the ways in which the General Agreement on Trade and Tariffs (GATT)/WTO law and cases have influenced the substance, and might in the future influence the interpretation, of the FIPA provision on national treatment and the general exceptions provision. Also of interest is the provision found in the US model BIT for considering the establishment of new forms of appellate mechanism for investment disputes, inspired by the WTO Appellate Body, and the lack thereof in the Canadian FIPA model.

66 See Canada-Peru FIPA, supra note 13 at Articles 38–39.
67 See, for example, US-Uruguay BIT, supra note 18. More generally, the issue of transparency and access is making inroads in other fora. See Statement by the OECD Investment Committee, June 2005, in favour of additional transparency; and the working paper “Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures,” April 2005, <http://www.oecd.org/dataoecd/45/9/34789013.pdf>. See also the judgment of the Inter-American Court of Human Rights in Claude Reyes et al. v. Chile, (19 September 2006). In this case, information was requested of the government regarding a foreign investment contract in the forestry sector, which raised environmental concerns. The court ruled that Article 13 (on freedom of thought and expression) of the American Convention on Human Rights, O.A.S.Treaty Series No. 96, 1144 U.N.T.S. 125 (entered into force 18 July 1978), includes the protection of the right of access to state-held information (at para. 77). The court stated: “In this regard, the State’s actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately. Access to state-held information of public interest can permit participation in public administration through the social control that can be exercised through such access” (at para. 86).
68 Marrakech Agreement Establishing the World Trade Organization, 15 April 1994 (1994) 33 I.L.M. 15 [WTO Agreement]. See Canadian FIPA Model, supra note 1, for example, at Article 9(4) on intellectual property rights; Article 10(7) on waiver of an obligation; Article 13(5) on compulsory licenses; and Article 14(7) on transfers. See also McIlroy, supra note 13 at 638.
69 General Agreement on Tariffs and Trade, 30 October 1947, 55 U.N.T.S. 187 [GATT].
NATIONAL TREATMENT AND GENERAL EXCEPTIONS

The provision on national treatment is a key component of BITs. It seeks to create a "degree of competitive equality" or level playing field between national and foreign investors and investments. The conventional origins of this standard can be traced to trade treaties. Readers familiar with GATT/WTO law will recognize the formulation of the national treatment obligation along the lines of Article III:4 of the GATT. The Canadian FIPA model states:

1. Each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favourable than it accords, in like circumstances, to investments of its own investors.

The US model BIT as well as NAFTA Chapter 11 contain very similar provisions. In addition, the general exceptions provision of the FIPA model reminds us of Article XX of the GATT. It states:

1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing on this Agreement shall be

70 UNCTAD, National Treatment, UNCTAD Series on Issues in International Investment Agreements (New York: United Nations, 1999) at 1 and Lavie, supra note 3 at 95.
71 UNCTAD, supra note 70 at 7-8.
72 Canadian FIPA Model, supra note 1 at Article 3.
73 One element that differentiates the model FIPA and BIT from NAFTA Article 1102 is the addition of the terms "in its territory" in paragraphs 1 and 2. This may be a response to the award in SD Myers where Canada argued unsuccessfully that the investor did not have an investment in Canada. See S.D. Myers, Partial Award, supra note 22 at paras. 382-384. Another difference concerns paragraph 5, dealing with sub-national governments, where the Canadian FIPA model and the US model BIT refer, inter alia, to "the treatment accorded" rather than to "the most favourable treatment accorded" at Article 1102 of NAFTA, supra note 5.
74 GATT, supra note 69 at Article XX.
75 Canadian FIPA Model, supra note 1 at Article 10. The article also provides exceptions, inter alia, relating to prudential measures, monetary policies, essential security interests, access to information, and cultural industries.
76 See NAFTA, supra note 5 at Article 2101(1), which incorporates Article XX of the GATT, supra note 69, for the purposes of trade in goods and technical barriers to trade.
77 Some variations can be found. For instance, many FIPA’s follow more closely Article XX(g) of the GATT than the model. For example, Canada-Panama FIPA, supra note 32 at Article XVII(5)(c). For a longer list of exceptions, see Agreement between the Government of Canada and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments, 17 January 1997, Can. T.S. 1998 No. 29 at Article XVII(3) (entered into force 24 September 1998).
78 See also Newcombe, supra note 10 at 101 and Côté, supra note 10 at 491-493.
79 This issue was faced head on, for example, in Methanex, Final, supra note 42 at part II, chap. B, para. 4-6 and part IV, chap. B, paras. 4-38. See also, for instance, Occidental, supra note 38 at paras. 174-176. See also D.A. Gantz, “Potential Conflicts between Investor Rights and Environmental Regulation under NAFTA’s Chapter 11” (2001) 53 Geo. Wash. Int’l L. Rev. 651 at 731-738, and Kinnear, Bjorklund, and Hannaford, supra note 5 at 1102:16-18.
80 For example, Methanex, Final, supra note 42; Methanex Corporation v. United States of America, Amended Statement of Defense of Respondent United States (5...
It is useful to look, first, at the interpretation of the national treatment obligation given by the NAFTA tribunals, including the key concept of "like circumstances," before turning to the impact that it might have on the interpretation of the FIPA equivalent combined with a general exceptions provision. For our purposes, two groupings of NAFTA Chapter 11 cases can be made in regard to the interpretation of Article 1102. There are the cases in which the tribunal found that the investor did not meet its burden of identifying a comparator "in like circumstances" (insufficient evidence being a major culprit) or in which, once a comparator had been identified, the investor failed to prove that it received less favourable treatment. The second group, which is more interesting for our present purposes, includes cases where the tribunal found a difference in treatment and proceeded to consider reasons for these differences. While the analytical methodologies used by tribunals regarding "like circumstances" vary and are, in fact, often not very clear, the result is the same — the tribunal attempts to ascertain whether there was a reason for the measure that was not discriminatory.

In this context, the government's "burden" has been defined in a manner that is generally respectful of regulatory autonomy. This statement calls for two comments. First, it seems apparent that the tribunals have shifted the burden of proof from the investor to the government, even if they do not explicitly say so. For some of the cases, commentators have likened this process to the application of an exception. Irrespective of qualification, it appears that the exculpatory facts have been provided, or have failed to be provided, by governments. Second, in evaluating the reasons provided for the difference in treatment, tribunals have looked for "a reasonable nexus to rational government policies," "legitimate public policy measures that are pursued in a reasonable manner," "a rational justification" or reasonable distinctions, or a plausible connection with a legitimate goal of policy. The tribunals have also verified whether the measures were applied in a discriminatory fashion. It appears that what is required of governments is not perfect regulation or even effectiveness in regulation.

Conversely, investors have not been required to provide a proof positive of discriminatory intent. Tribunals have recognized that short of a "smoking gun," this proof may be impossible to provide.

82 S. Myers, Partial Award, supra note 22 at para. 245.


84 In UPS-Counter-Memorial, supra note 37, Canada argued that "like circumstances" is not an exception and that "it operates as something in the nature of a condition precedent" (at para. 627).

85 See Feldman, supra note 82 at para. 127 and 182.

86 GAMI, supra note 82 at para. 114.

87 The tribunal in GAMI, supra note 82, went the furthest when it stated: "The Government may have been clumsy in its analysis of the relevant criteria for the cutoff line between candidates and non-candidates for expropriation. Its understanding of corporate finance may have been deficient. But ineffectiveness is not discrimination" (at para. 114). The factual determinations in Pope and Talbot, Phase 2, supra note 22, support this view (at paras. 89–104). The tribunal in Feldman, supra note 89, did not address this question directly as it drew a negative inference from the fact that Mexico did not provide any credible evidence to rebut the presumption of discrimination (see, for example, at para. 177).

88 S. Myers, Partial Award, supra note 22, could be the exception, in the way the tribunal effectively imported GATT Article XX concepts, including the idea of least restrictive measure, into its analysis (at paras. 245 and 255). This is in contrast with the position taken by the tribunal in respect of Article 1109: "[A] Chapter 11 tribunal does not have an open-ended mandate to second guess government decision making" (at para. 261).

89 One exception is an obiter in Loewen, supra note 81 at para. 139.

90 See Feldman, supra note 82 at paras. 181–83; and Pope and Talbot, Phase 2, supra note 22 at para. 79. See also Thunderbird, supra note 24 at para. 177.
This approach is consistent with the one taken under WTO law.\textsuperscript{94} Interestingly, however, the only two cases where a violation of Article 11.02 was found presented evidence of discriminatory intent or, if not a smoking gun, some smoke.\textsuperscript{95} The cases are too few to allow for a generalization, but it does appear that investors face an uphill battle when they cannot offer a proof of discriminatory intent but when the government is able to provide a rational justification for the differences in treatment.

How might these approaches vary under a FIPA when the national treatment standard is made subject to a general exceptions provision? In an arbitration, it is foreseeable that investors will draw heavily on WTO precedents. They will likely argue that the exception provision of the FIPA closely parallels Article XX of the GATT and that the state parties knew exactly the import of such a provision when they drafted the treaty.\textsuperscript{96} As an exception, investors will draw attention to the fact that it should be interpreted narrowly. In addition, the use of the word "necessary" (as opposed to "relating to" or "involving," for example) connotes the higher standard meant to be applied to government measures and calls for an evaluation of alternative measures that are less restrictive for trade and investment.\textsuperscript{97} Finally, investors will emphasize that the "chapeau" aims to prevent abuse in the way that the measures are applied and implies that they are applied reasonably.\textsuperscript{98}

With respect to the relation between national treatment and the general exceptions provisions, investors would likely acknowledge the findings of the WTO Appellate Body in \textit{European Communities – Measures Affecting Asbestos and Asbestos-Containing Products} but differentiate from it.\textsuperscript{99} In this case, Canada challenged a French measure that prohibited asbestos and products containing asbestos fibres. In this context, the Appellate Body considered the relation between Articles III and XX of the GATT as it relates to the health effects of asbestos. It was the first time that the Appellate Body interpreted the word "like" in Article III.4 of the GATT, and it called for an interpretation that took into account the context and object and purpose of the provision as well as the agreement at issue. It recalled its previous metaphor of the "accordion" of "likeness," which stretches in different ways in different provisions.\textsuperscript{100} It decided that evidence relating to health risks of a product were relevant to the analysis of "likeness" and not just for the application of Article XX.\textsuperscript{101}

Investors would likely embrace these conclusions, but they would argue that "like circumstances" should not be interpreted so broadly as to deprive the general exceptions provision of a FIPA of any effect. They would argue that the inquiries under the national treatment provision and the general exceptions provisions of a FIPA are not entirely different, and, therefore, they would differentiate from a key holding of the Appellate Body in \textit{Asbestos}:

We note, in this regard, that different inquiries occur under these two very different articles. Under article III.4, evidence relating to health risks may be relevant in assessing the \textit{competitive relationship in the marketplace} between allegedly "like" products. The same, or similar, evidence serves a different purpose under article XX (b), namely, that of assessing whether a Member has a sufficient basis for "adopting or enforcing" a WTO-inconsistent measure on the grounds of human health.\textsuperscript{102}

Thus, if a tribunal assesses whether the respondent state has any reason for adopting a measure that is not discriminatory under "like circumstances" in the national treatment provision (as has occurred in NAFTA Chapter 11 cases), the general exceptions become redundant. Put another way, to embrace the approach developed under NAFTA Chapter 11 and to permit a wide range of "rational" or "reasonable" justifications under the analysis of

\textsuperscript{94} See, for example, \textit{Japan – Taxes on Alcoholic Beverages,} Appellate Body Report, Doc. AB-1996-2 (4 October 1996).

\textsuperscript{95} A smoking gun was found in \textit{S.D. Myers,} Partial Award, supra note 22 at paras. 161-95, and some "smoke" in \textit{Feldman, supra note 8} at para. 182. The question of proof of intent raised issues as to "whose intent?" This difficulty was acknowledged in \textit{S.D. Myers,} where the protectionist intent of the minister of the environment was key (ibid. at paras. 161-63).

\textsuperscript{96} On the drafters fluency with GATT law and impact on interpretation, see \textit{Mohees,} Final, supra note 42, at part IV, chap. B, paras. 30-38.


\textsuperscript{99} \textit{Asbestos,} supra note 97.

\textsuperscript{100} Ibid. at para. 88.

\textsuperscript{101} Ibid. at para. 115.

\textsuperscript{102} Ibid.
national treatment would contradict the principle of effectiveness in treaty interpretation.

Investors would find support in the decision *In the Matter of Cross-Border Trucking Services*, which was rendered under NAFTA Chapter 20 (state-state dispute resolution). The tribunal interpreted the expression "in like circumstances" combined with a general exception provision in the context of trade in services. This tribunal did allow some elements of justification in the analysis of likeness provision in the context of trade in services. It also noted that "the Panel is mindful that a broad interpretation of the 'in like circumstances' language could render Articles 1202 and 1203 meaningless." The tribunal added: "Here the GATT/WTO history, liberally cited by the Parties, and the IFA language, noted earlier, are both instructive. Although there is no explicit language in Chapter Twelve that sets out limitations on the scope of the 'in like circumstances' language, the general exception in Article 2101:2 invoked by the United States closely tracks the GATT Article XX language, and is similar to the IFA proviso limiting exceptions to national treatment to situations where: 'the difference in treatment is no greater than necessary for ... health and safety or consumer protection reasons'" (ibid. at para. 260).

Investors may find additional support in an unlikely place — IISD's *amicus curiae* submission in *Mechanics*, supra note 42. In relevant part, it states:

However, as with all tests that are somewhat 'accordion-like' in nature, the degree to which one may squeeze the test closed or stretch it open must be determined by the context. IISD submits that a critical additional factor is important in this regard: the Panel in that case [*Trucking case*] expressly notes in its interpretation of Article 1202 the presence of the applicable exception provision in Article 2101 of NAFTA, which allows for exceptions for environmental and human health reasons. Chapter 11 has no applicable exception provision. Consequently, IISD submits that the Tribunal should have increased leeway to define when legitimate regulatory objectives provide relevant distinguishing circumstances. Otherwise, the absence of an exception provision would lead to very significant limitations on the ability of a state to be able to establish valid distinctions between investors on the basis of the actual impacts and effects of their investments [emphasis added] (at para. 259).

A contrario, the presence of an exception provision could ironically mean less leeway for the government.

Tribunals faced with such arguments will have to interpret the terms of these provisions in their context and in light of their object and purpose. This task raises many interpretive challenges. How transferable are approaches developed in the WTO? Are the objectives of these provisions in trade and investment treaties fundamentally different? How does the context of the national treatment provision, which includes the general exceptions provision, impact on its interpretation? How far does the "accordion of likeness" stretch for "in like circumstances"? Does the principle of effectiveness warrant an interpretation of these terms akin to an exception?

At this juncture, tribunals interpreting a FIPA would likely break new ground in investment law. Most BITs, including US BITs, do not include general exceptions provisions. The Energy Charter Treaty does include a similar provision, but, to our knowledge, no publicly available award under this treaty has applied the general exceptions provision. In this context, the lure of WTO law and cases may be even harder to resist.

**APPELLATE MECHANISM**

The Appellate Body has been one of the great successes of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The review that it performs has provided discipline to the legal interpretation of panels and has led to increased consistency and predictability in the system. The procedures and time frames that are provided have also created efficiencies in the dispute settlement process. While there is room for improvement, member governments are not questioning the value of the Appellate Body.

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103 See *In the Matter of Cross-Border Trucking Services*, NAFTA Chapter 20, Sec. File No. USA-MEX-98-2008-01, Final Report of the Panel (6 February 2001) [*Cross-Border Trucking Services*]. The tribunal also dealt with Article 1102 and 1103, but its reasoning does not include a consideration of "like circumstances" in the investment context (at paras. 265–94).

104 The tribunal added: "Here the GATT/WTO history, liberally cited by the Parties, and the IFA language, noted earlier, are both instructive. Although there is no explicit language in Chapter Twelve that sets out limitations on the scope of the 'in like circumstances' language, the general exception in Article 2101:2 invoked by the United States closely tracks the GATT Article XX language, and is similar to the IFA proviso limiting exceptions to national treatment to situations where: 'the difference in treatment is no greater than necessary for ... health and safety or consumer protection reasons'" (ibid. at para. 260).

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A contrario, the presence of an exception provision could ironically mean less leeway for the government.


107 UNCTAD, supra note 70 at 1 and 44.


Many of these benefits were quickly found to be lacking in the context of NAFTA Chapter 11. Since the ad hoc arbitration tribunals render awards that are meant to be final, critics have raised the risk of run-away tribunals. Specific cases involving sensitive public policy matters have further fueled this fear. State parties have also been confronted early on with interpretations with which they disagreed. Along with this came the realization that their avenues of recourse were fairly limited. Interpretations by the FTC were just that — interpretations — and any statement has required the agreement of all three state parties. Judicial review of final awards was possible but only on limited grounds. Meanwhile, in the broader BIT world, the spectre of conflicting interpretations of identical or very similar treaty provisions has become apparent.

In the United States, this context has led the Congress to mandate, in the TPA’s negotiating objectives, the provision of “an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements.” This search for coherence, thus, has found its way into the US model BIT as well as into agreements signed by the United States, which provide for two possibilities: a bilateral or multilateral appellate mechanism.

Annex D of the model, entitled “Possibility of a Bilateral Appellate Mechanism” provides: “Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism.” A more detailed mandate for the establishment of an appellate mechanism can be found in the free trade agreement that the United States signed with five Central American countries and the

More recently, two US District Courts denied applications for judicial review in Loewen, supra note 21 (because it was time barred) and Thunderbird, supra note 24 (where the court recognized that judicial review of arbitration awards is “extremely limited”). See Raymond L. Loewen v. United States of America, US District Court for the District of Columbia, 31 October 2005; and International Thunderbird Gaming Corporation v. United Mexican States, US District Court for the District of Columbia, 14 February 2007. All of the court decisions mentioned can be found online at: <http://ita.law.uvic.ca/annulment_judicialreview.htm>.

Under the ICSID Convention, supra note 52, the possibility of judicial review by domestic courts has been replaced by an Annulment Committee, which also reviews awards on limited grounds (see Article 52). The convention has not applied in the context of NAFTA since neither Mexico nor Canada were signatories. This could change in a few years, as Canada became a signatory to the ICSID Convention on 15 December 2006. See ICSID, “List of Contracting States and Other Signatories of the Convention,” <http://www.worldbank.org/icsid/constate/cstates.en.htm>. See also Gantz, supra note 110 at 49-50.


117 US Model BIT, supra note 2 at Annex D.
Dominican Republic in 2004 (US-CAFTA-DR). It provides that a negotiating group will be established within three months of the entry into force of the agreement, which shall consider, inter alia, the nature and composition of an appellate mechanism, the applicable scope and standard of review, the transparency of the proceedings, the effect of decisions, as well as the relationship of review by an appellate mechanism with other rules. Within one year of the establishment of the negotiating group, a draft amendment to the agreement is to be provided to the Free Trade Commission (similar to the NAFTA FTC). The parties would then have to approve such an amendment for an appellate mechanism to be created.

Both the US model BIT and the US-CAFTA-DR also provide for the possibility of the establishment of a multilateral appellate mechanism. For example, the model provides:

If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such an appellate body review awards rendered under Article 34 in arbitrations commenced after the multilateral agreement enters into force between the Parties.

One reading of these provisions would imply that the United States privileges a multilateral appellate mechanism, but, cognizant of the difficulties involved and the time required, it provides for a "plan B." The bilateral solution could then be temporary in the advent of a multilateral solution or permanent.

Meanwhile, the developments occurring in the United States were echoed at ICSID. In a discussion paper circulated by the Secretariat in October 2004 entitled "Possible Improvements of the Framework for ICSID Arbitration," the desirability of establishing an appellate mechanism was considered. The impetus was clear. According to the Secretariat, "by mid-2005, as many as 20 countries may have signed treaties with provisions on an appeal mechanism for awards rendered in investor-to-State arbitrations under the treaties. Most of these countries are also Contracting States of the ICSID Convention." The resulting diagnosis was also clear: "It would in this context seem to run counter to the objectives of coherence and consistency for different appeal mechanisms to be set up under each treaty concerned. Efficiency and economy, as well as coherence and consistency, might best be served by ICSID offering a single appeal mechanism as an alternative to multiple mechanisms."

The implementation of any such ICSID appellate mechanism was also considered. An annex to the paper presented possible features of an appeals facility, including membership (nomination, nationality, expertise, and term), grounds for appeal, decisions, fees and expenses, bonding requirements, and Secretariat support. Some of the features were inspired by the WTO Appellate Body. In the end, the response of the Administrative Council of the centre to these proposed changes was also clear — the proposal was premature.

What might the impact of these developments be on Canada? The Canadian FIPA model does not contain a provision related to an appellate body or similar mechanism. In time, the issue is likely to resurface at ICSID. And, at least then, Canada, as a signatory to ICSID, would be in a position to contribute to the creation of this new mechanism. The impact of developments in the United States is more uncertain. David Gantz has underlined the substantial legal and political challenges faced in the context of the US-CAFTA-DR. And while a draft amendment to this agreement may see the light of day, it may never get implemented. Nevertheless, a draft
amendment would likely serve in the United States as a model for
an appellate mechanism.\textsuperscript{131}
If political will were to materialize (perhaps after a few awards
are rendered against the United States in the context of NAFTA
Chapter 11), the following scenario might ensue. In recent years,
the United States has been signing an impressive number of agree-
ments (BIT and FTAs) that provide at least for the possibility of
creating an appellate mechanism.\textsuperscript{132} Since a core objective is the
pursuit of coherence and consistency, the United States will surely
not allow the creation of multiple mechanisms operating, for ex-
ample, under different standards of review.\textsuperscript{133} Whether the US-
CAFTA-DR provides the “model” or another develops out of the
practice of BITs, the result could be the same. Some form of ad hoc
plurilateral mechanism would emerge and be opened to others as
more agreements are signed. Might these “others” include Canada
and Mexico? Drawing on Gantz, while a “graft” onto such a mecha-
nism by NAFTA parties is conceivable, it is highly unlikely to hap-
pen for political reasons.\textsuperscript{134} Might such an ad hoc mechanism
eventually "fold" into a permanent facility created at ICSID?\textsuperscript{135} Only
time will tell.
In the end, a multilateral solution would probably be inevitable.
Countries who sign trade and investment agreements with the
United States would be in the difficult position of having some, but
not all, of the awards rendered under their agreements subjected
to an appeal. While some newer agreements exclude dispute reso-
lution provisions from the application of most-favoured-nation
clauses,\textsuperscript{136} most do not, and the decisions of arbitral tribunals
on this point are inconsistent.\textsuperscript{137} More generally, while some of the
initial anxiety has subsided, underlying concerns with run-away tri-
butals and the risk of inconsistent interpretations remain, and new
ones have emerged.\textsuperscript{138} One is the tendency of many arbitral tribu-

tals to rely heavily on other awards in making their decisions. Then,
the risk exists of “bad” law perpetuating itself.\textsuperscript{139}
There was a time when a suggestion that the WTO Appellate Body
might be used to resolve investment disputes would have been con-
ceivable. Today, the momentum is clearly against any type of invest-
ment issue being embraced by the WTO.\textsuperscript{140} This is not even
considering the many challenges related to the interpretation of
hundreds of differently worded BITs, which is a task that is very
different from what the WTO Appellate Body is accustomed to.
In conclusion, if the WTO Appellate Body as such is not the solu-
tion, its pursuit of consistency, predictability, and efficiency will re-
main an inspiration for those believers in the value of an appellate
mechanism for disputes under investment treaties. The WTO has
already influenced discussions at ICSID and elsewhere.

\textsuperscript{131} Ibid. at 76.
\textsuperscript{132} See USTR, supra note 19.
\textsuperscript{133} The US Senate report on the TPA emphasizes that negotiators should seek to
establish a single appellate body to review decisions in order to foster consistency,
predictability, and minimize the risk of aberrant interpretations. See Senate
Gantz, supra note 110 at 72.
\textsuperscript{134} Ibid. at 48.
\textsuperscript{135} For example, the United States, see US-Uruguay BIT, supra note 18 and Can-
ada, see Canada-Peru FIPA, supra note 13.
\textsuperscript{136} See Emilio Augustin Maffezini v. Kingdom of Spain, Decision of the Tribunal on
Objections to Jurisdiction, ICSID Case No. Arb/97/7 (25 January 2000) in
\textsuperscript{137} See Gantz, supra note 110, who discusses the risk “in leaving an allegedly erro-

\textsuperscript{138} See Gantz, supra note 110, who discusses the risk “in leaving an allegedly erro-

\textsuperscript{139} For a discussion, see D. Freyer and D. Herlihy, "Most-Favored-Nation Treatment and
Dispute Settlement in Investment Arbitration: Just How 'Favored' is 'Most-
Favored?'" (2005) 20(1) ICSID Rev-FILJ 58; and Kinneir, Bjorklund, and
Hannaford, supra note 5 at 1103-12-24.
\textsuperscript{139} For a discussion, see Franch, supra note 23 at 1615-10 and 1617-25; Bjorklund,
supra note 11 at 510 and ff. Some authors are expressing doubts as to the
value of an appellate mechanism, see Alvarez, supra note 16 at 95-97; and
99 Am. Soc'y Int'l. L. Proc. 97 at 101. See also Laird and Askew, supra note
115 at 267-302.
\textsuperscript{140} For a discussion, see Sen-

The Influence of US Domestic Law and Principles

Considering the context and conditions under which the US model BIT was drafted, including the TPA's "no greater rights" mandate, it is not really surprising to find US domestic law reflected in the expropriation provision of the model. What is more surprising is the inclusion of such principles in the Canadian FIPA model. Conversely, the US approach to preliminary objections in the model BIT, which is also inspired by domestic law, did not find its way into the model FIPA.

Indirect Expropriation

In the context of NAFTA Chapter 11, the claims of expropriation have driven the debate more than the actual awards. In fact, as of late 2003, about the time the US model BIT and FIPA model were being finalized, only one tribunal had made a finding of expropriation out of seven cases where such a claim was made.141 Article 1110 of NAFTA states:

No Party may directly or indirectly nationalize or expropriate an investment of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.142

Concerns regarding the scope of this provision, however, were real enough to lead the United States and Canada to include in their models an annex delineating, inter alia, the factors to be considered by tribunals in ruling on indirect expropriation claims. As early as November 1998, Canada made known to its NAFTA partners its concerns regarding the potentially broad interpretation of the expropriation provision and the difficulty in differentiating "compensable takings" from "non-compensable regulation."143 A few options were advanced to alleviate these concerns, but apparently none were appealing enough to convince the United States and Mexico to agree on an interpretation of Article 1110.144 The September 2000 award in Metalclad Corporation v. United Mexican States, which was broad in interpretation but thin in sources of law, fuelled some of the concerns.145 However, it was the expropriation claim in Methanex that galvanized the critics and focused the attention of the United States.146 The claim that a state measure adopted to protect public health and the environment could be a compensable taking hit a nerve in the NAFTA countries.

This issue found resonance in the US Congress years before an award was even made in the case.147 The TPA mandate on expropriation is clear. Negotiators should seek to "establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice"148 so as to effectuate the "no greater rights" mandate.149 The article on expropriation in the model BIT is similar to Article 1110 of NAFTA except that "measure tantamount" was replaced with a formulation of "measures equivalent."150 The innovation is found in Annexes A and B, according to which the article shall be interpreted.151 Annex A,

141 See Metalclad, supra note 22 at paras. 102-12. Excluded from this count are cases that were settled before a final award was made, for example, Ethyl, supra note 7. For a discussion of the cases related to expropriation, see G.H. Sampliner, "Arbitration of Expropriation Cases under U.S. Investment Treaties: A Threat to Democracy or the Dog That Didn't Bark?" (2003) 18 ICSID Rev-FILJ 3 at 15-50; Gantz, supra note 15 at 731-40; and Kinnear, Bjorklund, and Hannaford, supra note 5 at 1110:17-97.

142 NAFTA, supra note 5 at Article 1110.

143 See Inside U.S. Trade, volume 17, no. 6, 12 February 1999, at 1, 18, and ff., citing a "confidential" memo by a DFAIT official to its NAFTA counterparts.

144 See Gantz, supra note 79 at 686. See also note 29 and corresponding text on FTC interpretations under Article 1131(2) of NAFTA.


146 See, for example, DePalma, supra note 45.

147 The final award, rendered on 3 August 2005, found no expropriation in this case. See Methanex, Final, supra note 42 at Part IV, Chapter D, at para. 6-13.

148 TPA, supra note 15.

149 See notes 15-17 in this article and accompanying text. See also Sampliner, supra note 141 at 93-99.

150 This change reflects arguments made in early cases, such as Pope and Talbot Inc. v. Canada, Interim Award, UNCITRAL (26 June 2000) at paras. 84, 85, 94, and 104 (Pope and Talbot, Interim); and S.D. Myers, Partial Award, supra note 22 at paras. 283-86. See also Sampliner, supra note 141 at 9-6; and Kinnear, Bjorklund, and Hannaford, supra note 5 at 1110:27-29.

cited earlier, defines customary international law. Annex B on expropriation provides that

1. Article 6 [Expropriation and Compensation] (1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
3. Article 6 ... addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 6 ... is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

   (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
      (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
      (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
      (iii) the character of the government action.
   (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations" [emphasis added].

First, it should be noted that the three factors under Article 4(a) of the annex have their source in the US Supreme Court decision in Penn Central Transportation Co. v. New York City rendered in 1978.153

This case, which concerned the historic preservation of buildings and land use regulations, interpreted the Takings Clause of the 5th Amendment to the US Constitution, which provides: "[N]or shall private property be taken for public use, without just compensation."154 This decision, and the jurisprudence that followed, has been the subject of heavy criticism in the US domestic context.155

Second, the language of the annex reflects the process by which it was attained. As alluded to earlier, the inter-departmental negotiating process, fed by varying interest groups, tends to produce such compromise language.156 On the one hand, the annex states that Article 6 on Expropriation is meant to reflect customary international law. On the other hand, the factors to be considered under indirect expropriation are taken from US takings jurisprudence in order to meet the mandate from Congress. However, they will only be considered "among other factors." Then Article 4(b) of the annex in the earlier quote formulates a police power exception. This wording was also much debated — for example, whether it should be in "rare circumstances" or "exceptional circumstances."157

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153 Constitution of the United States: Amendment V. Interestingly, the decision, as it relates to reasonable expectations, was inspired by an article published in 1967 by Frank I. Michelman who, in turn, was strongly influenced by the writings of Jeremy Bentham. Under Bentham's utility theory, "[p]roperty is nothing but a basis of expectations." See F.I. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80(6) Harv. L. Rev. 1185. See also G. Kanner, "Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York" (2004) 19 Wm. and Mary Bill Rts J. 679 at 770.

154 See, for example, Kanner, supra note 154, who generally favours the rights of land owners, but notes that "for the past two decades law journals have been full of harshly critical assessments of the state of regulatory takings law, written by authors favoring as well as disfavoring far-reaching land-use regulations" (at 707).

155 See note 30 and accompanying text.

156 To be clear some of the debates predate the US Model BIT, supra note 2, since they occurred in the context of the FTA negotiations with Chile and Singapore.
The FIPA model generally follows the US approach, with an article on expropriation, reworded to take into account NAFTA concerns and an annex that clarifies what is an indirect expropriation. Article 13 of the model states: “Neither Party shall nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation... except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation.”

The text of the annex regarding indirect expropriation contains only minor differences compared to the corresponding paragraphs of the US annex. For instance, “a measure or series of measures” replaced “an action or series of action”; “sole” replaced “standing alone”; and an illustration is provided to clarify what “rare circumstances” means. In

See Sampliner, supra note 141 at 95-42. See also Inside US Trade, supra note 153 at 1 and 18-21.

Canadian FIPA Model, supra note 1 at Article 6. As compared to Article 1110 of NAFTA, supra note 5, and Article 6 of the US Model BIT, supra note 2, the model FIPA does not mention the minimum standard of treatment after the reference to due process. See McIlroy, supra note 10 at 856-57.

Following is the text of Annex B.13(1) with differences from the US model highlighted in italics:

The Parties confirm their shared understanding that:

a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;

b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
   i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
   ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and
   iii) the character of the measure or series of measures;

c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

However, Article 40 of the Canadian FIPA model, supra note 1, provides that “[a] Tribunal... shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.” Also omitted from the Canadian model are paragraphs (a) related to property rights and (g) on the definition of direct expropriation (cited earlier).

Some authors actually argue that the factors in Penn Central, supra note 153, are consistent with international customary law. See A. Newcombe, “The Boundaries of Regulatory Expropriation in International Law” [2005] 20 ICSID Rev.-FILJ 1 at 40 and ff. See also Sampliner, supra note 141, who notes that, “[a]lthough no known international law jurisprudence or writings have adopted the three-part Penn Central test to date, these factors are arguably the most prominent ones applied to international takings” (at 11).


private rights, reference to domestic law might give uncertain results and the choice of models might reveal ideological predilections. In this respect, United States Supreme Court decisions interpreting the constitutional protection of property are no exception.

In the end, the determination of which scenario prevails might have little to do with Canada. The annex on expropriation is found in US BITs and FTAs. Some of the countries who sign such agreements with the United States have reproduced the annex in their agreements with other countries. As such, the "factors" taken from United States Supreme Court decisions can now be found, for example, in agreements between Peru and Chile and Singapore and India. Many tribunals will interpret these provisions, and, once this happens, these concepts will have a life of their own, which may or may not come back to haunt Canada. More generally, this phenomenon highlights the influence that the United States has on the shaping of the international framework for the promotion and protection of investment. US domestic law and principles can be found (once again) far away from home.


165 However, one should not overstate the potential impact of "scenario no. 2." Overall, the language of the annex, including the police power exception, aims to limit the reach of the expropriation provision. See, for example, supra note 15 at 745, who states: "[T]he Annex unquestionably will make it more difficult for a foreign investor to claim successfully that any sort of government regulatory action is an expropriation, particularly if the regulatory action has any environmental or public health nexus." See also supra note 10 at 628-37, who discusses the retreat in the provision. For a discussion of the police power language, see, J.J. Coe, Jr. and N. Ruhins, "Regulatory Expropriation and the Temed Case: Context and Contributions," in Weiler, ed., supra note 40 at 641. For a different viewpoint, see M.C. Porterfield, "International Expropriation Rules and Federalism" (2004) 93 Stan. Envr'l L.J. 3 at 2 and 15-18, who argues that even with the clarifications, international law provides for better treatment than US domestic law in matters of regulatory takings.


167 Gagné and Morin, supra note 15 at 371-72. See also Kantor, supra note 15 at 383.

Experience under NAFTA Chapter 11 has taught state parties that they might spend years defending cases that they consider to be without merit, frivolous, or plainly outside the tribunals' jurisdiction, before ultimately prevailing. The model Canadian FIPA and the US BIT, as opposed to Chapter 11, now include provisions concerning jurisdiction and admissibility. At the time the models were being drafted, applicable arbitration rules ultimately provided discretion to NAFTA tribunals to rule on jurisdictional objections as a preliminary matter or to join their analysis to the merits.

While objections were raised by state parties in almost all Chapter 11 cases, as of December 2009, only one tribunal had declined to exercise jurisdiction as a preliminary matter. The Methanex case again became a beacon for discontent. In this case, the United States attempted unsuccessfully to have the claim rejected as a preliminary matter. Some of the United States's arguments focused on the lack of jurisdiction (for example, based on Article 1101(1) on scope and coverage), while others focused on inadmissibility (for example, based on Article 1102, 1105, and 1110). As an illustration of the latter, the United States submitted: "[O]ur 1102 objection is an admissibility objection. In other words, that taking all of the allegations of fact made to be true, including uncontested facts, that as a matter of law, there can be no claim, and that the claim is ripe for dismissal at this stage for that reason." The tribunal rejected many of the arguments presented by the United States based on the following grounds: it did not have the power to reject claims based on inadmissibility; some of the arguments properly related to the merits of the case and not jurisdiction; and, even in cases where the arguments related to jurisdiction, the legal merit was so intertwined with the facts at issue that the matter had to be joined to the merits.

At this stage, the tribunal

168 See Legum, supra note 43 at 351.

169 See UNCITRAL Arbitration Rules, supra note 55 at Article 21 (4); and ICSID Additional Facility Rules, supra note 52 at Article 45 (5).

170 Waste Management I, supra note 7.

171 See Methanex Corporation v. United States, Preliminary Award on Jurisdiction and Admissibility, UNCITRAL (7 August 2002) at paras. 84-95 [Methanex, Jurisdiction].

172 Ibid. at para. 109 [emphasis added].

173 Ibid. at paras. 84-95. See Laird, "A Distinction without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in Salini v. Jordan and
decided that, while “as a whole” the amended statement of claim presented by Methanex failed to meet the jurisdictional requirements of Article 1101(1), it required further evidence to decide whether some of the allegations could bring the case within the jurisdiction of the tribunal. In August 2005, almost six years after Methanex served its notice of arbitration and original statement of claim, the tribunal ruled that it did not have jurisdiction.

Under NAFTA, the limited scope of jurisdictional challenges, the tendency of tribunals to join to the merits as well as the time required to defend claims that ultimately lacked merit, among other reasons, have led the United States and Canada to improve provisions on preliminary challenges in BITs and FIPAs. The approaches, however, vary considerably. In the United States, the TPA mandates that negotiators should seek to “improve mechanisms used to resolve disputes between an investor and a government through (i) mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims; (ii) procedures to ensure the efficient selection of arbitrators and the expeditious disposition of claims.”

On the conduct of arbitration, Article 28 of the US model BIT serves to meet these goals:

4. Without prejudice to a tribunal’s authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 94.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted...

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not

within the tribunal’s competence. The tribunal shall suspend any proceedings on the merits and issue a decision on or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request...

6. When it decides a respondent’s objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney’s fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant’s claim or the respondent’s objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

First, it should be noted that the provision reflects the two types of challenges argued by the United States in Methanex but without the “admissibility” label. Interestingly, this basis of objection, and the inspiration for the expedited procedure, can be found in US domestic law. Rule 12(b)(6) of the Federal Rules of Civil Procedure, relating to the presentation of defences, provides as one of the defences: “[F]ailure to state a claim upon which relief can be granted.” Second, in the case where the respondent chooses the expedited procedure, under paragraph 4, the tribunal does not have the discretion to join the analysis of preliminary objections to the merits. Third, a disincentive to frivolous claims and objections is provided at paragraph 6 through the award to the prevailing party of “reasonable costs and attorney’s fees.”

While the US model BIT provision is long in details, prescriptions, and deadlines (and somewhat convoluted), the Canadian FIPA model’s corresponding provision is just the contrary. Article 37, entitled “Preliminary Objections to Jurisdiction or Admissibility,” states: “Where issues relating to jurisdiction or admissibility are raised as preliminary objections, a Tribunal shall, wherever possible, decide the matter before proceeding to the merits.”

174 See Methanex, Jurisdiction, supra note 171 at para. 172.

175 See Methanex, Final, supra note 42.

176 TP4, supra note 15 at sec. 2102(b)(3)(G).

177 US Model BIT, supra note 2 at Article 38, paras. 4 and 5 [emphasis added].

178 See USTR, “Eight Misunderstandings” supra note 153: “7. Foreign investors can not abuse the process by filing frivolous investor-state claims that threaten state and local regulations. Our agreements include checks to ensure that investors cannot abuse the arbitration process, such as a special provision (based on US court rules) that allows tribunals to dismiss frivolous claims at an early stage of the proceedings or to award attorneys’ fees and costs as a deterrent to such claims.”


180 See Gantz, supra note 15 at 758–61; and Legum, supra note 43 at 352–53.

181 Canadian FIPA Model, supra note 1 at Article 37.
Brevity, however, does not guarantee clarity. First, the domains of jurisdiction and admissibility are not defined. Does “admissibility” mean what the United States argued in Methanex and what is in the model BIT? Does it have the meaning imparted by the International Court of Justice in the interpretation of its statute and Rules of Court? Second, the word “shall” is combined with the qualifier “whenever possible.” How much does this wording really limit the power of tribunals to join preliminary objections to the analysis of the merit?

After both models were made public, ICSID also adopted new rules that address concerns over frivolous claims. Parties may now have recourse to an expedited procedure to “file an objection that a claim is manifestly without legal merit.” If such an objection is filed, the tribunal shall decide on it before proceeding to the examination of other objections — to jurisdiction or competence — or proceeding to the merit. It will be interesting to see how tribunals under a FIPA might interpret this provision, in conjunction with Article 37 of the model. Indeed, the FIPA model provides that “[t]he applicable arbitration rules shall govern the arbitration except to the extent modified by this Section, and supplemented by any rules adopted by the Commission under this Section.” Would a tribunal see an overlap between an “admissibility” objection and one to the effect that a claim “is manifestly without legal merit”? If so, would the overlap foreclose the use of the expedited procedure, since the FIPA maintains some discretion for the tribunal to join its analysis of admissibility objections to the merit? Ironically, it could be that these new rules will eventually help Canada as a respondent state facing frivolous cases in the context of NAFTA Chapter 11 but not under the new FIPA model — the provisions of which were meant in part to alleviate problems that arose in Chapter 11 cases.

In conclusion, domestic procedures have in the United States influenced the adoption of an expedited procedure to deal with claims under BITs that lack legal merit. It may well be that this procedure has also influenced the new procedures at ICSID. In this instance, Canada did not opt to adopt the US solution. Time will tell whether the less prescriptive Canadian approach will serve to alleviate some of the problems experienced in the context of NAFTA.

**Conclusion**

This article has explored different influences on the Canadian FIPA model and the US model BIT beyond NAFTA Chapter 11 itself. The first influence, the NAFTA FTA’s interpretation and statements, was probably the most obvious since Canada and the United States have reproduced a solution that they had developed in the context of NAFTA. The second influence, WTO law and cases, is slightly more remote but not really surprising since areas of convergence in trade and investment law have made comparisons between the two a mainstay of investment arbitration. The third influence, US domestic law and principles, is both surprising and not. It is not, if one considers the context of elaboration of the model in the United States, which includes the TPA’s “no greater rights” mandate. It is somewhat surprising, however, to find that Canada, in the case of the expropriation provision of the model, has adopted the US solution.

What this article exemplifies is the wealth of considerations that are found behind the wording of model treaty provisions. The Canadian FIPA model and the US model BIT depart from past practice in a number of ways. First, the models are largely influenced by experience with cases, especially under NAFTA Chapter 11. Consequently, many provisions attempt to solve problems that have arisen in this context. Second, the models implicitly acknowledge the realization that developed states can be on the receiving end of investor claims from developing countries. When this happens, at least in the United States, the government wants to insure that foreign investors are not provided benefits that are greater than what Americans receive in the United States. Third, the models display a concern with limiting the discretion of tribunals. The models go to
great lengths to provide details and clarifying language. In addition, new procedures — for example, ones relating to the treatment of preliminary objections — have been adopted. Ultimately, the US model provides for the possibility of the creation of an appellate mechanism for investment disputes.

As this article has demonstrated, efforts to limit the discretion of tribunals may however backfire or be ignored. For example, issues can arise in relation to changes in the wording of treaties over time or in relation to transfers of law across systems (whether from the WTO or US domestic law). These difficulties can be compounded by the "precedential" effect given by many tribunals to the awards of other tribunals.

More broadly, issues discussed in this article illustrate the fast-paced evolution of international investment law. The sheer number of treaties and disputes, as well as the ad hoc nature of the dispute resolution system, present unique challenges. States adapt to this evolving reality in different ways. A comparison between agreements signed by the United States and Canada since 2004 and their respective models already shows some evolution and course corrections. Other states have renegotiated earlier agreements. Another characteristic of this evolution is the influence of the United States. For instance, elements of the US model are starting to spread not only to countries with which they conclude FTAs and BITs but also to countries that negotiate with US partners.

In conclusion, some degree of convergence in international investment law is apparent, but how far will it go? One current FIPA negotiating partner, India, has already adopted the US treaty language on indirect expropriation in its agreement with Singapore — a country, of course, that has a previous FTA with the United States. Further, China could also end up adopting, via its FIPA with Canada, principles found in the United States Supreme Court decisions interpreting the American constitutional protection of private property. If anybody still has doubts regarding the profound effects of globalization, they can clearly be put to rest.

Influences on the Canadian FIPA Model and US Model BIT: NAFTA Chapter 11 and Beyond

In recent years, Canada and the United States have modified their model bilateral investment treaties (BITs). If NAFTA Chapter 11 cases have provided the new lens through which investment issues are considered, the solutions to problems experienced in this context have come from different sources. This article explores three influences on the model BITs: the NAFTA Free Trade Commission’s interpretation and statements, World Trade Organization law and cases, and US domestic law and principles. A range of interpretation issues is raised, from the effects of changes in wording in successive treaties, to the “transferability” of law across systems (international and
domestic), to the use of arbitral awards as precedent. Issues of a systemic nature are also raised, including attempts at limiting the discretion of arbitral tribunals through state interpretations, the possibility of creating an appellate mechanism, and a push for expedited preliminary procedures. The article illustrates the fast-paced evolution of international investment law and highlights the influence of the United States on this evolution.