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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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1 Foreign Affairs and International Trade Canada (DFAIT), "Canada's FIPA Model," 20 May 2004, <http://www.dfait-maeci.gc.ca/tna-nac/what_fipa-en.asp#structure> [Canadian FIPA Model].

2 Office of the United States Trade Representative (USTR), "U.S. Model Bilateral Investment Treaty (BIT)," November 2004, <http://www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html> [US Model BIT].

3 Generally, see United Nations Conference on Trade and Development (UNCTAD), *UNCTAD Series on Issues in International Investment Agreements* (New York: United Nations, 1999); R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff, 1995); G. Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection" (1998) 269 Rec. des C. 251; and J.-P. Laviec, *Protection et promotion des investissements* (Paris: Presses Universitaires de France, 1985).

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.[5] In a number of instances, provisions are identical or present only minor change from Chapter 11.[6] Other provisions include specific answers to the discrete problems that have been raised in Chapter 11 cases.[7] 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, 32 I.L.M. 289 (entered into force 1 January 1994) [NAFTA]. According to DFAIT, "[i]n 2003, 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. Kinnear and R. Hansen, "The Influence of NAFTA Chapter 11 in the BITs Landscape" (2005) 12 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).

An abundant literature now exists on NAFTA Chapter 11. For an extensive guide, see M.N. Kinnear, A.K. Bjorklund, and J.F.G. Hannaford, *Investment Disputes under NAFTA: An Annoted Guide to NAFTA Chapter 11* (Alpen aan den Rijn: Kluwer Law International, 2006). And for a collection of essays, see T. Weiler, ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley, NY: Transnational Publishers, 2004).

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 26(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 I*]. 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.[8] 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.[9]

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).[10] 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.J. 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.naftaclaims.com/>.

8 See UNCTAD, "International Investment Disputes on the Rise," Occasional Note, 29 November 2004, <http://www.unctad.org/sections/dite/iia/docs/webiteiit20042_en.pdf>.

9 See the table of cases prepared by S. Sinclair, "NAFTA Chapter 11 Investor-State Disputes," Canadian Centre for Policy Alternatives (CCPA), January 2005, <http://www.policyalternatives.ca/documents/National_Office_Pubs/2005/chapter11_january2005.pdf>. The websites of the NAFTA parties contain information and documents regarding the disputes, including the text of the awards. See, for Canada, DFAIT, <http://www.dfait-maeci.gc.ca/tna-nac/gov-en.asp>; for the United States: U.S. Department of State, <http://www.state.gov/s/1/c3741.htm>; for Mexico, Secretaría de Economía, <http://www.economia.gob.mx/?P=2259&NLang=en>.

10 See list and text of FIPAs at DFAIT, <http://www.dfait-maeci.gc.ca/tna-nac/fipa_list-en.asp>. For a comparison with other countries, see UNCTAD, "Country-Specific Lists of BITs," <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1> [UNCTAD, "BITs Database"].

made public thus far has been rendered under a FIPA.[11] The publication of the model in 2004 signalled 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 concern-

On the Canadian FIPA program, see R.K. Paterson, "Canadian Investment Promotion and Protection Treaties" (1991) 29 Can. Y.B. Int'l L. 373; J. McIlroy, "Canada's New Foreign Investment Protection and Promotion Agreement: Two Steps Forward, One Step Back?" (2004) 5 J. of World Investment and Trade 621; A. Newcombe, "Canada's New Model Foreign Investment Protection Agreement" (2004) 30 C.C.I.L. Bulletin 9, <http://ita.law.uvic.ca/documents/CanadianFIPA.pdf>; C.E. Côté, "Chronique de Droit international économique en 2004: Investissement" (2005) 43 Can. Y.B. Int'l L. 486 at 488–97; and C. Lévesque,"Chronique de Droit international économique en 1999: Investissement" (2000) 38 Can. Y.B. Int'l L. 310 at 325–29.

11 *EnCana Corporation v. Republic of Ecuador*, LCIA Case UN3481, UNCITRAL (3 February 2006). 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.

12 See DFAIT, "Regional and Bilateral Initiatives: Status of Negotiations," <http://www.dfait-maeci.gc.ca/tna-nac/fipa-en.asp>.

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-Peru10nov06-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 Maffezini v. Kingdom of Spain, infra* note 137.

14 See DFAIT, "Canada's International Market Access Report 2007," <http://www.international.gc.ca/tna-nac/2007/pdf/ITC_MarketAccess_ENGfinal.pdf> at 32.

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

ing 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]

This mandate has influenced some of the key provisions of the model BIT. The United States has signed forty-six BITs since 1982, including one based on the 2004 model with Uruguay.[18] It has also

known as "fast-track." See D.A. Gantz, "The Evolution of FTA Investment Provisions: From NAFTA to the United States—Chile Free Trade Agreement" (2004) 19 Am. U. Int'l L. Rev. 679 at 704–8. See also G. Gagné and J.-F. Morin, "The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT" (2006) 9 J. Int'l Econ. L. 357; and Mark Kantor, "The New Draft Model U.S. BIT: Noteworthy Developments" (2004) 21 J. Int'l Arb. 383 at 384.

16 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 priviledges not accorded to nationals, and that therefore they may seek redress for grievances only before the local authorities." See D.R. Shea, *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.

17 *TPA*, *supra* note 15 [emphasis added].

18 See Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, 4 November 2005, <http://www.ustr.gov/assets/Trade_Agreements/BIT/Uruguay/asset_upload_file748_9005.pdf> [US-Uruguay BIT]. A wide literature exists on the US BITs program. K.J. Vandevelde and J.W. Salacuse, to name a few, have written extensively on US BITs, including K.J. Vandevelde, *United States Investment Treaties; Policy and Practice* (Deventer: Kluwer Law International, 1992); J.W. Salacuse and N.P. Sullivan, "Do BITs Really Work? An Evaluation

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.

of Bilateral Investment Treaties and Their Grand Bargain" (2005) 46(1) Harvard Int'l L. J. 67.

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

20 NAFTA, *supra* note 5 at Article 1131(2). 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 treatment 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 38 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 investors of another Party.

21 See the table of cases prepared by S. Sinclair, "NAFTA Chapter 11 Investor-State Disputes" CCPA, March 2007, <http://policyalternatives.ca/documents/National_Office_Pubs/2007/NAFTA_Dispute_Table_March2007.pdf>. For possible reasons as to the popularity with investors of such claims in the context of BITs, see R. Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005) 39 Int'l L. 87 at 87–88.

22 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 (13 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 1105:18–28.

23 NAFTA FTC, "Notes of Interpretation of Certain Chapter 11 Provisions," 31 July 2001, <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp> [FTC Interpretation]. See S.D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2005) 73 Fordham L. Rev. 1521 at 1574–82; and Gantz, *supra* note 15 at 709–16.

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 Pauline Neer (USA) v. United Mexican States*, General Claims Commission, 4 R.I.A.A. 60 (1926) (15 October 1926). On the evolutionay 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 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (ICSID Add. Fac.) (11 October 2002) at paras. 114–16 [*Mondev*]. 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 Kinnear, 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. Myers*, *Mondev*, *ADF* and *Loewen* 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

Both Canada and the United States have incorporated the substance of the FTC interpretation in their model treaties.[27] 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

> [t]he Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [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]eeking 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

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).

27 Canadian FIPA Model, *supra* note 1 at Article 5; and US model BIT, *supra* note 2 at Article 5.

28 *TPA*, *supra* note 15 at section 2102 (b)(3)(E.).

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.[29] 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.[30]

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."[31] Others present a close

29 On possible readings of the provision and annex, see Gantz, *supra* note 15 at 726–27.

30 See *Report of the Subcommittee on Investment Regarding the Draft Model Bilateral Investment Treaty*, presented to the Advisory Committee on International Economic Policy, US Department of State (30 January 2004). See also letter from AFL-CIO, Center for International Environmental Law, Earth Justice, Friends of the Earth-U.S., National Wildlife Federation, Oxfam America, Sierra Club to US Department of State and USTR officials, 16 January 2004, Center for International Environmental Law, <http://www.ciel.org/Publications/BIT_Comments_Jan1604.pdf>. For a reference to the highly political inter-departmental negotiations, see H. Mann, "The Final Decision in *Methanex v. United States*: Some New Wine in Some New Bottles," International Institute for Sustainable Development (IISD), 2005, <http://www.iisd.org/publications/pub.aspx?id=719> at 9–10. On the questionable utility of the new language, see N. Rubins, "The Arbitral Innovations of Recent U.S. Free Trade Agreements: Two Steps Forward, One Step Back" (2003) I.B.L.J. 865 at 878–80.

31 For example, Agreement between the Government of Canada and the Government of the Republic of Armenia for the Promotion and Protection of Investments, 8 May 1997, Can. T.S. 1999 No. 22 at Article II(2) (entered into force 29 March 1999). FIPAs are available online, see note 10 in this article.

variation of this provision, where both "fair and equitable treatment" and "full protection and security" are subjected to the principles of international law.[32] In another twist, one FIPA refers both to international and national legislation, providing for the precedence of the former in case of conflict.[33] In yet another version, the protection standard appears without any reference to international law.[34]

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.[35] Even for the other formulations, investors could argue that "international law" must mean something different than

32 For example, Treaty between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments, 12 September 1996, Can. T.S. 1998 No. 35 at Article II(2) (entered into force 13 February 1998) [Canada-Panama FIPA]; and Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, 1 July 1996, Can. T.S. 1998 No. 20 at Article II(2) (entered into force 28 January 1998).

33 Agreement between the Government of Canada and the Government of the Republic of Romania for the Promotion and Reciprocal Protection of Investments, 17 April 1996, Can. T.S. 1997 No. 47 at Article II(2) (entered into force 11 February 1997).

34 Agreement between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments, 3 October 1991, Can. T.S. 1993 No. 14 at Article III(1) (entered into force 21 November 1993): "Investments or returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party." These few examples reflect the many variations in the wording of standards found in BITs. See Dolzer and Stevens, *supra* note 3 at 58 and ff.; and Dolzer, *supra* note 21 at 90. See also OECD, "Fair and Equitable Treatment Standard in International Investment Law," Working Papers on International Law, 2004, Doc. 2004/3.

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 3.1 of the Treaty. That Article omits any express reference to the customary minimum standard. The interpretation of Article 3.1 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.[36] 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.[37]

arise under treaties (such as the NAFTA) which expressly tie the 'fair and equitable treatment' standard to the customary minimum standard. Avoidance of these difficulties may even be regarded as the very purpose of the lack of a reference to an international standard in the Treaty. This clearly points to the autonomous character of a 'fair and equitable treatment' standard such as the one laid down in Article 3.1 of the Treaty" (at para. 294) [notes omitted].

36 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-Argentina 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 reaction to a tribunal's different understanding of this article and that, in recent agreements, the correlative clause has been drafted to reflect 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. 363). See also C. Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6 J. of World Investment and Trade 357 at 360. See also Gantz, *supra* note 15 at 766, who raises similar issues in regard to the interpretation of NAFTA Chapter 11.

37 In the context of NAFTA, this issue came up when investors argued the application of the MFN treatment (Article 1103) 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. 1009). 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. 195; see also para. 107). See also discussion in *Pope and Talbot*, Phase 2, *supra* note 22 at para. 117. See Kinnear, Bjorklund, and Hannaford, *supra* note 5 at 1103:9–12. Annex III of the Canadian FIPA Model, *supra* note 1, on exceptions from MFN treatment, provides that "Article 4

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.[38] 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.[39] 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."

38 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 para. 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 (12 May 2005) at para. 284 [*CMS*]. On the different standards, see also *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, UNCITRAL (1 July 2004), at para. 189–92 [*Occidental*]; and *Saluka, supra* note 35 at para. 291 and ff.

39 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 38 at paras. 58–62). The tribunal in *Mondev, 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. 117). 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 compensation in cases of expropriation. See also A.F. Lowenfeld, "Investment Agreements and International Law" (2003) 42 Colum. J. Transnat'l L. 123 at 128–30; S. M. Schwebel, "The Influence of Bilateral Investment Treaties on Customary International Law" (2004) 98 Am. Soc'y Int'l. L. Proc. 27 at 27–30; and Salacuse and Sullivan, *supra* note 18 at 112–15. This issue is obviously very controversial, see, for example, the US rejoinder in *Glamis Gold Ltd v. United States of America*, (15 March 2007) at 142 and ff. [*Glamis*], 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.

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 "passé." This conclusion highlights a diffi-

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. 76–101). See the judicial review process by BC Supreme Court Judge Tysoe in *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664 at paras. 67–72 [*Metalclad*, judicial review]. *Tecmed* 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 *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2 (ICSID Add. Fac.) (29 May 2003), at paras. 153–54 [*Tecmed*]. Tribunals in *Occidental*, *supra* note 38, in particular, at paras. 185–86, and *CMS*, *supra* note 38 at paras. 278–79, refer to both of these cases. See also *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 (25 May 2004), at paras. 114–15 [*MTD*], which relies on *Tecmed*. This use of *Tecmed* was discussed in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Decision on Annulment, ICSID Case No. ARB/01/7 (Annulment Proceeding) (21 March 2007), at paras. 65–71. The tribunal in *Saluka*, *supra* note 35, also refers to *Tecmed*, and espouses the concept, although it warns of the risks in taking this concept too far (at paras. 304–8). 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 appears to rely on citations, from one case to another, without much effort spent on the identification of sources of international law, beyond those awards that were themselves lacking in sources ... A notable exception is found in the separate opinion in *Thunderbird*, *supra* note 24, where T. Wälde spends considerable energy to validate the use of this concept (at paras. 25–57). On the deficiency of sources, see Z. Douglas, "Nothing If Not Critical for Investment Treaty Arbitration: *Occidental, Eureko* and *Methanex*" (2006) 22 Arb. Int'l. 27 at 27–28 and, in passing, E. Snodgrass, "Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle" (2006) 21 ICSID Rev.-FILJ 1 at 11. Generally, see F.O. Vicuña, "Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society" (2003) 5 Int'l L. Forum 188; Dolzer, *supra* note 21; Schreuer, *supra* note 36; S. Fietta, "Expropriation and the 'Fair and Equitable' Standard" (2006) 23 J. Int'l Arb. 375; T. Weiler, "Good Faith and Regulatory Transparency: The Story of *Metalclad v. Mexico*," in T. Weiler, ed., *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron May, 2005), 701.

41 On the issue of "transparency," both the Canadian FIPA model, *supra* note 1 at Article 19, and the US model BIT, *supra* note 2 at Article 11, provide for obligations similar to those found in Chapter 18 of NAFTA on "Publication, Notification and Administration of Laws." Notably, however, both models exclude the recourse to investor-state arbitration for matters that arise from these provisions

culty that Canada will likely have to face for years to come. Developments in this fast moving area of the law are primarily led by ad-hoc tribunals. As such, options for "redirection" are minimal. 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.[42]

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.[43] The

(see FIPA Model, Article 19, footnote 7; and US Model BIT, Article 24). It remains to be seen how the transparency provisions would be interpreted in relation to the minimum standard of treatment.

42 Both the Canadian FIPA model, *supra* note 1 at Article 40, and the US model BIT, *supra* note 2 at Article 30(3), 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 1105. 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 para. 177. See also discussion in *Mondev*, *supra* note 24 at para. 100–25; and *Methanex 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 [*Methanex*, Final]. See Gantz, *supra* note 15 at 699–700, 716–24, 727, and 754; Franck, *supra* note 23 at 1604–6; 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 415 at 432–35.

43 For example, H. Mann and K. von Moltke, "NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment," I.I.S.D., 1999, <http://www.iisd.org/publications/pub.aspx?id=409> at 17–18 and 50–59; A. DePalma, "NAFTA's Powerful Little Secret; Obscure Tribunals Settle

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

Disputes, but Go Too Far, Critics Say," *New York Times* (11 March 2001). See also B. Legum, "Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions" (2004) 19 ICSID Rev.-FILJ 344 at 349–50.

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 will request the consent of disputing investors and, as applicable, tribunals, 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.

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* ...
>
> 3. 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.
>
> 4. 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

47 *Methanex, Amicus, supra* note 46 at para. 49.

48 This was done through live, closed circuit televison. See Mann, *supra* note 30 at 12.

49 See *United Postal Service of America Inc. v. Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, UNCITRAL (17 October 2001) at para. 70 [*UPS, Amicus*]. See L. Mistelis, "Confidentiality and Third Party Participation: *UPS v. Canada* and *Methanex Corp v. USA*," in Weiler, ed., *supra* note 40 at 169; and Rubins, *supra* note 30 at 868–71.

50 See Canadian FIPA Model, *supra* note 1 at Article 39 and Annex C.39.

51 *Ibid.* at Article 38.

parties over open hearings and the publication of awards.[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.[53]

At the forefront, however, might not be where some of Canada's negotiating partners want to be.[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

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 affect 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/052405-sgmanual.pdf> [ICSID, Working Paper].

53 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, approved by the UN General Assembly, 15 December 1976. See UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Sixth Session*, 46th Sess., Doc. A/CN.9/619 (2007) at 14 and 25. It should be noted, however, that *amici* submissions have been made under the current rules. See, for example, *Methanex, Amicus, supra* note 46; and *UPS, Amicus, supra* note 49.

54 See IISD, "Canada Encountering Static from Negotiating Partners over Transparency Demands," *Investment Treaty News* (16 March 2007), <http://www.iisd.org/pdf/2007/itn_mar16_2007.pdf>. See A.K. Bjorklund, who presents some of the benefits but also explains some of the resistance to the participation of third parties in A.K. Bjorklund, "The Participation of Amici Curiae in NAFTA Chapter Eleven Cases," in *Essay Papers on Investment Protection: Ad Hoc Experts Group on Investment Rules* (22 March 2002), <http://www.dfait-maeci.gc.ca/tna-nac/participate-en.asp>.

transparency or openness.[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.[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:

> 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.[57]

Arguably, India and China, which had signed over fifty and one hundred BITs respectively as of June 2006,[58] 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?[59] If it does, criticisms are sure to be raised domestically. Alternatively,

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, 3 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 12). In the case of the China-Madagascar BIT (2005), international arbitration is contemplated under the ICSID Convention only. See UNCTAD, "BITs Database," *supra* note 10.

57 DFAIT, "Canada's Foreign Investment Protection and Promotion Agreements (FIPAs) Negotiating Programme," <http://www.international.gc.ca/tna-nac/what_fipa-en.asp#structure>.

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.[60]

The US model BIT follows a similar path as Canada's regarding *amici*, public access to documents, and open hearings.[61] 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"[62] 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.[63] In addition, it provides more detailed procedures for dealing with protected information.[64]

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.[65] First, Peru did agree to the Canadian model's obligations in this area.[66] 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.[67]

fipa-en.asp#structure>, for example: "One of the most significant improvements in the FIPA model is the institutionalisation of the possibility for non-disputing individuals or organisations to seek leave from the Tribunal to make their views known on the matters at issue in the arbitration."

60 Patrick Juillard also raises the issue of lack of capacity in many developing countries to conduct negotiations based on the complex and lengthy US model. See P. Juillard, "Le nouveau modèle américain de traité bilatéral sur l'encouragement et la protection réciproques des investissements (2004)" (2004) 50 A.F.D.I. 669 at 670.

61 This is in accord with the *TPA*'s mandate, *supra* note 15 at sec. 2102 (b)(3)(H); and Legum, *supra* note 43.

62 US Model BIT, *supra* note 2 at Article 28(3).

63 See Canadian FIPA Model, *supra* note 1 at Article 38(3). Exception is made for the publication of the award. See Article 38(4).

64 Compare US Model BIT, *supra* note 2 at Article 29, and Canadian FIPA Model, *supra* note 1 at Article 38.

65 In 2004, Mexico also agreed in principle to open hearings in NAFTA Chapter 11 cases. See DFAIT, "Commission Meetings — NAFTA Free Trade Commission Joint Statement," 16 July 2004, <http://www.dfait-maeci.gc.ca/nafta-alena/JS-SanAntonio-en.asp>. Generally, see B. Stern, "Un petit pas de plus: l'installation de la société civile dans l'arbitrage CIRDI entre Etat et investisseur" (2007) 1 Revue de l'arbitrage 3.

The Influence of WTO Law and Cases

The Canadian FIPA model contains several direct references to WTO law.[68] 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.[69] Also of interest is the provision found in the US model BIT for considering the establishment of some form 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/25/3/34786913.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. 36, 1144 U.N.T.S. 123 (entered into force 18 July1978), 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 10 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.[70] The conventional origins of this standard can be traced to trade treaties.[71] 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.[72]

The US model BIT as well as NAFTA Chapter 11 contain very similar provisions.[73] In addition, the general exceptions provision of the FIPA model reminds us of Article XX of the GATT.[74] It states:

1. Subject to the requirement that such measures are not applied in 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 Laviec, *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. 222–32. Another difference concerns paragraph 3, 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.

construed to prevent a Party from adopting or enforcing measures necessary:

(a) to protect human, animal or plant life and health;
(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
(c) for the conservation of living or non-living exhaustible natural resources.[75]

In this instance, the US model BIT does not include an equivalent, and the general exceptions provision of NAFTA Article 2101 does not apply to Chapter 11.[76] Interestingly, such provisions are not new to Canada's practice as they have been included in every FIPA signed since the adoption of NAFTA.[77] However, Canada has chosen to maintain this provision, undoubtedly aware of the interpretation challenges that it poses.[78]

The convergence of standards in trade and investment treaties has led investors, states, and tribunals to draw on trade practice in the interpretation of BITs. Not surprisingly, it has also raised the question of the appropriateness of transfers from one system to the other.[79] Most often, differences in wording, context, and objectives are drawn to the attention of the tribunals by state parties, while investors insist on the commonalities between the provisions.[80]

[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 FIPAs follow more closely Article XX(g) of the GATT than the model. For example, Canada-Panama FIPA, *supra* note 32 at Article XVII(3)(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 10; and Côté, *supra* note 10 at 491–93.

[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. 174–76. See also D.A. Gantz, "Potential Conflicts between Investor Rights and Environmental Regulation under NAFTA's Chapter 11" (2001) 33 Geo. Wash. Int'l L. Rev. 651 at 731–38; 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.[81] 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.[83]

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.[84] For some of the cases, commentators have likened this process to the application

December 2003), at para. 300 and ff.; and *United Postal Service of America Inc. v. Government of Canada*, Investor's Memorial (Merits Phase), (23 March 2005), at para. 510 and ff.; and *UPS-Counter-Memorial, supra* note 37 at para. 574 and ff.

81 This accounts for *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. Arb(AF)/98/3 (ICSID Add. Fac.) (26 June 2003) [*Loewen*]; *ADF, supra* note 24; *Methanex*, Final, *supra* note 42; and *Thunderbird, supra* note 24.

82 This group includes *Pope and Talbot*, Phase 2, *supra* note 22; *S.D. Myers*, Partial Award, *supra* note 22; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (ICSID Add. Fac.) (16 December 2002) [*Feldman*]; and *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL (15 November 2004) [*GAMI*].

83 For a description of the tribunal's holdings, see Kinnear, Bjorklund, and Hannaford, *supra* note 5 at 1102:21–35.

84 The tribunal in *Feldman, supra* note 82 at paras. 176–77, is the most explicit on the burden shift, followed by the tribunal in *Pope and Talbot*, Phase 2, *supra* note 22 at para. 78, which refers to a presumption of violation that can be rebutted. The treatment of government justifications in *S.D. Myers*, Partial Award, *supra* note 22 at para. 255 and *GAMI, supra* note 82 at para. 114, imply such a shift.

of an exception.[85] Irrespective of qualification, it appears that the exculpatory facts have been provided, or have failed to be provided, by governments.[86] Second, in evaluating the reasons provided for the difference in treatment, tribunals have looked for "a reasonable nexus to rational government policies";[87] "legitimate public policy measures that are pursued in a reasonable manner";[88] "a rational justification" or reasonable distinctions;[89] or a plausible connection with a legitimate goal of policy.[90] 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.[91]

Conversely, investors have not been required to provide a proof positive of discriminatory intent.[92] Tribunals have recognized that short of a "smoking gun," this proof may be impossible to provide.[93]

85 T. Weiler, "Saving Oscar Chin: Non-Discrimination in International Investment Law," in Weiler, ed., *supra* note 40 at 573–77. But see Kinnear, Bjorklund and Hannaford, *supra* note 5 at 1102:26.

86 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).

87 *Pope and Talbot*, Phase 2, *supra* note 22 at para. 78.

88 *S.D. Myers*, Partial Award, *supra* note 22 at para. 246.

89 *Feldman, supra* note 82 at paras. 170 and 182.

90 *GAMI, supra* note 82 at para. 114.

91 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. 83–104). The tribunal in *Feldman, supra* note 82, 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). *S.D. 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. 246 and 255). This is consistent with the separate opinion of Brian Schwartz, who argues that Article XX disciplines do apply to Chapter 11 (at paras. 132–35). This is in contrast with the position taken by the tribunal in respect of Article 1105: "[A] Chapter 11 tribunal does not have an open-ended mandate to second guess government decision making" (at para. 261).

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

93 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.[94] Interestingly, however, the only two cases where a violation of Article 1102 was found presented evidence of discriminatory intent or, if not a smoking gun, some smoke.[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.[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.[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.[98]

With respect to the relation between national treatment and the general exceptions provisions, investors would likely acknowledge

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

95 A smoking gun was found in *S.D. Myers,* Partial Award, *supra* note 22 at paras. 161–95, and some "smoke" in *Feldman, supra* note 82 at para. 182. The question of proof of intent raised issues as to "whose intent?" This difficulty was aknowledged in *S.D. Myers,* where the protectionist intent of the minister of the environment was key (*ibid.* at paras. 161–63).

96 On the drafters fluency with GATT law and impact on interpretation, see *Methanex,* Final, *supra* note 42, at part IV, chap. B, paras. 30–38.

97 See *United States – Standards for Reformulated and Conventional Gasoline,* Appellate Body Report, Doc. AB-1996-1 (29 April 1996) [*Gasoline*]; and *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,* Appellate Body Report, AB-2000-11 (12 March 2001) at paras 164 and ff. [*Asbestos*].

98 See *Gasoline, supra* note 97 at part IV. On Article XX interpretation methodology, see D.M. McRae, "GATT Article XX and the WTO Appellate Body," in M. Bronckers and R. Quick, eds., *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (London: Kluwer Law International, 2000) at 219–36.

the findings of the WTO Appellate Body in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* but differentiate from it.[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.[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.[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 *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 *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.[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

99 *Asbestos, supra* note 97.

100 *Ibid.* at para. 88.

101 *Ibid.* at para. 115.

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.[103] This tribunal did allow some elements of justification in the analysis of likeness but stated that "like circumstances" and the general exception provision — as exceptions — were to be construed narrowly.[104] 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."[105]

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. 285–94).

104 The tribunal added: "Here the GATT/WTO history, liberally cited by the Parties, and the FTA 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 FTA 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).

105 Investors may find additional support in an unlikely place — IISD's *amicus curiae* submission in *Methanex, 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.[106] 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.[107] 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.[108] 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).[109] 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.[110] While there is always room for improvement, member governments are not questioning the value of the Appellate Body.[111]

106 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, Article 31.

107 UNCTAD, *supra* note 70 at 1 and 44.

108 Energy Charter Treaty, 17 December 1994, 34 I.L.M.374 (1995), <http://www.encharter.org/index.php?id=7> at Article 24. See also list of cases prepared by the Energy Charter Secretariat, <http://www.encharter.org/index.php?id=213>.

109 WTO Agreement, *supra* note 68 at Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes" at Article 17 [DSU].

110 D.A. Gantz, "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges" (2006) 39 Vand. J. Transnat'l L. 39 at 56–57.

111 See D. McRae, "Comments on Dr. Claus-Dieter Ehlermann's Lecture" (2003) 97 Am. Soc'y Int'l. L. Proc. 87.

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.[112] State parties have also been confronted early on with interpretations with which they disagreed.[113] 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.[114] Judicial review of final awards was possible but only on limited grounds.[115] Meanwhile, in the

112 See, for example, *Metalclad, supra* note 22, which concerned the operation of a hazardous waste landfill; and *Methanex, supra* note 42, which concerned a chemical component of gasoline believed to pose risk to the environment. See also Gantz, *supra* note 110 at 43; and Gantz, *supra* note 79 at 659–69 and 705–9.

113 See, for example, the award in *Pope and Talbot*, Phase 2, *supra* note 22 at paras. 105–18, where the tribunal interpreted the terms "including" found in Article 1105 as having an "additive" meaning, and the award in *S.D. Myers*, Partial Award, *supra* note 22 at paras. 266–68, where the tribunal ruled that a violation of Article 1102 established a violation of Article 1105.

114 See discussion note 42. See also Gantz, *supra* note 110 at 54–55.

115 Canada was the place of arbitration of the first three Chapter 11 cases reviewed, and, as such, the grounds for review were essentially those of Article 34 of the UNCITRAL Model Law on International Commercial Arbitration. They include, *inter alia*, a party was unable to present his case, the award contains decisions on matters beyond the scope of the submission to arbitration and the award is in conflict with the public policy of this state. Canada and Mexico, both as applicant and intervener, argued that the level of judicial deference due to commercial arbitral awards was not appropriate for Chapter 11 awards as they concerned matters of public interest. As such, they were not protected by a high standard of review. These arguments were rejected in the three cases, as the courts adopted the discourse of deference, even though their application of the standards of review were not necessarily consistent or without criticism. See the court decisions in *Metalclad*, judicial review, *supra* note 40; *United Mexican States c. Marvin Roy Feldman Karpa*, Case 03-CV-23500, Ontario Superior Court (3 December 2003), and Case C41169, Ontario Court of Appeal (11 January 2005); and *Canada (P.G.) c. S.D. Myers Inc.*, [2004] F.C. 38 (13 January 2004). See also C. Lévesque, "Chronique de Droit international économique en 2003: Investissement" (2004) 42 Can. Y.B. Int'l Law 480 at 480–85; Gantz, *supra* note 110 at 51–55 and 57–58; Brower, Brower, and Sharpe, *supra* note 42 at 430–32; and I. Laird and R. Askew, "Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System?" (2005) 7 J. App. Prac. and Process 285 at 287–94.

broader BIT world, the spectre of conflicting interpretations of identical or very similar treaty provisions has become apparent.[116]

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."[117] 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."[118] 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 81 (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 Others Signatories of the Convention," <http://www.worldbank.org/icsid/constate/c-states-en.htm>. See also Gantz, *supra* note 110 at 49–50.

116 See Brower, Brower, and Sharpe, *supra* note 42 at 424–28; Franck, *supra* note 23 at 1558–74; A.K. Bjorklund, "The Continuing Appeal of Annulment? Lessons from AMCO Asia and CME," in Weiler, ed., *International Investment Law*, *supra* note 40 at 471; and Gantz, *supra* note 110 at 44–45.

117 *TPA, supra* note 15 at sec. 2102 (b)(3)(G).

118 US Model BIT, *supra* note 2 at Annex D.

Dominican Republic in 2004 (US-CAFTA-DR).[119] 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.[120]

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.[121]

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.[122]

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

[119] See USTR, "CAFTA-DR Final Text," Annex 10-F on Appellate Body or Similar Mechanism, <http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html> [US-CAFTA-DR]. It is discussed at length in Gantz, *supra* note 110.

[120] *Ibid.*, Chapter 10, Annex 10-F; Chapter 19, Article 19.1 on Free Trade Commission; and Chapter 22, Article 22.2 on Amendments.

[121] US Model BIT, *supra* note 2 at Article 28(10). To the same effect, see US - CAFTA-DR, *supra* note 119 at Article 10.20(10).

[122] Juillard, *supra* note 60 at 681. However, see Gagné and Morin, *supra* note 15 at 378.

an appellate mechanism was considered.[123] The impetus was clear. According to the Secretariat, "[b]y 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."[124] 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."[125]

The implementation of any such ICSID appellate mechanism was also considered.[126] 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.[127] In the end, the response of the Administrative Council of the centre to these proposed changes was also clear — the proposal was premature.[128]

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.[129] 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.[130] Nevertheless, a draft

[123] ICSID, Discussion Paper, *supra* note 52 at 14 and ff.

[124] *Ibid.* at para. 20.

[125] *Ibid.* at para .23.

[126] *Ibid.* at Annex.

[127] See *ibid.* at Annex, for example, notes 4 and 8.

[128] ICSID, Working Paper, *supra* note 52 at para. 4.

[129] On Canada's signature, see note 115 in this article. See also Côté, *supra* note 10 at 495–96.

[130] Gantz, *supra* note 110 at 75–76.

amendment would likely serve in the United States as a model for an appellate mechanism.[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 agreements (BIT and FTAs) that provide at least for the possibility of creating an appellate mechanism.[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 example, under different standards of review.[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 mechanism by NAFTA parties is conceivable, it is highly unlikely to happen for political reasons.[134] Might such an ad hoc mechanism eventually "fold" into a permanent facility created at ICSID?[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 resolution provisions from the application of most-favoured-nation clauses,[136] most do not, and the decisions of arbitral tribunals on this point are inconsistent.[137] More generally, while some of the

131 *Ibid.* at 76.

132 See USTR, *supra* note 19.

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 abberant interpretations. See Senate Report 107-139, <http://www.congress.gov/cgi-bin/cpquery/R?cp107:FLD010:@1(sr139):> at 16.

134 Gantz, *supra* note 110 at 72.

135 *Ibid.* at 48.

136 For example, the United States, see US-Uruguay BIT, *supra* note 18 and Canada, see Canada-Peru FIPA, *supra* note 13.

137 See *Emilio Augustin Maffezini v. Kingdon of Spain,* Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. Arb/97/7 (25 January 2000) in which the tribunal concluded that "if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests that those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle" (at para. 56). This reasoning was followed in a number of awards. For another line of cases, see *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan,* Decision on Jurisdiction, ICSID Case No. ARB/02/13 (15 November 2004); and *Plama Consortium Ltd v. Republic of Bulgaria,* ICSID Case No. ARB/03/24 (8 February 2005). For a discusion, 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 Kinnear, Bjorklund, and Hannaford, *supra* note 5 at 1103:12-24.

initial anxiety has subsided, underlying concerns with run-away tribunals and the risk of inconsistent interpretations remain, and new ones have emerged.[138] One is the tendency of many arbitral tribunals to rely heavily on other awards in making their decisions. Then, the risk exists of "bad" law perpetuating itself.[139]

There was a time when a suggestion that the WTO Appellate Body might be used to resolve investment disputes would have been conceivable. Today, the momentum is clearly against any type of investment issue being embraced by the WTO.[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 solution, its pursuit of consistency, predictability, and efficiency will remain 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.

138 For a discussion, see Franck, *supra* note 23 at 1606-10 and 1617-25; Bjorklund, *supra* note 116 at 510 and ff. Some authors are expressing doubts as to the value of an appellate mechanism, see Alvarez, *supra* note 16 at 96-97; and F.O. Vicuña, "Foreign Investment Law: How Customary Is Custom?" (2005) 99 Am. Soc'y Int'l. L. Proc. 97 at 101. See also Laird and Askew, *supra* note 115 at 297-302.

139 See Gantz, *supra* note 110, who discusses the risk "in leaving an allegedly erroneous decision unchallenged" (at 55); and Douglas, *supra* note 40 at 27-28, who provides examples of abuse of precedents. The question of precedent in international investment law has attracted considerable attention in recent years. For an account and a citation analysis, see J.P. Commission, "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence" (2007) 24 J. Int'l Arb. 128.

140 Gantz, *supra* note 110 at 71.

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 an investor 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

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 1 at 18–30; Gantz, *supra* note 15 at 731–40; and Kinnear, Bjorklund, and Hannaford, *supra* note 5 at 1110:17–27.

142 NAFTA, *supra* note 5 at Article 1110.

"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,

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 20 and corresponding text on FTC interpretations under Article 1131(2) of NAFTA.

145 See *Metalclad, supra* note 22 at paras. 102 and ff. See also J.C. Thomas, "The Experience of NAFTA Chapter 11 Tribunals to Date: A Practitioner's Perspective," in L. Ritchie Dawson, ed., *Whose Rights? The NAFTA Chapter 11 Debate* (Ottawa: Centre for Trade Policy and Law, 2002), 98 at 124; and R. Dolzer, "Indirect Expropriations: New Developments?" (2002) 11 N.Y.U. Envt'l L.J. 64 at 72.

146 See, for example, DePalma, *supra* note 43.

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. 6–18.

148 *TPA, supra* note 15.

149 See notes 15–17 in this article and accompanying text. See also Sampliner, *supra* note 141 at 35–39.

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, 89, 94, and 104 [*Pope and Talbot,* Interim]; and *S.D. Myers,* Partial Award, *supra* note 22 at paras. 285–86. See also Sampliner, *supra* note 141 at 5–6; and Kinnear, Bjorklund, and Hannaford, *supra* note 5 at 1110:27–29.

151 See US Model BIT, *supra* note 2 at Article 6 (Expropriation and Compensation), note 9. See Gantz, *supra* note 15 at 743–46.

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

[t]he Parties confirm their shared understanding 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[[152]]
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]

152 This paragraph raises issues in relation to the interaction of the definition of investment with the reference to "property rights and property interest in an investment."

153 *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978) [*Penn Central*]. See USTR, "Eight Misunderstandings about U.S. Investment Agreements and Trade," March 2007 <http://www.ustr.gov/assets/Trade_Sectors/Services/How_does_trade_in_services_benefit_your_state/asset_upload_file123_10869.pdf> [USTR "Eight Misunderstandings]: "4. Investment agreements *do not* provide greater substantive rights to foreigners than to domestic investors in the United States. Our agreements provide foreign investors with substantive rights that closely correspond to rights already available to any investor under US law—no more no less. For example, the text of our agreements applicable to a dispute involving an expropriation claim would be one drawn directly from U.S. Supreme Court decisions." See also *Inside U.S. Trade,* volume 20, no. 39, 27 September 2002, at 18-19.

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]

154 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. 1165. See also G. Kanner, "Making Laws and Sausages: A Quarter-Century Retrospective on *Penn Central Transportation Co. v. City of New York*" (2004–5) 13 Wm. and Mary Bill Trs J. 679 at 770.

155 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).

156 See note 30 and accompanying text.

157 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."[158] 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.[159] In

See Sampliner, *supra* note 141 at 39–42. See also *Inside US Trade, supra* note 153 at 1 and 18-21.

158 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 636–37.

159 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.

addition, the reference to customary international law found in the US model's annex is not reproduced in the Canadian model.[160]

What might the impact of this lineage be on the interpretation of the indirect expropriation wording of FIPAs? In one scenario, it has little impact. Tribunals will analyze the ordinary meaning of the terms of the provision and of the annex, as mandated by Article 31 of the Vienna Convention on the Law of Treaties, and will look for support in international customary law or general principles of law as applicable.[161] Arguments based on US Supreme Court decisions will be considered in the proper frame of international law, for example, as evidence of the practice of states.[162]

In another scenario, it has greater impact. Tribunals may find that while there is ample support in international law for the consideration of the economic impact of the measure and the character of governmental action, there is less so for "interference with distinct, reasonable investment-backed expectations" in the expropriation context.[163] Thus, the temptation could be great to borrow from United States Supreme Court takings jurisprudence. (Arbitrators might reason, openly or not, that this is the immediate source of the terms after all.) As Ian Brownlie warns, however, in his discussion of general principles of law as sources of international law, "in some cases, for example the law relating to expropriation of

160 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 (2) related to property rights and (3) on the definition of direct expropriation (cited earlier).

161 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).

162 See I. Brownlie, *Principles of Public International Law*, 6th edition (Oxford: Oxford University Press, 2003) at 22.

163 See C. Lévesque, "Distinguishing Expropriation and Regulation under NAFTA Chapter 11: Making Explicit the Link to Property," in K. Kennedy, ed., *The First Decade of NAFTA: The Future of Free Trade in North America* (Ardsley, NY: Transnational Publishers, 2004) at 293. However, see J. Paulsson and Z. Douglas, "Indirect Expropriation in Investment Treaty Arbitrations," in N. Horn and S. Kroll, eds., *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (The Hague: Kluwer Law International, 2004), 145 at 157–58.

private rights, reference to domestic law might give uncertain results and the choice of models might reveal ideological predilections."[164] In this respect, United States Supreme Court decisions interpreting the constitutional protection of property are no exception.[165]

In the end, the determination of which scenario prevails might have little to do with Canada. The annex on expropriation is found in US BIT 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.[166] 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.[167] US domestic law and principles can be found (once again) far away from home.

164 Brownlie, *supra* note 162 at 16. See also M. Sornarajah, *The International Law on Foreign Investment*, 2nd edition (Cambridge: Cambridge University Press, 2004), on the changing notions of property in the United States and Europe (at 368 and ff.).

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, Gantz, *supra* note 15 at 745, who states: "[The 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 McIlroy, *supra* note 10 at 636–37, who discusses the retreat in the provision. For a discussion of the police power language, see, J.J. Coe, Jr. and N. Rubins, "Regulatory Expropriation and the Tecmed Case: Context and Contributions," in Weiler, ed., *supra* note 40 at 642. For a different viewpoint, see M.C. Porterfield, "International Expropriation Rules and Federalism" (2004) 23 Stan. Envt'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.

166 See "Free Trade Agreement between Peru and Chile" (27 August 2006), (in Spanish): <http://2005.sice.oas.org/Trade/CHL_PER_FTA/Texto_s.pdf> at Article 11.10, Annex 11-D; and "Comprehensive Economic Cooperation Agreement between India and Singapore" (29 June 2005), <http://commerce.nic.in/ceca/toc.htm> Article 6.5, Annex 3-Expropriation.

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

OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

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.[168] 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.[169] While objections were raised by state parties in almost all Chapter 11 cases, as of December 2003, only one tribunal had declined to exercise jurisdiction as a preliminary matter.[170]

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).[171] 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."[172]

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 merit 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.[173] At this stage, the tribunal

168 See Legum, *supra* note 43 at 351.

169 See UNCITRAL Arbitration Rules, *supra* note 53 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 (7August 2002) at paras. 84–95 [*Methanex,* Jurisdiction].

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

173 *Ibid.* at paras. 84–95. See I. 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.[174] 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.[175]

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."[176] 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 34.
>   (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 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.[177]

Methanex v. USA," in Weiler, ed., *supra* note 40 at 201; Legum, *supra* note 43 at 352.

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

[175] The final award, which counts over 300 pages, also considered the merits of the case. See *Methanex*, Final, *supra* note 42.

[176] *TPA*, *supra* note 15 at sec. 2102(b)(3)(G).

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.[178] 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."[179] 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."[180]

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."[181]

[177] US Model BIT, *supra* note 2 at Article 28, 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."

[179] US Fed Rules of Civil Procedure, Rule 12(b)(6).

[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?[182] 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.[183] Parties may now have recourse to an expedited procedure to "file an objection that a claim is manifestly without legal merit."[184] 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.[185] 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."[186] 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

182 See discussion in *Methanex*, Jurisdiction, *supra* note 171 at paras. 107–26. See also Laird, *supra* note 173.

183 See ICSID, Working Paper, *supra* note 52 at 7.

184 See ICSID, Arbitration Rules, *supra* note 52 at Rule 41(5); and ICSID Additional Facility Rules, *supra* note 52 at Article 45(6).

185 Rule 41(5) states: "Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection." To the same effect, see ICSID Additional Facility Rules, *supra* note 52.

186 Canadian FIPA model, *supra* note 1 at Article 27(3) [emphasis added].

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 FTC'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.

Sommaire

Influences du Chapitre 11 de l'ALÉNA et d'autres sources sur les modèles canadien et américain de traités bilatéraux sur les investissements

Le Canada et les États-Unis ont adopté, ces dernières années, de nouveaux modèles de traités bilatéraux sur les investissements. L'expérience acquise dans les affaires relevant du Chapitre 11 de l'ALÉNA a certainment coloré la perception des problèmes de réglementation des investissements étrangers. Toutefois, les solutions élaborées afin de faire face à ces problèmes proviennent de sources multiples. Les modèles canadien et américain ont en effet aussi subi l'influence (1) des interprétations et déclarations de la Commission du libre-échange de l'ALÉNA; (2) du droit de l'Organisation mondiale du commerce; et (3) du droit interne américain. Plusieurs questions d'interprétation se soulèvent alors, notammeni les effets des modifications au libellé des dispositions par rapport à des traités antérieurs, la possibilité de "transférer" des règles d'un système juridique à un autre (droit international ou interne), et l'utilisation des sentences arbitrales à titre de précédent. Des questions systémiques sont également soulevées relativement aux efforts du Canada et des États-Unis afin de limiter la discrétion des tribunaux arbitraux notamment à travers des déclarations d'interprétation, la création possible d'un mécanisme d'appel des sentences et l'élaboration de procédures accélérées de traitement des objections préliminaires. Cet article illustre l'évolution rapide du droit international des investissements et souligne l'influence des États-Unis sur cette évolution.

Summary

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.