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Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600

Re: Inquiry into the Korea-Australia Free Trade Agreement

Dear Committee members,

I am writing to recommend that the Korea-Australia Free Trade Agreement (KAFTA) be renegotiated by the Government to exclude any clause that allows for investor-state dispute settlement (ISDS), In the attached submission, I outline serious problems with both the process of ISDS and the handling of important issues of public policy by investment arbitration tribunals. The key points are:

- Investment arbitration is a very expensive process that lacks democratic accountability
- Investment protection provisions have been broadly and inconsistently interpreted by arbitral tribunals
- Legitimate public policies, particularly in the area of environmental protection, have been challenged by corporations under ISDS in many countries
- The high costs associated with arbitration, coupled with the inconsistency in tribunal rulings, can lead to "regulatory chill"
- The "safeguards" in KAFTA that the Government claims will protect public policy are untested and likely insufficient
- There is no evidence to suggest that including ISDS in KAFTA will lead to an increase in Korean investment in Australia

Please do not hesitate to contact me if you would like me to explain any of these issues further.

Yours sincerely,

Dr. Kyla Tienhaara

Investor-State Dispute Settlement in the Korea-Australia Free Trade Agreement

Submission to the to the Joint Standing Committee on Treaties

16 May 2014

Dr. Kyla Tienhaara

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Summary

This submission recommends that the Korea-Australia Free Trade Agreement (KAFTA) be sent back to the negotiating table for removal of any clause permitting investor-state dispute settlement (ISDS). The submission outlines serious problems with both the process of ISDS and the handling of important issues of public policy by investment arbitration tribunals. The key points are:

- Investment arbitration is a very expensive process that lacks democratic accountability
- Investment protection provisions have been broadly and inconsistently interpreted by arbitral tribunals
- Legitimate public policies, particularly in the area of environmental protection, have been challenged by corporations under ISDS in many countries
- The high costs associated with arbitration, coupled with the inconsistency in tribunal rulings, can lead to 'regulatory chill'
- KAFTA's 'safeguards' are largely untested and likely insufficient
- There is no evidence that including ISDS in KAFTA will lead to an increase in Korean investment in Australia

Introduction

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

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

The Gillard Government, following the recommendations of the Productivity Commission, decided to cease the practice of including ISDS clauses in trade agreements and took a strong position on this issue in the ongoing negotiations for the Trans Pacific Partnership Agreement (TPP).

The Abbott Government has abandoned this policy and has stated that it will approach ISDS provisions in trade agreements on a case-by-case basis. The KAFTA contains an ISDS clause but recently signed deal with Japan reportedly does not.

Concerns with Process

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

Although ISDS has been around for a long time, only a handful of cases emerged prior to the mid-1990s. Thereafter, the frequency of disputes increased rapidly and as of the end of 2013 the total number of known cases had reached 568.[4] The large number of disputes can be attributed in part to the proliferation of BITs (there are now estimated to be more than 3000 worldwide) but also to recent arbitral interpretations of provisions in IIAs, which have both broadened the range of potential claims that can be made against a state and increased investor interest in this form of dispute settlement.

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

The rules most commonly referred to in IIAs are those developed by the UN Commission on International Trade Law (UNCITRAL)[5] and the International Centre for the Settlement of Investment Disputes (ICSID).[6] These are the rules specifically referred to in KAFTA, though the parties are also given the option to use any other arbitration rules that they can mutually agree upon.

The UNCITRAL rules are ad hoc and no organisation keeps track of disputes where they are applied. On the other hand, ICSID, a part of the World Bank Group, maintains a website with relevant details about disputes in which its rules are utilised and posts tribunal awards if they are made public.[7] Although ICSID was established in 1966, the first ICSID arbitral tribunal did not convene until 1972 and the pace of cases brought before the Centre remained slow for decades.[8] It is only in the last fifteen years that the caseload of ICSID has increased sharply. Between 2001 and 2006, the number of disputes filed under ICSID was 150% of the total number of cases filed over the first 35 years that the Centre was in existence.[9]

In a typical case, regardless of whether ICSID or UNCITRAL rules are chosen, an investment arbitral tribunal will have three members: one chosen by the investor, one chosen by the state and a third that is mutually agreed upon and will act as president. It is not only barristers and retired judges that are frequently appointed as arbitrators, but also professors, who in many cases also have careers as leading private lawyers.[10] In fact, it is entirely possible for an individual to act as a legal representative for a respondent or claimant in one case, and an arbitrator in another.[11]

It has been said that 'the awards of arbitrators are more widely enforceable than any other adjudicative decision in public law'.[12] IIAs often explicitly obligate states to recognize awards, thus allowing investors to seek enforcement in the local courts of the host state.[13] Furthermore, where an IIA provides for enforcement under the ICSID Convention, an investor can seek enforcement in the domestic courts of any state party to the Convention. Article 54 of the ICSID Convention stipulates that each Contracting

'the awards of arbitrators are more widely enforceable than any other adjudicative decision in public law'

State shall recognize an ICSID award as binding and enforce the pecuniary obligations imposed by that award within its territory as if it were a final judgment of a domestic court. Awards may also be enforceable under other arbitration treaties such as the New York Convention. The New York Convention is similar to the ICSID Convention in that it requires courts in contracting states to enforce arbitral awards. Australia has ratified both the ICSID and the New York conventions.

KAFTA deals with one of the major complaints that have been made about the process of ISDS; that it lacks transparency. The agreement provides for the publication of documents, decisions, and awards and stipulates that tribunal proceedings will be public. These are important measures; however, there are other problems with the process of ISDS that have not been addressed in KAFTA:

❖ Institutional Bias & Conflicts of Interest

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

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

The fact that individuals can act as both arbitrators and counsel in different cases is also problematic as they may 'consciously or unconsciously' make decisions as arbitrators that will further their client's interests in another case.[15] Furthermore, even when such a direct conflict of interest does not exist, a large number of arbitrators work for law firms with corporate clients that have a direct stake in the interpretation of IIAs.[16]

❖ Inconsistency

Awards rendered in investment arbitration are only binding on the parties involved in the

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

This problem is compounded by the ambiguous nature of the provisions found in IIAs (e.g. the requirement to provide 'fair and equitable treatment', see further below). When the outcome of arbitration is uncertain, states that are faced with a threat of arbitration are more likely to settle investor claims, often at the expense of public policy (see further discussion of 'regulatory chill' below).

The 'possibility' of a bilateral appellate mechanism being developed in the future is mooted in Annex 11-E of KAFTA. However, similar aspirational statements in other agreements have failed to result in the development of any appeals process.

❖ High Costs

The ICSID Secretariat charges a fee for the lodging of a request for arbitration (US$25,000), for any interpretation, revision or annulment of an arbitral award rendered pursuant to the Convention (US$10,000), for the administration of a dispute (US$32,000 per year plus out of pocket expenses), and for the appointment of an arbitrator or decisions on the challenge of an arbitrator in arbitrations not conducted under the Convention or Additional Facility Rules.[18] ICSID Arbitrators receive reimbursement for any direct expenses reasonably incurred in the course of the arbitration, and unless otherwise agreed between them and the parties, a fee of US$3,000 per day of meetings or other work performed in connection with the proceedings. The tribunal in an ICSID case is free to determine how the costs of the arbitration, and the legal fees of the parties, should be distributed in the award.[19]

The UNCITRAL Rules provide that the arbitral tribunal shall fix the costs of arbitration in its award.[20] There is no ceiling for arbitrator fees under the UNCITRAL Rules, though it is stipulated that they 'shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter,

the time spent by the arbitrators and any other relevant circumstances of the case'.[21] It is also suggested that the 'costs of arbitration shall in principle be borne by the unsuccessful party'.[22] However, the arbitral tribunal may choose to divide the costs, including legal fees, between the parties, taking into account the circumstances of the case.

Institutional fees and arbitrator fees make up a small proportion of the total costs of an investor-state dispute (on average about 2% and 18% respectively). The costs of legal counsel and expert witnesses accounts for the remainder. In 2005, UNCTAD reported that companies have been known to spend up to US$4 million on lawyers' and arbitrators' fees for an investor-state dispute, and countries can expect an average tribunal to cost US$400,000 or more in addition to the US$1–2 million in legal fees.[23] Costs have since skyrocketed and a more recent UNCTAD report (2010) documents several cases where the state party's costs exceeded US$4 million.[24] An OECD survey shows that legal and arbitration costs for the parties in ISDS cases have averaged over US$8 million with costs exceeding US$30 million in some cases.[25] Argentina has reportedly spent US$12 million in the jurisdictional phase of an ongoing case[26] and Turkey was required to pay approximately US$13.5 million in costs in one dispute, which far outweighed the compensation (~$US 9.1 million) it was ordered to pay the investor.[27]

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In addition to the procedural costs associated with international arbitration, there is the issue of damages. Tribunals are given a significant degree of discretion to determine damages, which may include a company's 'lost future profits'. The Czech Republic was obliged to pay more than US$350 million in compensation to a Dutch investor, which according to one report meant a near doubling of the country's public sector deficit.[28] The largest awards from 2012 and 2013 include: US$1.77 billion plus pre- and post-award compound interest (*Occidental* v. *Ecuador II*) – the largest award in ISDS history; US$935 million plus interest (*Mohamed Abdulmohsen Al-Kharafi & Sons Co.* v. *Libya* – the second largest award in ISDS history); US$136.13 million plus compound interest

(*EDF* v. *Argentina*); and US$60.36 million plus interest (*Deutsche Bank* v. *Sri Lanka*).[29]

Threats to Public Policy

IIAs cover discrimination (national treatment and most favoured nation treatment), the international minimum standard of treatment (including 'fair and equitable treatment'), and expropriation. Measures to prevent discrimination have potential implications for regulation, but it is the minimum standard of treatment/fair and equitable treatment and clauses on expropriation that have generated the most discussion in academia and caused the greatest concern amongst regulators and the broader public.

❖ The Minimum Standard & Fair and Equitable Treatment

The international minimum standard can essentially be thought of as a 'floor', below which the treatment of foreign investors should not fall. It has long been debated whether or not such a minimum standard exists in customary international law. Defining the precise nature and content of the standard remains quite problematic, as it is rarely laid out explicitly in the texts of IIAs. Referring to cases on state responsibility, one could conclude that the standard potentially relates to three areas: compensation for expropriation; responsibility for destruction or violence by non-state actors; and denial of justice.[30] However, as expropriation is dealt with separately in IIAs (see below), and responsibility for destruction or violence is usually covered by reference to 'full protection and security', the only content unique to the minimum standard, in this view, would be 'denial of justice'. The principle of denial of justice derives from customary international law and relates to the conduct of national courts.

The real controversy arises when tribunals interpret the minimum standard as requiring treatment beyond that which is established in customary international law. In this respect, it is the seemingly harmless reference to 'fair and equitable treatment' (often included in the minimum standard clause) that has caused considerable difficulty for governments. Scholars, arbitrators and lawyers have fiercely debated whether this language should be read as further explication of the minimum standard or instead as an additional requirement. The issue is complicated by the fact that some treaties include a reference to fair and equitable

treatment without any mention of the minimum standard or customary international law, suggesting that it can be an autonomous treaty standard.

Those that view that fair and equitable treatment as a discrete standard argue that tribunals should test government measures against its 'plain meaning'. However, this is problematic given that, as an UNCTAD report suggests: 'the concepts "fair" and "equitable" are by themselves inherently subjective and therefore lacking in precision'.[31] Despite this, there appears to be broad support for the plain meaning approach in the investment law literature and in arbitral jurisprudence.[32] Following a review of arbitral awards, Westcott concluded that 'ensuring stability of the business and legal framework is now an established element of fair and equitable treatment'.[33] The International Law Association (ILA) International Law on Foreign Investment Committee goes even further with its suggestion that 'certain elements of an emergent standard of review of administrative action appear to be taking shape' which reflect 'contemporary approaches to good governance'.[34] In the view of the Committee, fair and equitable treatment requires quite significant obligations on the part of the host state:

> it is now reasonably well settled that the standard requires a particular approach to governance, on the part of the host country, that is encapsulated in the obligations to act in a consistent manner, free from ambiguity and in total transparency, without arbitrariness and in accordance with the principle of good faith. In addition, investors can expect due process in the handling of their claims and to have the authorities act in a manner that is non-discriminatory and proportionate to the policy aims involved. These will include the need to observe the goal of creating favourable investment conditions and the observance of the legitimate commercial expectations of the investor.[35]

It is clear that a very wide array of government actions, and indeed inactions, could fall within the purview of such a capacious standard. It is, therefore, unsurprising that fair and equitable treatment is considered by some to be 'the most important standard, from the perspective of investor protection'[36] and, according to UNCTAD, it is also the most likely provision to be invoked by an investor in an arbitral claim.[37]

❖ Indirect Expropriation

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

expropriation. Indirect expropriation falls short of actual physical taking of property but results in the effective loss of management, use or control, or a significant depreciation of the value of the assets of a foreign investor.[38] Indirect expropriations have variously been referred to in IIAs by language such as measures having a 'similar' or 'equivalent' effect to expropriation or that are 'tantamount' to expropriation.

For further clarity, a distinction can be made between 'creeping expropriations' and 'regulatory takings'. Creeping expropriations involve the slow and incremental encroachment on the ownership rights of a foreign investor, leading to the devaluation of the investment.[39] Regulatory takings are defined by UNCTAD as 'those takings of property that fall within the police powers of a State, or otherwise arise from State measures like those pertaining to the regulation of the environment, health, morals, culture or economy of a host country'.[40] It is obviously the latter form of indirect expropriation that is of principle relevance in discussions on the right to regulate.

In establishing whether or not a regulatory taking has occurred, tribunals have tended to

Regulatory takings are 'those takings of property that fall within the police powers of a State, or otherwise arise from State measures like those pertaining to the regulation of the environment, health, morals, culture or economy of a host country'

adopt one of two basic approaches. Under the first approach, the tribunal focuses solely on the effect of the regulation on the investor.[41] In evaluating the effect of a measure, tribunals will likely examine both its economic impact and its duration. While outside of investment arbitration (e.g., in the European Court of Human Rights) there is indication that an investment must be rendered valueless or that the economic impact on it must be at least 'severe' or 'substantial' for a measure to qualify as an expropriation, investment tribunals place a stronger emphasis on the 'legitimate expectations' of the investor.[42]

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

need to fulfil the stated purpose of the measure is proportional to the negative effect felt by the investor.[43] The definition and scope of police powers are not agreed upon and it is debated whether they should be quite strictly circumscribed to cover only measures necessary for the maintenance of public order and safety, or should instead be considered broad enough to cover regulation more generally.[44] Given the difficulty of drawing a 'bright line' between bona fide non-compensable regulation and a taking, many commentators and arbitrators suggest that such a determination can only be achieved on a case-by-case basis.[45]

Cases

It has been suggested by some observers in Australia that concerns about ISDS are overblown. In support of this position, defenders of ISDS point out that Australia has only been subject to one claim (by tobacco giant Philip Morris) despite being party to many treaties containing ISDS. However, this perspective is shortsighted and ignores the fact that most of Australia's existing treaties are with developing countries that are not major sources of inward investment. As UNCTAD has noted, companies based in Europe and the US launch the vast majority of ISDS cases.[46] As Australia does not have any treaties containing ISDS with the US, American investors can currently only sue Australia if they restructure their investments to access an ISDS clause in the treaty of a third country.

Although the threat is greatest in treaties involving the US and European countries, there are indications that arbitration will increasingly be employed by Asian investors in the future. Kim argues specifically that:

> Reviews of the economic and legal environment, as well as data from international commercial arbitration, suggest that Asian investors in the near future will become far more prominent actors in investment arbitration. Within Asia, Chinese, Korean and possibly Japanese investors in particular appear most likely to be the candidates to lead this trend, given their considerable overseas foreign investment, vast number of investment treaties and experience with international commercial arbitration.[47]

To gauge what could potentially happen if Australia continues to sign treaties containing ISDS with countries like Korea, which are sources of inward investment to the country, it is instructive to look at the experience of Canada, a country that shares much in common with Australia. Canada has faced 22 ISDS cases, all brought by American investors under the North American Free Trade Agreement (NAFTA).

A significant proportion these cases have concerned environmental regulation. Several cases are summarised below to demonstrate the extremely broad range of environmental policies that can be challenged under ISDS. It is important to note that Canada has prevailed in some of these cases (which some would argue involved frivolous claims) but has had to expend significant resources defending both federal and provincial regulations.

The summaries are based on arbitral documents that can be found on the Canadian Department of Foreign Affairs, Trade and Development website.[48]

❖ Ethyl Corp v. Canada

This case concerned a ban on the importation and interprovincial trade of Methylcyclopentadienyl manganese tricarbonyl (MMT), a fuel additive used to increase the level of octane in unleaded gasoline. The health and environmental impacts of MMT have been debated since the 1970s.

Ethyl Corporation (Ethyl), incorporated under the laws of the State of Virginia and sole shareholder of Ethyl Canada Inc., was the developer and sole importer of MMT into Canada at the time of the ban. Ethyl initiated a dispute under NAFTA in 1996. The company argued that the ban amounted to expropriation of its investment, as well as breach of the national treatment standard and the prohibition on performance requirements. The company claimed US$201 million in damages plus 'costs associated with efforts to prevent the Government of Canada's breach of its NAFTA obligations', costs associated with the arbitration proceedings and interest. The company later raised its claim to US$251 million plus costs.

Canada challenged the jurisdiction of the tribunal to hear Ethyl's claims, which it argued were outside the scope of NAFTA's investment chapter. However, the tribunal found that it had jurisdiction over the case. Canada settled with Ethyl less than a month later, agreeing to reverse the ban on MMT, to pay Ethyl US$13 million in legal fees and damages and to issue a statement declaring that current scientific information did not demonstrate any harmful effects of MMT to health or automotive systems. Several scholars and NGOs have hypothesized that the Canadian government settled this case because it was concerned about the large amounts of money that it had spent on

the arbitration and the huge damages it could be expected to pay Ethyl if it lost.[49]

❖ S.D. Myers v. Canada

In the early 1990s, S.D. Myers—an international waste treatment company headquartered in Ohio—sought to import polychlorinated biphenyls (PCBs) and PCB wastes from Canada for processing in the US. The firm was (temporarily) thwarted by a 1995 government ban on the movement of these substances across the Canada-US border.

PCBs are highly toxic substances that have been the subject of increasingly strict regulation in Canada and the US since the 1970s, including restrictions on imports and exports. Furthermore, Canada has ratified the Basel Convention on the Transboundary Movement of Hazardous Wastes, a multilateral environmental agreement that prohibits the export and import of hazardous wastes (including PCBs) to and from non-parties (such as the US) unless an agreement exists between the party and non-party that is as stringent as the Convention (Article 11). While there is a bilateral agreement (the 1986 Agreement Concerning the Transboundary Movement of Hazardous Waste) between Canada and the US, it was unclear to the Canadian government at the time that it implemented the ban whether this agreement actually covered PCBs (which were not classified by the US as hazardous waste) and met the requirements of Article 11 of the Basel Convention.

S.D. Myers filed for NAFTA Chapter 11 arbitration in 1998, seeking US$20 million in damages. S.D. Myers claimed that Canada had breached the articles in Chapter 11 covering national treatment, the minimum standard of treatment, performance requirements and expropriation. The arbitral tribunal determined that Canada had, in imposing the ban on the trans-border movement of PCBs, breached some of these provisions and should pay S.D. Myers nearly CDN$7 million in damages and costs. With regard to the Basel convention, the tribunal determined that Article 11 permitted cross-border movement of hazardous waste under the terms of the bilateral Transboundary Agreement. However, they also noted: 'Even if the Basel convention were to have been ratified by NAFTA Parties, it should not be presumed that Canada would have been able to use it to justify the breach of a specific NAFTA provision.'[50] The tribunal concluded that 'where a state can achieve its chosen level of

environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade.'[51]

❖ Vito Gallo v. Canada

On 29 March 2007, Mr. Vito G. Gallo, a US citizen, launched a dispute against Canada over his failed endeavours to convert the Adams Mine site (a former open-pit iron ore mine in northern Ontario) into a landfill. The proposed project, which would have involved the disposal of household and commercial waste in a manmade lake, was very controversial. NGOs and local communities raised concerns about the potential for surface and groundwater contamination and argued that the proposed project, which had only been approved following a major overhaul of the province's environmental review process, was poorly designed.

In 2004, the newly elected Government of Ontario passed Bill 49-An Act to Prevent Disposal of Waste at the Adams Mine Site. This Act forestalled any future development of the landfill and provided a formula by which compensation was to be paid to Mr. Gallo's company, based on the expenses it had incurred in the development of the project. Mr. Gallo rejected the compensation, choosing instead to try to obtain a larger award that would include 'lost future profits' under NAFTA. Mr. Gallo sought in excess of US$355 million.

The Award in this case was released to the parties in September 2011. A heavily redacted version was released to the public in early 2012. The Tribunal found that it did not have jurisdiction to hear Mr. Gallo's claims because there was no evidence that Mr. Gallo actually owned and controlled the enterprise that had invested in the Adams Mine site prior to the enactment of the legislation that prohibited the conversion of the site into a landfill.

In line with UNCITRAL Rules, the Tribunal awarded the cost of arbitration to be paid by the losing party – Mr. Gallo; this amounted to US$900,000. However, despite the frivolous nature of the claim, the Tribunal found that Canada should bear its own legal costs.

❖ Claytons/Bilcon v. Canada

Several members of the Clayton family and Bilcon of Delaware launched this case in May

2008. The dispute concerns the environmental review of Bilcon's proposed quarry and marine terminal in Nova Scotia. The project was to be sited in the Bay of Fundy, an ecologically significant area classified as a Right Whale Conservation Area and UNESCO Biosphere Reserve.

In Canada, environmental assessment reviews are conducted by the provincial government and in certain instances also by the federal government. In the case of the Bilcon proposal there were several 'triggers', including the project's potential impact on fisheries, that necessitated federal involvement and a joint review was therefore conducted. The project proposal was subjected to the highest level of review (a panel review) and was ultimately rejected. Although the review panel found a variety of potential harms that could result from the quarry and marine terminal, in their recommendation they placed particular emphasis on the impact that the investment would have on the 'core community values' in the area where the project was to be sited. Bilcon and the Claytons argue that this type of impact falls outside of the scope of an environmental assessment. The investors also argue that the review process was exceedingly lengthy and onerous. They are seeking US$188 million in compensation.

This case is ongoing.

❖ Chemtura Corp. v. Canada

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

In the late 1990s, when the events of interest in this case took place, Canada had restricted most uses of lindane but still permitted its use for seed treatment of certain crops, most importantly canola. These treated seeds were also exported to the US, where there was no registration for lindane use on canola or tolerance levels for residues in food. Although technically illegal, US Customs did not prevent the importation of lindane-treated seeds. The

situation changed in 1997 when Gustafson, an American subsidiary of Chemtura, alerted the US Environmental Protection Agency (EPA) to the discrepancy between law and practice on this issue. According to Canada, in doing so Gustafson was trying to secure a market for its lindane substitute product known as Gaucho. The EPA agreed with the company that the imports of lindane-treated seeds were illegal and mandated that they be stopped by 1 June 1998.

In response to the threat of a border closure, two industry associations – the Canadian Canola Growers Association and the Canola Council of Canada – brokered a Voluntary Withdrawal Agreement with the four companies registered in Canada to sell products with lindane as the active ingredient. The agreement provided a phase-out of the use of lindane-based products on canola in order to appease the EPA. As a part of the voluntary agreement the Canadian Pest Management Regulatory Agency (PMRA) agreed to expedite the approval of lindane-free versions of existing products and to also to make registration of replacement products a priority. Around the same time, the PMRA was re-evaluating the registration of lindane for all agricultural uses. This was part of a broad program to review a large number of 'old' pesticides registered in the system. In 2001, following the completion of the re-evaluation, the PMRA elected to suspend all remaining agricultural uses of lindane. It offered the affected companies a three-year phase out of existing products if they agreed to withdraw their registrations immediately. Chemtura did not accept the terms of the offer and its registrations were cancelled in February 2002.

Chemtura argued in arbitration that the PMRA pressured it to enter into the voluntary agreement and suggested that the agency was motivated by trade concerns rather than environmental or health concerns. The company also claimed that the PMRA's review of lindane was improperly conducted. The company sought US$80.2 million in damages as well as other costs amounting to a total of over US$83.1 million.

In addition to dismissing all of Chemtura's claims, the Tribunal in this case ruled that the company would be required to pay the entire cost of the arbitration proceedings (US$688,219) as well as half of Canada's legal fees and expenses (CDN$2.89 million).

❖ Dow AgroSciences v. Canada

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

On 25 May 2011, the Government of Canada signed a Settlement Agreement with Dow Agrosciences, LLC. The settlement involved no payment of compensation to the company, nor any reversal of Québec's policy to restrict the use of 2,4-D. However, the Government of Québec was required to make a public statement that 'products containing 2,4-D do not pose an unacceptable risk to human health or the environment provided that the instructions on their label are followed'.

❖ Mesa Power v. Canada

In 2009, the Canadian Province of Ontario launched a comprehensive feed-in tariff (FIT) program. The program, aimed at spurring renewable energy production, provided guaranteed electrical grid access and premium purchase prices fixed for a twenty year period for producers of wind, solar, hydroelectric and biogas generated energy.

Mesa Power is a Texas-based company with several subsidiaries incorporated in the Canadian Province of Alberta. The company had planned four wind farm projects in Ontario. In order to gain access to the FIT program, the company had to meet several criteria, including a minimum amount of domestic content. Projects over 10 MW were also prioritised through a program that ranked applicants within defined geographic regions.

In its NAFTA claim, Mesa has made two main complaints: first, that the rules for awarding FIT contracts were arbitrarily changed in June 2011 (and subsequently, the company was not offered contracts); and second, that a Korean-

based company had, through a CDN$7 billion investment agreement signed in 2010, been given substantially better access to supply the grid than other energy suppliers in the province. The company argues that the actions of the Government of Ontario (and thereby, the Government of Canada) amount to a breach of NAFTA's national and most favoured nation treatment standards, the minimum standard of treatment, as well as the prohibition on performance requirements. Mesa is seeking CDN$775 million in damages.

This case is ongoing.

❖ St. Mary's VCNA v. Canada

In May 2011, a cement company owned by St Marys VCNA, LLC, registered in Delaware, submitted a Notice of Intent to arbitrate under Chapter 11 of NAFTA. The company had purchased a plot of land and had taken over a permitting application process commenced by another company to convert a rural area near the city of Hamilton in the Province of Ontario into an aggregate quarry.

The company's plans had been fiercely opposed by a local organisation called Friends of Rural Communities and the Environment (FORCE) in a campaign that was allegedly spearheaded by members of the governing Ontario Liberal Party. The Provincial government issued a Municipal Zoning Order on 12 April 2010, which froze the existing agricultural zoning of the land that St. Mary's had sought to have re-zoned for extractive industrial use. The company was also denied any opportunity to seek review of the Order.

While FORCE and some government officials argued that the quarry threatened groundwater supplies and wetlands in the area, St. Mary's contends that the opponents of the quarry were really acting to protect their personal financial interests (the quarry was expected to have a negative impact on the value of adjacent properties).

St. Mary's alleges that the actions of the Government of Ontario resulted in breaches of national treatment, most favoured nation treatment, and the international minimum standard of treatment and are also tantamount to expropriation. The company is seeking US$275 million in compensation.

This case is ongoing.

❖ Windstream Energy LLC v. Canada

In 2011, the Province of Ontario placed a moratorium on offshore windfarms until further research into the health and environmental impacts of such developments can be conducted. This impacted Windstream Energy's plans for a 300MW power plant based in the eastern part of Lake Ontario. The company is seeking CDN$475 million in compensation.

This case is ongoing.

❖ Lone Pine Resources v. Canada

This case, launched in 2012, deals with coal seam gas (CSG). The American company Lone Pine Resources had sought to exploit shale gas deposits beneath the St. Lawrence River and had acquired an exploration permit from another company. However, in 2010 the Province of Québec announced a moratorium on CSG operations in the St. Lawrence until an environmental impact assessment could be carried out. Subsequently, the provincial government revoked all exploration permits in the area. The company is seeking CDN$250 million in damages.

This case is ongoing.

Regulatory Chill

The cases summarised above represent only a sample of investor-state disputes arising over matters of public policy in Canada. Many other countries have also been subject to ISDS cases over environmental policy and investors have also challenged regulations in other areas of public interest such as health. While it is evident that ISDS cases cost taxpayers a great deal of money (often even if the government wins a case) other potential long-term implications of investment arbitration on policy development are difficult to quantify.

Supporters of ISDS argue that legitimate regulation will not be found in breach of IIAs and, further, that arbitral tribunals are equipped to make decisions on the legitimacy of government actions.[52] The assumption here is that cases where environmental or health and safety measure have been utilized as a cover for protectionism will be clearly distinguishable from those where action was motivated by a legitimate desire to protect the public and/or the environment.

There is evidence in each case discussed above

that the Canadian federal or provincial government was responding to genuine environmental concerns. However, in some cases there were also indications that other factors played a role, as is likely to be the case in practically all political decisions. The question is whether the existence of multiple factors influencing a government, which is arguably inevitable given the complexity of the issues raised in these disputes, provides proof that environmental concern is not legitimate. Loy makes the crucial point that: 'Virtually every piece of environmental or conservation legislation or regulation affects a commercial sector, and will thus be politically supported (or opposed) by private interest groups'.[53]

At the end of the day, investment tribunals do not typically see it as in their purview to require governments to revoke contested policy measures. Nevertheless, by awarding damages to companies that have been involved in environmentally damaging (or otherwise harmful) activities, they pull taxpayer funds away from areas where they could be used for the public good and they effectively reverse important policy principles, such as the 'polluter pays' principle.[54] Furthermore, there is the potential for investor-state disputes to have a broader and more long-term impact on public policy through what has been termed 'regulatory chill'.

The concept of regulatory chill reflects the fact that policy makers will be wary of introducing measures that could be challenged in arbitration because of the immense costs associated with the arbitration system and the uncertainty surrounding how investment provisions will be interpreted in any given case. Occurrences of regulatory chill are incredibly difficult to prove (effectively one has to find evidence of something that *hasn't happened*). Nevertheless, several scholars have put forward case studies that suggest that investor threats of arbitration had an impact on the development of specific policies.[55]

Peterson notes that 'practicing lawyers do admit that they hear rumours of investors applying informal pressure upon host states while brandishing an investment treaty as a potential legal stick'.[56] In a globalised world, ISDS cases may also be initiated in one jurisdiction by investors hoping to deter the development of policies in other jurisdictions. This may, in part, explain Philip Morris' disputes with Uruguay and Australia over

plain packaging of cigarettes; i.e. the company may be hoping that the threat of arbitration will deter the development of similar labelling policies in other countries.

Safeguards?

The Abbott Government has defended the inclusion of ISDS in KAFTA by arguing that the agreement includes 'safeguards'. The Government has not explicitly stated which specific provisions it considers safeguards, but it is likely that the following would be on the list:

❖ General Exception

Chapter 22 of KAFTA contains a clause that states:

> For the purposes of Chapter 11 (Investment), subject to the requirement that such measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures:
> (a) necessary to protect human, animal or plant life or health;
> (b) necessary to ensure compliance with laws and regulations that are not inconsistent with this Agreement;
> (c) imposed for the protection of national treasures of artistic, historic or archaeological value; or
> (d) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

The use of general exceptions like this, which are modeled on Article XX of the GATT, is not common practice in IIAs. As a result, it is unclear how investment tribunals will deal with them. However, one expert has hypothesised that 'that the inclusion of general exceptions in IIAs is unlikely to have much practical significance' but has also cautioned that the intent of governments might backfire and that arbitral tribunals might actually 'interpret general exceptions as providing less regulatory flexibility for legitimate objectives, compared to that under existing IIAs that do not incorporate general exceptions.'[57]

❖ Clarification of the minimum standard

Article 11.5 of KAFTA on the minimum standard of treatment includes the clarification that:

> For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" shall not require treatment in addition to or beyond that which is required by that standard, and shall not create additional substantive rights.

The Article is accompanied by an Annex that further sets out the 'shared understanding' of the parties that 'customary international law' 'results from a general and consistent practice

of States that they follow from a sense of legal obligation'.

This clarification follows the general practice of Canada and the US. Although the clarification undoubtedly represents an improvement on the original NAFTA Chapter 11 text and that found in other IIAs, it is questionable whether the issue has been definitively resolved. Explicitly equating fair and equitable treatment with the minimum standard may only serve to intensify the debate on the current status of customary international law in the area; investors and many arbitrators may argue that the minimum standard has evolved (and expanded) considerably in recent history.[58] This has been the strategy of investors in several recent investor-state disputes. Another issue is the possibility that investors may be able to access more ambiguous references to 'fair and equitable treatment' in earlier agreements through a most favoured nation treatment clause.[59]

❖ Annex on Expropriation

Annex 11-B of KAFTA is intended to prevent overly expansive interpretations of the provision on expropriation and protect public-interest regulation. It provides a three-part test for the determination of whether a regulatory taking has occurred. The factors that are to be considered are:

> (a) the economic impact of the government action, although the fact that an action or a 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;
> (b) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
> (c) the character of the government action, including its objectives and context.

This language has been borrowed from American treaties that were, in turn, modeled on American jurisprudence on expropriation.

This type of expropriation provision is untested in arbitration. However, opinions have been expressed about its potential efficacy. Some observers are not optimistic that all potential loopholes have been filled, and argue that the three-part test is vague and outdated in relation to both US domestic and international jurisprudence.[60] During the government review of the 2004 US Model BIT, a number of environmental organisations made a submission to the US Trade Representative that argued that the language of the indirect expropriation provision fails to provide the proper explanations and limitations that exist in US Supreme Court jurisprudence.[61]

Importantly, they noted that reference to the 'character' of the government action is 'extraordinarily ambiguous and could easily be misapplied by tribunals that are neither trained in nor bound by U.S. precedent'.[62] The NGOs also view the reference to an investor's expectations as problematic, noting that breach of legitimate expectations is a 'necessary, but not sufficient, condition for liability' and that treaties should make clear that investors 'must expect that health, safety, and environmental regulations often change and become more strict over time'.[63]

KAFTA's Annex on expropriation also contains a final statement that:

> 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.

Again, this language has been taken from American treaty practice. In that context, it has been suggested that the use of the ambiguous terminology 'rare circumstances' will only encourage lawyers to develop creative arguments to test the boundaries of the exception.[64]

Although no ISDS cases have been concluded which could demonstrate whether the changes to indirect expropriation and fair and equitable treatment clauses in recent treaties might provide effective 'safeguards', it is worth noting that they have not prevented cases involving environmental and health issues from being launched. For example, a case has arisen under the 2006 US-Peru Free Trade Agreement over environmental liability for a contaminated site.[65] An investor has also launched a dispute against El Salvador under the 2004 Central America Free Trade Agreement over a ban on mining aimed at protecting the country's limited groundwater resources.[66] In both cases, the involved investors are invoking provisions on indirect expropriation and the minimum standard of treatment that were formulated following the 2004 US Model BIT.

It may be several years before these cases are decided. But even if the tribunals rule in the respective governments' favour, this will not guarantee that the 'safeguards' will work for Australia as awards rendered in ISDS are only binding on the parties involved in the dispute and future tribunals may interpret the clauses differently.

Benefits of ISDS?

Given the significant risks that ISDS poses to public policy, the Government should provide a strong justification for its inclusion in KAFTA. The onus should be on the supporters of ISDS to prove that it provides benefits that outweigh the costs that it imposes on public policy and the public purse.

Historically, states have argued that signing BITs and other agreements containing ISDS clauses increases flows of foreign direct investment. Unfortunately, despite numerous studies, there is no strong evidence to support this argument. In fact, the Productivity Commission in a 2010 report on Bilateral and Regional Trade Agreements could find no economic justification for including provisions on ISDS in Australia's trade agreements. [67]

In the absence of evidence of a positive impact of investment flows, the Abbott Government has argued that the aim of including ISDS clauses in trade agreements is to 'provide protection for those who choose to pursue new opportunities for Australia by investing abroad'.[68] However, Australian investors already have access to domestic courts, which in advanced countries like Korea are regarded as robust and impartial, and also often having access to arbitration through contracts negotiated directly with the host state.

Furthermore, the 'Australian' companies that have utilized the protection of Australian treaties thus far include the subsidiaries of British and Singaporean mining companies operating in Indonesia.[69] How does providing protection to these companies benefit Australia? And even if some benefit did accrue, would it balance the risk to Australian regulation and taxpayer funds?

The absence of evidence of any clear benefits of ISDS coupled with substantial concerns about the costs of the system have led many countries to reconsider BITs and the inclusion of ISDS clauses in trade agreements. The European Commission has announced public consultations on ISDS in the Transatlantic Trade and Investment Partnership (TTIP) being negotiated with the US and representatives of some key European countries (most notably Germany and France) have stated that they would not support including an ISDS mechanism in the agreement.[70] South Africa has

moved to terminate some of its BITs and the Trade Minister has stated that:

> Investor-state dispute resolution that opens the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration is of growing concern to constitutional and democratic policy-making.[71]

In recent weeks there have also been reports that Indonesia has terminated its BIT with the Netherlands and is considering terminating all of its BITs.[72] India is also conducting a review of its BIT program.[73]

Finally, it is worth noting that ISDS has been a subject of intense public debate in Korea.[74] The country's Supreme Court cautioned that the ISDS clause in a trade agreement with the US could lead to 'legal chaos'.[75]

Recommendation

This submission has outlined serious problems with the process of ISDS and explained how it poses a threat to public policy. In conclusion, it is recommended that the Government renegotiate KAFTA to remove ISDS.

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[1] See, e.g.: *Aguas del Tunari, S.A.* v. *Republic of Bolivia*, ICSID Case No. ARB/02/3; *Biwater Gauff Ltd.* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22; *Glamis Gold Ltd* v. *United States of America*; *FTR Holding S.A. (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay)* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7; *Chemtura Corp.* v. *Canada*.

[2] Washington, DC, 18 May 2004 (in force 1 January 2005), full text of the agreement available at www.dfat.gov.au.

[3] Patricia Ranald, 'The Australia-US Free Trade Agreement: Reinforcing Re-peripheralisation' in Paul Bowles, Ray Broomhill, Teresina Gutiérrez-Haces and Stephen McBride (eds.) *International Trade and Neoliberal Globalism: Towards Re-peripheralisation in Australia, Canada and Mexico?* (2008) at 43; Ann Capling and Kim Nossal, 'Blowback: Investor-State Dispute Mechanisms in International Trade Agreements' (2006) 19 *Governance* 151.

[4] UNCTAD, 'Recent Developments in Investor–State Dispute Settlement', *IIA Issues Note No. 1* (April 2014) at 1, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

[5] UNCITRAL Arbitration Rules, 28 April 1976, Report of the United Nations Commission on International Trade Law on the Work of its Ninth Session, UN Doc. A/31/17 (1976), reproduced in 15 *ILM* (1976): 701.

[6] 'Rules of Procedure for Arbitration Proceedings (Arbitration Rules)', *ICSID Convention, Regulations and Rules* (2006) http://icsid.worldbank.org.

[7] See http://icsid.worldbank.org.

[8] Gabriel Egli, 'Don't Get BIT: Addressing ICSID'S Inconsistent Application of Most Favored-Nation Clauses to Dispute Resolution Provisions' (2007) 34 *Pepperdine Law Review* 1045 at 1063.

[9] 'Canada: ICSID at a Crossroads', *Mondaq*, 27 September 2006, www.mondaq.com.

[10] 'Private Practices', *American Lawyer* (2003) www.americanlawyer.com.

[11] Jack Coe 'Transparency in the Resolution of Investor-State Disputes: Adoption, Adaption, and NAFTA Leadership' (2006) 54 *University of Kansas Law Review* 1339 at 1351-2.

[12] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (2007) Oxford University Press at 5.

[13] *Ibid: 118.*

[14] Carlos Garcia, 'All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration' (2004) 16 *Florida Journal of International Law* 301 at 352.

[15] Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22 *Arbitration International* 495 at 498.

[16] Howard Mann, 'Is "Fair and Equitable" Fair, Equitable, Just, or Under Law?' (2006) 100 *American Society of International Law Proceedings* 74.

[17] Charles N. Brower, Charles H. Brower and Jeremy Sharpe, 'The Coming Crisis in the Global Adjudication System' (2003) 19 *Arbitration International* 415; Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521.

[18] This schedule of fees is effective as of 1 January 2012.

[19] ICSID Convention: Art. 61.

[20] UNCITRAL Rules: Rule 38.

[21] *Ibid*: Rule 39.

[22] *Ibid*: Rule 40.

[23] UNCTAD, *Investor-State Disputes and Policy Implications* (2005) TD/B/COM.2/62, Geneva, at 7.

[24] UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration, *Series on International Investment Policies for Development* (2010) at 16-18, http://unctad.org/en/docs/diaeia200911_en.pdf

[25] David Gaukrodger and Kathryn Gordon, Investor-state dispute settlement: A scoping paper for the investment policy community, *OECD Working Papers on International Investment No. 2012/3* (2012), http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf

[26] *Ibid.*

[27] *PSEG Global Inc. and Konya Ilgin Elektrik Uretim Ve Tikaret Limited Sirketi* v. *Republic of Turkey* (ICSID Case No. ARB/02/5), Award, 19 January 2007.

[28] International Institute for Sustainable Development, 'A Parliamentarian's Guide to International Investment Agreements and their Implications for Domestic Policy-Making' (2007), Winnipeg.

[29] UNCTAD 2014 (see note 4 above) and UNCTAD, 'Recent Developments in Investor–State Dispute Settlement', *IIA Issues Note No. 1* (May 2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf

[30] M. Sornarajah, *The International Law on Foreign Investment* (2nd ed, 2004) Cambridge University Press at 330.

[31] UNCTAD, 'Fair and Equitable Treatment', *Issues in International Investment Agreements* (1999) at 10-1.

[32] Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (2008) at 65.

[33] Thomas Westcott, 'Recent Practice on Fair and Equitable Treatment' (2007) 8 *Journal of World Investment and Trade* 409 at 425.

[34] ILA International Law on Foreign Investment Committee, *International Law on Foreign Investment: First Report of the International Law Association* (2006) at 16.

[35] *Ibid.* Yannaca-Small identifies similar categories of obligation falling under the fair and equitable treatment standard including: the obligation of vigilance and protection; due process including non-denial of justice and lack of arbitrariness; transparency; and good faith (which could cover transparency and lack of arbitrariness). Catherine Yannaca-Small, 'Fair and Equitable Treatment Standard in International Investment Law', *OECD Working Papers on International Investment* (2004) at 26. See also Behrens who lists good faith, non-discrimination, lack of arbitrariness, due process, transparency, consistency and proportionality as the key requirements of fair and equitable treatment. Peter Behrens, 'Towards the Constitutionalization of International Investment Protection' (2007) 45 *Archiv des Völkerrechts* 153 at 175.

[36] ILA International Law on Foreign Investment Committee (see note 34 above) at 16.

[37] UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (2007) UNCTAD/ITE/IIA/2006/5 at 32. See also Subedi (note 32 above) at 63.

[38] UNCTAD, 'Taking of Property', *Issues in International Investment Agreements* (2000) UNCTAD/ITE/IIT/15, Geneva.

[39] *Ibid* at 11.

[40] *Ibid* at 12.

[41] Yves Fortier and Stephen Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor' (2004) 19 *ICSID Review: Foreign Investment Law Journal* 293 at 300.

[42] Muse-Fisher suggests that there is a two-part test to determine the legitimate expectations of an investor:

(i) the tribunal must determine whether the investor had an actual expectation that his property would not be affected by a given regulation when he purchased it; and (ii) if he did have such an expectation, the tribunal must evaluate whether this expectation was reasonable. The US courts have been hesitant to find an investor's expectations reasonable when he is entering a heavily regulated jurisdiction, particularly if newly-enacted legislation only builds on the existing framework, but international investment tribunals have been less consistent in this respect. Michael Muse-Fisher, 'CAFTA-DR and the Iterative Process of Bilateral Investment Treaty Making: Towards a United States Takings Framework for Analyzing International Expropriation Claims' (2007) 19 *Pacific McGeorge Global Business & Development Law Journal* 495 at 518-19.

[43] Andrew Newcombe, 'The Boundaries of Regulatory Expropriation in International Law', in Philippe Kahn and Thomas Wälde (eds.) *New Aspects of International Investment Law* (2007) at 417; Howard Mann and Julie Soloway, *Untangling the Expropriation and Regulation Relationship: Is There a Way Forward?, Report to the Ad Hoc Expert Group on Investment Rules and the Department of Foreign Affairs and International Trade, Canadian Department of Foreign Affairs and International Trade* (2002).

[44] See: Muse-Fisher (note 42 above); Simon Baughen, 'Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven' (2006) 18 *Journal of Environmental Law* 207; Jeffrey Turk, 'Compensation for 'Measures Tantamount to Expropriation' Under NAFTA: What it Means and Why it Matters' (2005) 1 *International Law & Management Review* 41.

[45] Fortier and Drymer (note 41 above) at 314.

[46] UNCTAD (note 4 above) at 8.

[47] Joongi Kim, 'A Pivot to Asia in Investor-State Arbitration: The Coming Emergence of Asian Claimants' (2012), 27 (2) *ICSID Review* 399, at 415.

[48] http://www.international.gc.ca

[49] Howard Mann, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights* (2001) IISD and World Wildlife Fund; Ray C. Jones, 'NAFTA Chapter 11 Investor-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?' (2002) 2 *Brigham Young University Law Review* 527.

[50] *S.D. Myers* v. *Government of Canada*, Partial Award, 13 November 2000, para 212, emphasis added.

[51] *Ibid*, para 221, emphasis added.

[52] Charles Brower, 'Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium' (2001) 29 *Pepperdine Law Review* 43; Thomas Wälde, 'International Disciplines on National Environmental Regulation: With Particular Focus on Multilateral Investment Treaties' (2001) in *The International Bureau of the Permanent Court of Arbitration (ed.), International Investments and Protection of the Environment: The Role of Dispute Resolution Mechanisms*, PCA Peace Palace Papers, Kluwer Law International, The Hague, pp. 29–71.

[53] Frank Loy, 'On a Collision Course? Two Potential Environmental Conflicts Between the U.S. and Canada' (2002) 28 *Canada-United States Law Journal* 11 at 24.

[54] Mann (note 52 above) at 33; Public Citizen and Friends of the Earth, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy: Lessons for Fast Track and the Free Trade Area of the Americas* (2001) at 9.

[55] See further: David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (2008) Cambridge University Press; Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (2009) Cambridge University Press.

[56] Luke Peterson, 'All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties', in Zarsky (ed.), *International Investment for Sustainable Development: Balancing Rights and Rewards*, Earthscan, London (2004), pp. 123–49, at 139.

[57] Andrew Newcombe, 'General Exceptions in International Investment Agreements', Draft Discussion Paper Prepared for BIICL Annual WTO Conference, 13-14 May 2008, London.

[58] Courtney Kirkman, 'Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105' (2002) 34 *Law and Policy in International Business* 343. See also Thomas Westcott (note 33 above).

[59] This was the strategy of Chemtura Corporation in its NAFTA Chapter 11 case against Canada. See *Chemtura Corporation* v. *Canada*, Redacted Reply of the Claimant Investor, 15 May 2009.

[60] Muse-Fisher (note 42 above) at 509.

[61] Center for International Environmental Law, Joint NGO Comments on US Model BIT Review, 2009, http://ciel.org/Publications/BIT_Comments_Aug09.pdf

[62] *Ibid.*
[63] *Ibid.*
[64] Rachel Edsall, 'Indirect Expropriation Under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations' (2006) 86 *Boston University Law Review* 931.
[65] Public Citizen, 'Renco Uses U.S.-Peru FTA to Evade Justice for La Oroya Pollution', https://www.citizen.org/documents/renco-la-oroya-memo.pdf
[66] 'El Salvador mining ban could establish a vital water security precedent', *The Guardian*, 10 June 2013, http://www.theguardian.com/global-development/poverty-matters/2013/jun/10/el-salvador-mining-ban-water-security
[67] Productivity Commission, Report on Bilateral and Regional Trade Agreements (2010) http://www.pc.gov.au/__data/assets/pdf_file/0013/104215/12-chapter9.pdf
[68] DFAT, 'Frequently Asked Questions on Investor-State Dispute Settlement', https://www.dfat.gov.au/fta/isds-faq.html
[69] 'International Arbitration against the Republic of Indonesia Moves Forward', Churchill Mining News Release, 15 October 2012, http://www.churchillmining.com/library/file/CHL FINAL.pdf; 'Indonesia Roundup', *Investment Arbitration Reporter*, 18 November 2013, http://www.iareporter.com.virtual.anu.edu.au/articles/20131118_1
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[71] Luke Peterson, 'South Africa Pushes Phase-Out of Early Bilateral Investment Treaties after at least Two Separate Brushes with Investor-State Arbitration', *Investment Arbitration Reporter*, 23 September 2012.
[72] Martin Khor, 'Investor Treaties in Trouble', *The Star Online*, 24 March 2014, http://www.thestar.com.my/Opinion/Columnists/Global-Trends/Profile/Articles/2014/03/24/Investor-treaties-in-trouble/
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[75] Jung Eun-joo, 'Supreme Court recommends renegotiation of ISD clause', *The Hankyoreh*, 26 April 2012, http://english.hani.co.kr/arti/english_edition/e_international/530076.html