Court File No. T-153-13

FEDERAL COURT

BETWEEN:

HUPACASATH FIRST NATION

Applicant

And

THE MINISTER OF FOREIGN AFFAIRS CANADA and
THE ATTORNEY GENERAL OF CANADA

Respondents

AFFIDAVIT OF J. CHRISTOPHER THOMAS, Q.C.

I, J. Christopher Thomas, Q.C., Senior Principal Research Fellow, employed by the National University of Singapore's Centre for International Law, 469 Bukit Timah Road, Singapore 259756, District 11, in the Republic of Singapore, SWEAR THAT:

1. I have personal knowledge of the matters hereinafter deposed to by me, except where same are stated to be based on information and belief and where so stated I verily believe them to be true.

2. Attached as **Exhibit "A"** is a copy of my curriculum vitae.

3. Attached as **Exhibit "B"** is a copy of a letter from Tim Timberg, counsel for the Respondents, dated 11 March 2013.

4. Attached as **Exhibit "C"** is a copy of my expert opinion report, dated 13 March 2013.

5. Attached as **Exhibit "D"** is a list of the literature and material I used to complete my Expert Opinion Report. Electronic copies of these materials are provided in the attached CD-ROM.

6. Attached as **Exhibit "E"** is a signed copy of Form 52.2, "Certificate Concerning Code of Conduct for Expert Witness".

SWORN before me in District 11, in the Republic of Singapore, this 13th day of March 2013.

J. Christopher Thomas, Q.C.

COMMISSIONER FOR OATHS
William Oh
Kim Chong
C2012/0301
1 Apr 2012 - 31 Mar 2013
SINGAPORE

Commissioner for Taking Affidavits
within the Republic of Singapore

This is Exhibit A

as referred to in the Affidavit of J. Christopher Thomas Q.C. this 13th day of March 2013

Before me

Commissioner for Oaths

JOHN CHRISTOPHER THOMAS, Q.C., C. ARB.
BARRISTER AND SOLICITOR

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CURRICULUM VITAE

10 March 2013

John Christopher Thomas, Q.C. is a lawyer and Chartered Arbitrator who has practiced in the field of international trade and commercial law with emphasis on trade and investment regulation and dispute settlement. He is currently Senior Principal Research Fellow at the National University of Singapore's Centre for International Law and a visiting professor at the NUS Faculty of Law. He is a national of Canada.

He has been counsel in many international disputes, in domestic administrative law procedures (anti-dumping and countervailing duty cases), and in contentious proceedings before the superior courts of Canada. He was appointed Queen's Counsel in 2002 and has been designated a Chartered Arbitrator by the ADR Institute of Canada. From March 1993 until June 2008, he ran the law firm of Thomas & Partners. Since June 2008, he has been a sole practitioner, acting primarily as an arbitrator in international investment, trade and commercial disputes.

He is Editor of Investor-State LawGuide, an on-line legal research database on investment treaty arbitration law.

EDUCATION, QUALIFICATIONS AND PROFESSIONAL EMPLOYMENT

B.A., University of British Columbia, 1977; M.A., Sussex University, 1978; LL.B., University of British Columbia, 1981; and LL.M., Columbia University, 1984.

After graduating from law school, he clerked for the Honourable Mr Justice Peter Seaton and for the Honourable Mr Justice Edward Hinkson of the British Columbia Court of Appeal and then articled at Ladner Downs, Barristers and Solicitors. After obtaining his LL.M at Columbia University, he taught at two Canadian law schools (the University of Ottawa (1984-86) and the University of British Columbia (1987-1989)), and worked for the Government of Canada (the Department of Foreign Affairs and International Trade) as Senior Policy Advisor to the Minister for International Trade during the Canada-United States Free Trade Agreement negotiations (1986-87). In 1990, he rejoined Ladner Downs, becoming a partner, until he formed Thomas & Associates (later Thomas & Partners) in 1993. In June 2008, the other partners and associates of Thomas & Partners became partners and associates of Borden Ladner Gervais LLP (a successor firm to Ladner Downs) and he agreed to act as a consultant to that firm until 31 December 2012.

He has lectured in academic and professional contexts in Canada (the Vancouver Institute, the Canadian Council on International Law, the Canadian Bar Association and at various universities) and abroad (the 2012 ICCA Congress in Singapore, various meetings of the American Society of International Law and various continuing legal education and skills development seminars at U.S. universities, the Lauterpacht Centre for International Law Research, the British Institute of International and Comparative Law, the Canadian Institute for Advanced Legal Studies Conferences at Queen's College, Cambridge, the Keidan-ran, the Singapore International Arbitration Forum, and at various International Bar Association conferences).

He is a member of the Law Society of British Columbia.

NOTABLE INTERNATIONAL TRADE DISPUTES AS COUNSEL OR PANEL MEMBER

Mr Thomas has acted as counsel or legal advisor in GATT, Canada-U.S. Free Trade Agreement, WTO, and NAFTA disputes, both for private industry interested in the outcome of a particular dispute and directly for governments (both as complainants and as respondents).

Notable cases, acting as counsel/legal advisor or as a panel member:

European Economic Community: Regulation on Imports of Parts and Components (GATT Panelist in a Panel proceeding between Japan and the European Community);

In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring (Counsel in a Canada-United States FTA Chapter Eighteen panel proceeding);

Lobsters from Canada (Legal advisor in a Canada-United States FTA Chapter Eighteen panel proceeding);

Puerto Rican Regulation of UHT Milk (Legal advisor in a Canada-United States FTA Chapter Eighteen panel proceeding);

Pure and Alloy Magnesium from Canada (Panelist in a Canada-United States FTA Chapter Nineteen panel proceeding);

Cut-to-Length Steel Plate (Panelist in a NAFTA Chapter Nineteen panel proceeding);

Canada: Tariffs Applied by Canada to Certain U.S. Origin Agricultural Products (Counsel for the intervenor in a NAFTA Chapter Twenty panel proceeding);

United States: Broomcorn Brooms from Mexico (Counsel in a NAFTA Chapter Twenty panel proceeding);

United States: In the Matter of Cross-border Trucking Services (Counsel in a NAFTA Chapter Twenty panel proceeding); and

Mexico: Tax Measures on Soft Drinks and Other Beverages (Counsel in a WTO Panel and Appellate Body proceeding).

NOTABLE INTERNATIONAL INVESTMENT DISPUTES AS COUNSEL

Notable cases, acting as counsel:

Robert Azinian and others v. United Mexican States, ICSID Case No. ARB(AF)/97/2;

Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1;

Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2;

Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3;

Marvin Roy Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1;

International Thunderbird Gaming, Inc. v. United Mexican States, NAFTA Chapter 11 Case under the UNCITRAL Arbitration Rules;

Fireman's Fund Insurance Company v. United Mexican States, ICSID Case No. ARB(AF)/02/1;

Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1;

Bayview Irrigation District et al v. United Mexican States, ICSID Case No. ARB(AF)/05/1;

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5;

Cargill, Inc. v. *United Mexican States*, ICSID Case No. ARB(AF)/05/2;

Tecmed v. *United Mexican States*, ICSID Case No. ARB(AF)/00/2;

Gemplus S.A, SLP, S.A. and Gemplus Industrial S.A. de C.V. v. *United Mexican States*, ICSID Case No. ARB(AF)/04/3; and

Talsud S.A. v. *United Mexican States*, ICSID Case No. ARB (AF)/04/4.

He has also acted as counsel in judicial review proceedings of investor-State arbitral awards (*Metalclad*, *S.D. Myers*, *Feldman* and *Bayview Irrigation District*).

INTERNATIONAL INVESTMENT DISPUTES AS ARBITRATOR

He has acted, or is acting, as an arbitrator in the following investment arbitrations:

Société Générale de Surveillance, S.A. v. *The Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13;

EnCana Corporation v. *Republic of Ecuador*, LCIA Case No. UN3481, an investor-State arbitration under the UNCITRAL Arbitration Rules;

Cementownia Nowa Huta S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2;

Invesmart B.V. v. Czech Republic, an investor-State arbitration under the UNCITRAL Arbitration Rules;

City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos de Ecuador (Petroecuador), ICSID Case No. ARB/06/21;

Vito G. Gallo v. Canada, a claim under NAFTA Chapter 11 and the UNCITRAL Arbitration Rules (until 21 October 2009);

Giovanni Alemanni and others v. Argentine Republic, ICSID Case No. ARB/07/08;

Hochtief AG v. Argentine Republic, ICSID Case No. ARB/07/31;

Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos de Ecuador (Petroecuador), ICSID Case No. ARB/08/6;

Global Trading Resource Corp. and Globex International, Inc. v. Ukraine, ICSID Case No. ARB/09/11;

An arbitral proceeding under a bilateral investment treaty between a European claimant and a European State;

KT Asia Investment Corp. B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8;

Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16;

Commerce Group Corp. and San Sebastian Mines v. Republic of El Salvador, ICSID Case No. ARB/09/17;

An arbitral proceeding under a bilateral investment treaty between a European claimant and a European State;

Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines, ICSID Case No. ARB/11/27;

Abdel A. Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33;

An arbitration under a bilateral investment treaty between a European claimant and a European State;

An arbitration between a European investor and the Arab Republic of Egypt;

Emmis International Holding BV et. al. v. Hungary, (ICSID Case No. ARB/12/2);

Gazprom v. Republic of Lithuania (ICC Case 18630/GZ); and

Ali Allawi (UK) v. The Islamic Republic of Pakistan (PCA Case No AA45) (appointed by the appointing authority)

OTHER ARBITRAL PROCEEDINGS

He has acted as an arbitrator, including as presiding arbitrator, in various arbitral *fora*, ranging from LCIA commercial arbitration to dispute settlement proceedings under Canada's *Agreement on Internal Trade* (AIT).

ADVICE TO STATES ON INTERNATIONAL TREATY NEGOTIATIONS

Mr Thomas has advised a number of States on international treaty negotiations. In 1986-87, he was Senior Policy Advisor to the Canadian Minister for International Trade during the Canada-U.S. free trade negotiations and the GATT's Uruguay Round of Multilateral Trade Negotiations. After leaving the federal government, he was retained in 1989-90 to advise two Canadian federal departments on various aspects of the Uruguay Round Multilateral Trade Negotiations.

In 1991, with the consent of Canadian government conflict of interest authorities, he was retained as legal counsel to the Secretary of Commerce of the Government of Mexico on issues relating to the negotiation of the North American Free Trade Agreement. He subsequently advised on the structure and content of the North American Agreement on Environmental Cooperation and the North American Agreement on Labour Cooperation. After NAFTA's entry into force, he advised Mexico on its NAFTA, GATT, and World Trade Organization (WTO) rights and obligations, numerous questions on the NAFTA-consistency of Mexican laws and policies, the drafting of Rules of Procedure for the NAFTA and side agreement dispute settlement mechanisms.

He has advised other States on the structure and content of international treaties on trade and investment.

GENERAL TRADE REGULATION

Mr Thomas has prepared legal opinions on many areas of international commercial law and regulation, including: agricultural trade, customs regulation, energy trade (oil and gas, hydroelectricity), trade in other natural resources, environmental regulation, trade remedy actions (anti-dumping and countervailing duty cases), import licensing, non-tariff import barriers, quantitative restrictions (export and import), state trading enterprises and monopolies, services (in particular, telecommunications and financial services), tariff classification, and general international dispute settlement.

MEMBERSHIP ON DISPUTE SETTLEMENT BODY ROSTERS

He has been appointed to the following rosters of dispute settlement panelists:

> Roster of Panelists for Chapters Eighteen and Nineteen of the *Canada-U.S. Free Trade Agreement* (FTA);
>
> Permanent Roster of Non-governmental Panelists for the *General Agreement on Tariffs and Trade* (GATT);
>
> Roster of Non-governmental Dispute Settlement Panelists for the *World Trade Organization* (WTO);
>
> ICC Canada;
>
> Singapore International Arbitration Centre's International Panel of Arbitrators;

Hong Kong International Arbitration Centre;

World Intellectual Property Organization's Roster of Panelists for Domain Name Disputes; and

the Roster of Panelists for Canada's *Agreement on Internal Trade*.

PROFESSIONAL RANKINGS

Mr Thomas has received various peer-rated rankings in different publications such as Martindale-Hubbell, *Chambers Global*, *The International Who's Who of Commercial Arbitration*, Lexpert's *American Lawyer Guide to the Leading 500 Lawyers in Canada*, *The International Who's Who of Business Lawyers*, Woodward/White's *The Best Lawyers in Canada*, *etc.*).

PUBLICATIONS

- Thomas, J.C., "*The Future of ICSID, Ad Hoc Committees, Appellate Tribunals, International Investment Courts and Investment Arbitration: The Evolution of the ICSID System as an Indication of What the Future Might Hold*", forthcoming in the ICCA Congress Series (ed. Albert Jan van den Berg);
- Thomas, J.C. and Ewing-Chow, Michael, "*The Maturation of International Investment Law*", ICSID Review, Foreign Investment Law Journal, Volume 25, Number 1, Spring 2010
- Thomas, J. C., "*The North American Free Trade Agreement (NAFTA)*" in J. William Rowley, Arbitration World: Jurisdictional Comparison, European Lawyer Reference Series (2006)
- Thomas, J.C., "*Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*", ICSID Review, Foreign Investment Law Journal, Volume 17, Number 1, Spring 2002
- Thomas, J.C., "*Investor-State Arbitration under NAFTA Chapter 11*", Canadian Yearbook of International Law, Volume XXXVII (1999) at 99-136
- Thomas, J.C., "*Litigation Process under the GATT Dispute Settlement System: Lessons for the World Trade Organization?*" Journal of World Trade, Spring 1996
- Thomas, J.C., Tereposky, G. A., and Fujihara, K., "*Canadian Antidumping and Countervailing Duty Law and Procedure" in Trading Punches: Trade Remedy Law and Disputes under NAFTA*", edited by Beatriz Leycegui, William B.P. Robson and S. Dahlia Stein, published by the North American Committee
- Thomas, J.C. and Tereposky, G.A. "*The NAFTA and the Side Agreement on Environmental Cooperation: Addressing Environmental Concerns in a North American Free Trade Regime*" (1993) 27/6 Journal of World Trade 5
- Thomas, J.C. and Tereposky, G.A. "*The Evolving Relationship Between Trade and Environmental Regulation*" (1993) 27/4 Journal of World Trade 23-45

- Thomas, J.C. and Tereposky, G.A. "*The GATT, the FTA, and the NAFTA: The Evolving Relationship Between International Trade and Environmental Regulation*" published in "Course Materials: 22nd Annual Conference on Environmental Law" American Bar Association Section of Natural Resources, Energy and Environmental Law (March, 1993)
- Thomas, J.C., "*The Future: The Impact of Environmental Regulations on Trade*" (1992) 18 Canada-United States Law Journal 383-398
- Thomas, J.C., "*Reflections on the Canada-U.S. Free Trade Agreement in the Context of the Multilateral Trading System*" Claire Cutler and Mark Zacher (eds.), Canadian Foreign Policy and International Economic Regimes (Vancouver: UBC Press, 1992)
- Thomas, J.C., "*National Treatment vs. Discriminatory Policies- An Analysis of Chapter 16: Investment*", D.M. McRae and D.P. Steger (eds.), Understanding the Free Trade Agreement, Halifax: Institute for Research on Public Policy, 1989
- McRae, D.M. and Thomas, J.C., "*The Development of the Most-Favoured Nation Principle: Friendship, Commerce, and Navigation Treaties and the GATT*" in Maureen Irish and Emily F. Carasco (eds.), The Legal Framework for Canada-United States Trade (1987)
- Thomas, J.C., "*The Trade and Antitrust Laws and a Canada-United States Trade Agreement*", in Transnational Commercial and Trade Litigation, Recent Developments, an American Law Institute-American Bar Association Course of Study (1986)
- Finlayson, J.A. and Thomas, J.C., "*The Elements of a Canada-United States Comprehensive Trade Agreement*" (1986) 20 International Lawyer 1307-1334
- Thomas, J.C., "*Conflict Over the Extraterritorial Application of U.S. Antitrust Law: A Canadian Perspective*", in Canada and International Trade: Major Issues of Canadian Trade Policy, (Halifax: Institute for Research on Public, 1985)
- McRae, D.M. and Thomas, J.C., "*The GATT and Multilateral Treaty-Making: The Tokyo Round*" (1983) 77 American Journal of International Law 51-83
- Thomas, J.C., "*Impeachment of a Party's Own Witness by a Prior Inconsistent Statement*" (1982) 16 U.B.C. Law Review 35-70
- McLachlin, B.M. and Thomas, J.C., "*Solosky and Prisoner Mail-opening: A New View of Solicitor-Client Privilege?*" (1981) 2 Supreme Court Law Review 387-403

This is Exhibit 'B'

as referred to in the Affidavit of J. Christopher Thomas Q.C. this 13th day of March 2013

Before me

Commissioner for Oaths

Department of Justice Canada | Ministère de la Justice Canada

Department of Justice
Business & Regulatory Law Section
900 - 840 Howe Street
Vancouver, British Columbia
V6Z 2S9

Telephone: (604) 666-6728
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March 11, 2013

Email: jcthomas@thomas.ca

Mr. J. Christopher Thomas, Q.C.
Senior Principal Research Fellow
Centre for International Law
National University of Singapore

Attention: Mr. Thomas

Dear Mr. Thomas:

Re: ***Hupacasath First Nation v. The Minister of Foreign Affairs Canada and the Attorney General of Canada***
Court No.: T-153-13

We are counsel for the respondent, the Government of Canada, in the above judicial review brought by the Hupacasath First Nation. The Applicant seeks a court declaration that Canada is required to engage in a process of consultation and accommodation with First Nations, including the Applicant, prior to taking steps which will bind Canada under the Canada China Foreign Investment Promotion and Protection Agreement (CCFIPA). They also seek a final injunction to restrain the Minister of Foreign Affairs from ratifying the CCFIPA, as described at page 3 of their notice of application. Copies of the notice of application and the five affidavits filed in support are attached.

You will note that the affidavit of Professor Gus Van Harten provides an expert opinion with respect to five questions posed by counsel for the Hupacasath located at Exhibit A to his affidavit.

In addressing a number of the questions raised in this litigation, it would be of assistance to the Court if you could provide an expert opinion under the *Federal Courts Rules* to provide a response to the expert report of Professor Van Harten's report and address the following issues:

1. In response to Professor Van Harten's report and his criticism of international investor-state arbitration, please provide any relevant context that you believe would be useful to the Court on the history and rationale for international investment treaties and investment treaty arbitration.

2. In your view is the Canada-China Foreign Investment Promotion and Protection Agreement ("Canada-China FIPA") significantly different from Canada's past agreements on investment protection, including NAFTA Chapter Eleven? In responding

to this question, please review the substantive obligations and investor-state dispute settlement mechanism contained in the Canada-China FIPA and correct any misconceptions or inaccuracies contained in Professor Van Harten's report.

3. In your view does the FIPA prevent a government from determining an appropriate level of environmental protection, from managing its natural resources or from making changes to its laws?

4. Please explain the interaction between the FIPA and Canadian domestic law, and remedies that can be granted by an arbitral tribunal constituted under the Canada-China FIPA.

5. Please explain to what extent Canada can be held internationally responsible under the Canada-China FIPA, for legislative or judicial decisions and with respect to the Hupacasath First Nation.

6. What is the scope of the aboriginal affairs' exception in the Canada-China FIPA? In providing your answer, please specifically address section 2.f in Associate Professor Van Harten's report and explain why the aboriginal reservation does not apply to minimum standard treatment and expropriation.

In your review of Professor Van Harten's report, we can advise that the Hupacasath First Nation does not have the law-making powers of a First Nation with a modern Aboriginal treaty, as set out at page 18 of his report. The Hupacasath First Nation is a band within the meaning of the term defined in the *Indian Act,* R.S.C. 1985, c. I-5 and are confined to the law making powers provided in that *Act* (see sections 81 and 83). To be clear, the Hupacasath First Nation does not have a modern treaty and has not been active in the treaty process since 2009.

In order to comply with the *Federal Courts Rules* in respect to the preparation of your expert report it will be necessary for you to provide the following:

1. a description of your qualifications that allow you to address the issues in this report;

2. a current curriculum vitae;

3. a statement of the facts and assumptions on which the opinions in your report are based, including attaching this letter of instructions to your report as a schedule;
4. a summary of the opinions expressed;

5. the reasons for each opinion expressed by you;

6. any literature, other materials including other reports specifically relied on in support of your opinion;

7. the caveats or qualifications necessary to render your expert report complete and accurate, including those relating to any insufficiency of data or research or an indication of any matters that fall outside your field of expertise; and

8. particulars of any aspect of your relationship with the plaintiffs or the defendant or the subject matter of your proposed evidence that might affect your duty to the Court.

9. a signed certificate confirming that you have read the Code of Conduct for Expert Witnesses set out in the schedule to the *Federal Court Rules* and agree to be bound by it. For your reference, please find attached a copy of the Code of Conduct.

In preparing your report, it must be kept foremost in your mind that under the *Federal Court Rules*, as an expert witness who provides a report of this kind, you have an overriding duty to assist the Court impartially on matters relevant to your expertise. This duty overrides any duty to a party to a proceeding, including the respondent retaining you as an expert witness in this litigation. As an expert you must be independent and objective and must not be an advocate for the respondent despite being retained by the respondent.

Please do not hesitate to contact us if you have any questions on the above matters.

Yours truly,

Tim Timberg

This is Exhibit 'C'

as referred to in the Affidavit of J. Christopher Thomas Q.C. this 13th day of March 2013

Before me

Commissioner for Oaths

J. Christopher Thomas, Q.C.
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13 March 2013

Mr. Tim Timberg
Counsel
Department of Justice
Business & Regulatory Law Section
900-840 Howe Street
Vancouver, British Columbia
V6Z 2S9

Dear Sir:

Re: ***Hupacasath First Nation v. The Minister of Foreign Affairs Canada and the Attorney General of Canada*** **Court No.: T-153-13**

1. I am writing in response to your letter dated 11 March 2013 requesting my views on the expert report of Professor Gus Van Harten dated 13 February 2013 and filed in the above-mentioned proceeding.

A. Experience

2. I am a Senior Principal Research Fellow at the National University of Singapore's Centre for International Law. My responsibilities at the Centre are to: (i) organize the Singapore International Arbitration Academy, an intensive training programme on commercial, State-to-State and investor-State arbitration for government and private sector lawyers from the Asia-Pacific region (the first of which was held last year); (ii) teach an upper-level and graduate student course entitled, "International Legal Protection of Trade and Investment"; (iii) conduct a research project on the origins and evolution of investor-State arbitration from 1960 to the present day; (iv) train Singaporean lawyers in international dispute settlement; and (v) develop a research project on best practices in modern investment treaty-making.

3. I have prepared this opinion based upon my experience as: (i) having acted as counsel in international legal proceedings; (ii) having advised various States in the past on the negotiation of international trade and investment treaties; and (iii) having acted as a panel or tribunal member in various international trade and investment disputes. In addition to my practice experience, I oversaw the building of an online database, Investor-State LawGuide, and in doing so have reviewed many decisions and awards rendered by investment treaty tribunals.

4. My resumé is attached hereto. I have practiced in the field of international economic law for over 25 years. I have taught at two Canadian universities, worked for the Federal Minister for International Trade during the launch of the Uruguay Round of Multilateral Trade Negotiations (which led to the establishment of the World Trade Organisation) and the *Canada-United States*

Free Trade Agreement negotiations, later acted for the Government of Mexico in relation to the negotiation of the *North American Free Trade Agreement* (NAFTA) and two related agreements on Labour and Environmental Co-operation, and have practiced as counsel, legal advisor, as an international trade dispute panelist and as an international arbitrator.[1]

B. Questions Posed

5. In your letter dated 11 March 2013, you posed the following six questions:

1. In response to Professor Van Harten's report and his criticism of international investor-state arbitration, please provide any relevant context that you believe would be useful to the Court on the history and rationale for international investment treaties and investment treaty arbitration.
2. In your view is the Canada-China Foreign Investment Promotion and Protection Agreement ("Canada-China FIPA") significantly different from Canada's past agreements on investment protection, including NAFTA Chapter Eleven? In responding to this question, please review the substantive obligations and investor-state dispute settlement mechanism contained in the Canada-China FIPA and correct any misconceptions or inaccuracies contained in Professor Van Harten's report.
3. In your view does the FIPA prevent a government from determining an appropriate level of environmental protection, from managing its natural resources or from making changes to its laws?
4. Please explain the interaction between the FIPA and Canadian domestic law, and remedies that can be granted by an arbitral tribunal constituted under the Canada-China FIPA.
5. Please explain to what extent Canada can be held internationally responsible under the Canada-China FIPA, for legislative or judicial decisions and with respect to the Hupacasath First Nation.
6. What is the scope of the aboriginal affairs' exception in the Canada-China FIPA? In providing your answer, please specifically address section 2.f in Associate Professor Van Harten's report and explain why the aboriginal reservation does not apply to the minimum standard treatment and expropriation.

C. Summary of Opinion

7. At the outset, I noted that a theme running through Professor Van Harten's opinion is his view that the institution of investor-State arbitration is inherently defective. Much of his opinion is

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[1] I have had a limited exposure to aboriginal law issues as a result of my involvement as a member of the federal team in treaty negotiations between Canada, British Columbia and the Nisga'a First Nation in 1993-1994. I have no further experience and no claim to expertise in this area. This opinion is restricted to my area of practice. I have provided legal services to Canada over the years, but I have not done any work for Canada for at least seven years. I was appointed to one NAFTA tribunal by Canada, but resigned after I was put to an election as result of a challenge procedure.

taken up with what he calls his "broader concerns about the lack of institutional safeguards of independence in international investor-state arbitration."[2] The same arguments have also been made in the past in respect of the NAFTA and could be made against any other investment protection treaty that Canada has entered into in the last 20 years.

8. I will seek to explain why in my opinion there is no basis for concluding that the investor-State arbitral mechanism in the *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* (the "Canada-China Treaty" or the "Treaty") is materially different from any of Canada's prior investment treaties.

9. In addition to reviewing the Treaty's key features, I will direct the Court's attention to the many instances of international cooperation in the development of substantive legal standards, the rules of State responsibility, the rules of treaty interpretation, arbitral procedures, review procedures, *etc.* I do not suggest that Professor Van Harten's concerns about investor-State arbitration as an institution are completely without merit. Rather, I will seek to demonstrate that many of his concerns are directed at policy decisions taken by large numbers of States, including Canada, after due deliberation, and have little to do with the Treaty which is the subject of the current Application.

10. For example, Professor van Harten observes that some investment treaty obligations have been interpreted in different ways under similar investment treaties.[3] I agree that there are divergences of opinion between tribunals on matters of interpretation of substantive provisions. However, this is due to a variety of reasons. First, investment treaties address the same "menu" of obligations, but they do so in different ways. This means that an award rendered under Treaty A may not be relevant to the analysis of Treaty B, even given though it has facially similar provisions. Second, claims are decided by *ad hoc* arbitration tribunals (comprising different arbitrators) rather than by a standing tribunal. Third, the negotiators decided not to provide for review of awards for error of law. Both of the latter policy choices were made during the drafting of the leading international treaty that provides the institutional underpinnings of investor-State arbitration and they were made in full knowledge that *ad hoc* arbitration could lead to inconsistent outcomes, even in cases arising out of the same facts. *Ad hoc* arbitration and the preclusion of judicial review on the merits is the practice in private commercial arbitration and in State-to-State arbitration, not just in international investment treaty arbitration.[4]

11. Had the drafters chosen to create standing tribunals whose awards would be subject to appellate review, many of Professor Van Harten's criticisms would fall away. However, to date the international community has not opted for standing tribunals and an appellate body. This is not to rule out the possibility that it might in the future. However, I have not yet seen a groundswell of

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2 Affidavit of Professor Gus Van Harten, p. 3.

3 Affidavit of Professor Gus Van Harten, p. 7.

4 I would also note that one can overstate the extent of divergent opinions. While the early years of NAFTA could be characterized as a period of jurisprudential uncertainty, I believe that the Free Trade Commission's Note of Interpretation on the Minimum Standard of Treatment led to a convergence of arbitral opinion. I also believe that outside of the NAFTA context, the approach taken to a number of recurring issues has become clearer and more settled. There are different reasons for this, which I shall attempt to elaborate below.

support in favour of the kind of changes that Professor Van Harten has advocated in his prior writings.

12. I would add that the policy decisions that have been taken, have in many cases been made with Canada's active participation and that many of the countries most actively involved in the development of these standards, practices and procedures are countries with which Canada shares close legal and political traditions (such as France, the United Kingdom, and the United States).

13. As for some of Professor Van Harten's other concerns, I will seek to show how, as countries have gained more experience with international investment treaties, they have sought to clarify, restate, and otherwise elaborate upon the substantive standards and procedures. A comparison of the Canada-China Treaty with the NAFTA shows this process in operation.

14. To the extent that Professor Van Harten has expressed specific concerns about the Canada-China Treaty, I have reviewed it on an article-by-article basis in order to determine the extent to which it could be traced back to the NAFTA and post-NAFTA treaty-making practice exemplified by the 2004 Canadian Model Foreign Investment Protection Agreement ("FIPA"), in order to see whether it deviates significantly from prior practice, and if so, whether it does so in a retrogressive fashion.[5]

15. When I did so, I formed a different view than Professor Van Harten. In fact, I was struck by how closely, in its fundamentals, the Treaty resembles the NAFTA and post-NAFTA treaties, going so far as to replicate many of NAFTA's provisions – word for word in many parts – and in other instances reflects the approach taken in 2004 Canadian Model FIPA.

16. After conducting further research, I realized that there is good reason for this: the post-NAFTA treaty-making practice of Canada and the United States has been studied by Asian-Pacific countries, including China, and has influenced the structure of their investment treaties.

17. With one exception, the substantive obligations contained in Part B of the Treaty are standard obligations which are typical of Canadian treaty-making practice dating from the NAFTA.

18. The Treaty's substantive obligations are the following:

(i) Promotion and Admission of Investment;
(ii) Minimum Standard of Treatment;
(iii) Most-Favoured-Nation Treatment;
(iv) National Treatment;
(v) Senior Management, Boards of Directors and Entry of Personnel;
(vi) Performance Requirements;
(vii) Expropriation;
(viii) Compensation for Losses; and
(ix) Transfers.

19. The lineage of each of the above, except for one provision, is directly traceable back to the NAFTA. That single provision, Article 3, *Promotion and Admission of Investment*, is based upon a provision found in many international investment treaties.

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5 See Part IV *infra*.

20. To the extent that the Treaty may differ from the NAFTA and/or the 2004 Canadian Model FIPA, I do not share Professor van Harten's opinion that such differences amount to "problems."[6] The Treaty does not stand out as being categorically different from any of the other Canadian treaties with which I am familiar. This is not to say that there are no differences between this Treaty and the other treaties, but these are a normal and expected outcome of the give-and-take of international negotiations.

21. When analyzing the Treaty, it is important to note not only what it does, but also what it does not do. Two key points immediately come to mind and there are others which I will address when responding to your questions.

22. First, and most importantly, the Treaty does not purport to change the allocation or distribution of governmental powers in either Contracting Party. Whatever the allocation or distribution of the totality of the powers of the Canadian State (and by this I include the judiciary, executive and the legislature at all levels of government) that has been made under or pursuant to the *Constitution Act*, remains unchanged. This is a matter that falls within the exclusive jurisdiction of Canada. This has also been the case with the NAFTA and Canada's other treaties.

23. In particular, in relation to the matters raised in the current Application, the relationships between the federal Crown and First Nations remain unchanged; nothing in the Treaty requires that any changes to such relationships be made, and conversely, nothing in the Treaty precludes Canadian governments from making further changes in such relationships as they see fit under the Constitution. This Treaty has no *supra*-national effect and a tribunal established thereunder cannot interfere with such matters. They fall within the exclusive jurisdiction of each Contracting Party.

24. Secondly, the Treaty does not supplant Canadian law, which remains fully in effect. Thus to the extent that Professor Van Harten contemplates behavioural differences between Chinese and, for example, American, investors/claimants (*i.e.*, this Treaty would permit "a different group of major investors – who may or may not conduct themselves in a similar way to US investors in Canada" to bring claims[7]), Chinese investors who invest in Canada, like investors from any other country, are subject to the full force of Canadian law and would continue to be so under the Treaty after its entry into force. If their investments do not conduct themselves in accordance with Canadian law, they are subject to the consequences. This is the case now and would continue to be the case after the Treaty's entry into force.

25. You have requested that I explain the interaction between the Treaty and Canadian domestic law and the remedies that can be granted by an arbitral tribunal constituted under the Treaty. I would begin by noting that in procedural matters, an international tribunal has the power to call upon a party to produce witnesses or evidence, but it lacks the kind of compulsory enforcement power held by a Canadian court to ensure compliance with its process. In so far as its remedial powers are concerned, under this Treaty a tribunal has *no* power to enjoin a governmental measure. It can recommend an interim measure of protection to preserve the rights of a disputing party, or to ensure that its jurisdiction is made fully effective, but a tribunal "shall not recommend attachment or enjoin the application of the measure alleged to constitute a breach..."[8] In addition, where a tribunal makes a final award against a disputing Contracting Party, its powers are limited:

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6 Affidavit of Professor Gus Van Harten, p. 3.

7 Affidavit of Professor Gus Van Harten, p. 4.

8 Article 31, *Interim Measures of Protection and Final Award.*

It is empowered to award monetary damages and any applicable interest or to award restitution of property, but in the latter case, it must recognize that the respondent may decline to make restitution.[9] A tribunal may also award costs in accordance with the applicable arbitration rules. It cannot order a disputing Contracting Party to pay punitive damages.[10]

26. All of the foregoing is consistent with the powers of NAFTA tribunals. Under this Treaty, a tribunal has no jurisdiction to grant injunctive or other extraordinary relief of the type commonly granted by Canadian courts, to set a measure aside, or otherwise compel a respondent Contracting Party to change its measure. Its powers are thus restricted in comparison to those of a Canadian court.

27. You have also asked my opinion on whether the Treaty prevents a government from determining an appropriate level of environmental protection, from managing its natural resources, or from making changes to its laws. I note in this regard that Professor Van Harten lists various First Nations' law-making powers and suggests that decisions "in any of these areas may lead to a claim under the FIPPA..." and a finding of non-compliance with Canada's treaty obligations.[11] One of his principal concerns is that a First Nation might, for example, be found to have expropriated a covered investment of a Chinese investor.[12] That is correct, if the First Nation is assumed to have acted contrary to Canada's international obligations. However, in such circumstances, it would be Canada, not the First Nation in question, that is internationally responsible.[13]

28. As to whether this Treaty poses a substantial risk of exposure to a finding of State responsibility resulting from a regulatory measure taken by a First Nation, one can have some sense of this by observing that the point Professor Van Harten makes has applied equally to the risk of potential claims from American and Mexican investors in Canada for some 19 years.

29. On his analysis, First Nations' regulatory measures face a substantial risk of attracting State responsibility. But if this is true for this Treaty, it must also be true for the NAFTA, which has been in effect since 1 January 1994. I have closely followed the experience of all three NAFTA Parties and I note that there has been only one notice of intent filed against Canada for a measure that potentially involved measures that were, it appears, in part at least, to be related to an aboriginal interest in the caribou hunt, and that claim did not proceed to the establishment of a tribunal.[14]

30. To my knowledge, in almost twenty years of experience with investors from the country which is the largest foreign investor in Canada, there have been no other claims, let alone a tribunal finding of State responsibility against Canada for any federal, provincial or territorial measures

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9 *Id.* In such a case, the award shall provide that the Contracting Party may pay damages and any applicable interest in lieu of restitution.

10 *Id.*.

11 Affidavit of Professor Gus Van Harten, p. 18.

12 Affidavit of Professor Gus Van Harten, pp. 18-20.

13 Professor Van Harten expresses concern that the First Nation could be financially liable for its having taken an expropriation that breached Article 10; the Treaty is silent on this issue and the question of the financial liability is an internal matter for Canada.

14 *John R. Andre v. Government of Canada*, Notice of Intent to Submit a Claim, 19 March 2010, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/andre-01.pdf.

taken in relation to aboriginal rights or interests, or for allegedly unlawful measures taken by First Nations themselves. Obviously, one cannot categorically rule out the possibility of a claim in the future, but the NAFTA experience does not suggest a substantial probability of a spate of claims based on measures based on aboriginal rights or interests.

31. That said, there has been one claim brought against the United States (by a Canadian investor) which did challenge Federal and State regulatory measures taken in respect of the protection of an aboriginal group's cultural heritage. In my opinion, the tribunal's award in that case actually provides a good example of how such societal interests are taken into consideration by an international tribunal when it applies the treaty standards. I will refer to the award from time to time in order to illustrate particular points.[15]

32. With respect to a government's determining the appropriate level of environment protection, during the course of my opinion, I will explain the fundamental rationale of the national treatment rule as well as discuss the distinction between governmental regulation and expropriation. Reflecting the fact that States make different policy choices, a right preserved by the national treatment rule, there is a substantial body of international jurisprudence and writing on the State's right to engage in *bona fide* regulation. In doing so, it is open to a government, within its jurisdiction, to prescribe the level of public welfare protection that it seeks to attain and it is not bound by another government's own policy choices. This accounts for the different approaches taken by governments around the world and within States at the subnational level (provincial, state, aboriginal, regional, and municipal levels) in regulating matters pertaining to public health and safety, environment protection, public morals, *etc.* The fact that a regulatory measure affects an investment or increases its cost of doing business due to increased costs of compliance does not dictate the conclusion that the State has engaged in an expropriation.

33. Indeed, the Canada-China Treaty contains an Annex (B.10) which sets out the Contracting Parties' shared understanding as to whether a measure or series of measures can constitute an indirect expropriation and notes that only in "rare circumstances" such as if a measure or series of measures "is *so severe in light of its purpose that it cannot be reasonably be viewed as having been adopted and applied in good faith*, a non-discriminatory measure or series of measures that is designed and applied to protect the legitimate public objectives for the well-being of citizens, such as health, safety and environment, does not constitute indirect expropriation."[16] [Emphasis added.] On the Contracting Parties' shared understanding, therefore, it would only be in rare circumstances that non-discriminatory measures designed for public welfare objectives could possibly engage State responsibility.

34. With respect to Professor Van Harten's concern that "Canada would not be able to rely on its own domestic law and Constitution to avoid its obligations under the FIPPA"[17], if Canada were seeking to *avoid* its obligations, as opposed to defending its compliance with its international obligations by reference to the operation of its domestic law or legal system, his point is correct, but this argument could be made equally with respect to any of Canada's thousands of international obligations.

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15 *Glamis Gold, Ltd. v. United States of America*, an UNCITRAL Arbitration conducted under Chapter 11 of the NAFTA and administered by the International Centre for Settlement of Investment Disputes, Award. Available at: http://www.state.gov/documents/organization/125798.pdf.

16 Annex B.10(3), *Expropriation.*

17 Affidavit of Professor Gus Van Harten, p. 16.

35. The supremacy of international law over national law is fundamental to the structure and operation of the international legal system. International law cannot operate effectively if States parties to treaties can elevate their domestic law above their international obligations at will. If States could plead their domestic law as a defence to a breach of their international obligations, their treaty obligations would be nullified with a resulting reduction in the efficacy of their treaties. For this reason, the international community as a whole – including Canada – recognizes the supremacy of international law rule.

36. The supremacy of international law does not mean, however, that international tribunals are blind to the domestic law of States. This is not the case, in my experience. International law is worded in more general terms than domestic law and regulations and in the investment treaty context, tribunals routinely consider domestic law and regulations because foreign investments are made within the framework of the host State's legal system. To take a simple example, when a foreign investor incorporates a subsidiary in Canada, it is establishing a legal person which derives its existence from Canadian law and it is subject to all applicable Canadian regulation. A potential breach of international law can arise when Canadian law – in its terms or in its application – is at variance with Canada's international obligations.

37. At paragraph 31, I adverted to an award of a NAFTA tribunal that considered regulatory measures taken by the State of California and the US Federal government in relation to a mining project which was considered to have an impact upon the interests of an aboriginal society.[18] The First Nation in question, the Quechen Nation, has had since time immemorial a spritual pathway known as the "Trail of Dreams"[19], which has been used by members of that nation and the gold mining project at issue in the arbitration (which was owned by a Canadian investor) was subjected to a series of measures that were taken to protect that aboriginal cultural legacy.

38. In the course of analyzing the alleged breach of the NAFTA's "minimum standard of treatment" and expropriation provisions, the tribunal engaged in an extensive review of US Federal and State law with respect to the regulation of mining projects and the preservation of aboriginal cultural heritage. These matters are regulated at both levels of government and the tribunal reviewed this body of legislation, noting in addition that the United States was a party to several international conventions and declarations developed under the auspices of the United Nations Educational, Scientific and Cultural Organisation ("UNESCO") regarding the protection and preservation of cultural property. As shall be seen, the tribunal devoted considerable attention to the consideration of this regulatory regime when determining whether the United States was in breach of its NAFTA investment obligations.

39. In short, while Professor Van Harten's opinion makes a series of general points with which I agree, I do not share his view as to their legal consequences, nor do I share his reservations about this Treaty. As to his broader systemic concerns about investment treaty arbitration, I believe that

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[18] *Glamis Gold Corporation v. United States of America*, an UNCITRAL Arbitration conducted under Chapter 11 of the NAFTA and administered by the International Centre for Settlement of Investment Disputes, Award. Available at: http://www.state.gov/documents/organization/125798.pdf.

[19] The award notes that the Trail of Dreams is part of a complex trail network known as *Xam Kwatcan*, which also encompasses the Medicine Trail, the Mojave Salt Song Trail and the Keruk Trail. The Quechen believe that *Kumastamxo*, the God-son of their creator, *Kukumat*, led them down the sacred Trail upon *Kukumat*'s death as the completion of the creation cycle because the creator had told the people that, upon his death, he would "return to where he came from." Award, paragraph 105.

some of his concerns have been or are being addressed and that the system will continue to evolve, perhaps towards a model that is more acceptable to him. However, States do not agree to changes overnight and the process of evolving new treaty models and other rules takes time.

D. Structure of Opinion

40. This opinion will generally follow the order of the questions posed in your letter of 11 March 2013. However, certain questions are best answered within the detailed review of the Treaty's provisions.

41. Parts I-III respond to your Question #1 and describe: (i) certain features of the international legal system that must be taken into account when considering international investment treaties and the institution of investor-State arbitration; (ii) the emergence of investor-State arbitration as a commonly used means for resolving investment disputes between investors and host States; and (iii) the development of international treaties for the reciprocal promotion and protection of investment enforceable by private parties.

42. Part IV responds to your Questions #2-6 by reviewing the Canada-China Treaty. In the course of this, I will discuss internationally agreed rules dealing *inter alia* with the arbitral process, treaty interpretation, State responsibility, and the review of arbitration awards.

43. Throughout the opinion, I have provided historical background and examples of treaty-making practice to explain particular issues. Investor-State arbitration is a widespread international legal remedy accepted by a substantial majority of the world's States[20], and it is supported by a large body of treaties, rules of customary international law, and other non-binding but authoritative sources of guidance.

44. I have not attempted to provide a basic description of the content of the Treaty's rights and obligations because I am instructed that the Lead Negotiator for the Canada-China Treaty negotiations during the period 2009-2012, Mr. Vernon MacKay, will be providing an affidavit which describes those matters. Since I have restricted myself to the text that was ultimately agreed by the two Contracting Parties, and you have requested me to focus on Professor Van Harten's critiques, this opinion focuses more on the lineage of the provisions.

45. I reserve the right to amend my opinion should I become apprised of any information which would materially affect it.

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[20] This includes Canada's major trading partners, including those States with which our legal traditions are most closely connected; France, the United Kingdom, as well as all (but one) of the other member States of the European Union, and the United States. As a result of the Lisbon Treaty, all member States of the European Union are now represented in international investment negotiations by the European Commission which is now beginning to negotiate international treaties that will apply to the European Union as a whole. One such potential treaty is the free trade agreement currently being negotiationed between Canada and the EU. Offical EU policy is to incorporate investor-State arbitration into EU investment treaties.

Part I: Basic Features of International Law and Jurisdiction

46. You have asked me to provide "any relevant context that would be useful to the Court on the history and rationale for international investment treaties and investment treaty arbitration" by explaining the relevant international legal rules.

47. In order to appreciate the role and purpose of an international investment treaty, it is necessary to understand the distinction between rules of customary international law and "conventional" or "treaty" rules.

48. One starts from the fact that the international legal plane contains no centralized legislative or judicial power and hence all rules of international law, except for certain fundamental rules known as *jus cogens*, are derived from the consent of States.[21] The absence of a centralized *judicial* power means that the international legal system is very different from the legal system of a sovereign State in which there is a monopoly of judicial power distributed within a hierarchy of courts. The different nature of the international legal system is manifested in various ways which I will discuss below.

49. Likewise, the absence of a centralized *legislative* power means that rules of international law also result from the consent of States. Customary international law comprises rules of conduct that have been accepted in widespread State practice and in respect of which States exhibit a psychological sense (known as *opinio juris*) that the rules are legally binding.[22] Only if it can be shown that a practice attracts widespread acceptance and that States evidence the requisite *opinio juris* in relation to the practice, will it be considered to be a rule of customary international law.[23] There is a substantial body of judicial and arbitral case law, as well as much writing, on the formation and discernment of such rules.[24] Establishing the existence and the precise content of a customary international law rule can be a difficult and disputatious exercise.

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[21] The Permanent Court of International Justice in the *The Case of the S.S. 'Lotus' (France v. Turkey)* (1927), Judgment of September 1927, P.C.I.J. (Ser. A) No. 10 at p. 18 noted that because States are sovereign equals, the rules that bind them "must emanate from their own free will." See also, James Crawford, ed., Brownlie's Principles of Public International Law, 8th ed. (Oxford: OUP, 2012) at p. 9: "International law was not law *above* States, but law *between* States, enforceable, short of way by war, by way of moral opprobrium or by reciprocal denial of benefits" (emphasis in original). *Jus cogens* is that body surrounding principles of norms from which no derogation is permitted. They are recognised as being fundamental to the maintenance of the international legal order and applied to such subjects as genocide or the slave trade.

[22] The Max Planck Encyclopedia of Public International Law, vol. II (United Kingdom: OUP, 2012) at p. 939.

[23] See the definition adopted by the International Court of Justice in the *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, [1969] I.C.J. Rep. 3 at paragraph 77: "...Not only must the acts concerned amount to a settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it. The need for such a belief *ie.* the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation."

[24] See, for example, the summary of jurisprudence and writing on the elements of customary international law in The Max Planck Encyclopedia of Public International Law, vol. II (United Kingdom: OUP, 2012) at pp. 941-949.

50. For that reason, in many areas of international relations ranging from maritime boundary delimitation, the rights of navigation, territorial delimitation, mutual legal assistance, anti-bribery laws, exchange rates and monetary policy coordination, telecommunications, civil aviation, international trade regulation and so on, States have sought to increase the level of certainty and predictability in their relationships by negotiating treaties that supplement or vary customary international law rules or indeed address a new subject-matter not previously regulated by such rules.[25] As discussed below, the treatment to be accorded to what were historically described as "aliens" and their property (in the modern investment treaty lexicon, "investors" and their "investments"), is an example of States deciding to draft reciprocal treaties.[26] By adhering to the same obligations, they thereby gain correlative rights for themselves as well as rights for their respective investors.[27]

51. This leads to the question of the relationship between a State's international treaty obligations and its domestic law. It is commonly agreed that international law has priority over a State's inconsistent domestic law. As noted in the Summary of Opinion, this is a topic touched on by Professor Van Harten in his opinion where he expresses concern about the supremacy of international law over Canadian law.[28] He refers to Article 27 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*") and to Article 3 of the International Law Commission's ("ILC"[29]) Draft Articles on State Responsibility[30] – both of which are widely accepted by States – and asserts that, "Canada would not be able to rely on its own domestic law and Constitution to avoid its obligations under the FIPPA."[31]

52. As noted in the Summary of Opinion, if it is truly a case of Canada avoiding its obligations, as opposed to defending its compliance with its international obligations by reference to the operation of its domestic law or legal system, Professor Van Harten's point is correct, but it is one that could be made equally with respect to any of Canada's international obligations.

53. I have already observed that if States could plead their domestic law as a defence to a breach of their international obligations, their treaty obligations could be nullified with a resulting

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25 Examples would be the *International Covenant on Civil and Political Rights*, 19 December 1996, 999 U.N.T.S. 171; the *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S 3; *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187; and the *Convention on the International Maritime Organisation*, 6 March 1948, 289 U.N.T.S. 3.

26 See below at paragraphs 64 to 66.

27 James Crawford, ed., Brownlie's Principles of Public International Law, 8th ed. (Oxford: OUP, 2012) at p. 9.

28 Affidavit of Professor Gus Van Harten, pp. 16-18.

29 The ILC comprises a group of international law experts reflecting the different legal traditions of the world which was established by the United Nations General Assembly to progressively develop and codify the rules of public international law. Membership in the ILC is limited to 34 members and results from an election by the Member States of the United Nations. There is at present a Canadian member on the ILC, Professor Donald M McRae of the University of Ottawa. The Articles on State Responsibility have been published both by the United Nations and by Cambridge University Press.

30 International Law Commission, "Responsibility of States for Internationally Wrongful Acts 2001" in *Yearbook of the International Law Commission* 2001, vol. 2, part 2 (New York: UN, 2001), accessible at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf ("*Articles on State Responsibility*").

31 Affidavit of Professor Gus Van Harten, p. 16.

reduction in the efficacy of their treaties.[32] For this reason, the international community as a whole – including Canada – devised the supremacy of international law rule.

54. I also observed earlier that international law's supremacy over inconsistent domestic law does not mean however that international tribunals are blind to the domestic law of States and they do not take into consideration domestic law which is consistent with the State's international obligations. Indeed, international law does not generally regulate to a degree remotely approximating the specificity of domestic law (or "municipal" law, as it is known in international law).

55. This was noted by the International Court of Justice when discussing the separate legal personality of a corporation in the course of its Judgment in the *Barcelona Traction* case, where the Court, in ruling on Belgium's claimed right to provide diplomatic protection to Belgian shareholders in a Canadian company, stated:

> "In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of State with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights.[33] [Emphasis added.]

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[32] When the justification of a State measure is based *inter alia* upon its claimed compliance or implementation of another international obligation, the tribunal or court must consider the interaction of the two international instruments in order to determine whether there is a basis for the justification. I do not agree with the statement that Canada "could not argue that its obligations under other sources of international law, such as international human rights law or international environmental law, provided a defence to obligations owed under the FIPPA.": Affidavit of Professor Gus Van Harten, p. 18 [Emphasis added]. It is true that defences of measures said to be driven by the respondent's compliance with other international obligations have not generally succeeded to date, but it is incorrect to state as a matter of law, that the defences are unavailable. Under Article 31(3)(c) of the *Vienna Convention on the Law of Treaties,* 23 May 1969, 1155 U.N.T.S 331, when a court or tribunal engages in the exercise of interpretation, there "shall be taken into account, together with the context: … (c) any relevant rules of international law applicable in the relations between the parties." Other international treaties fall within the scope of that provision.

[33] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain),* Judgment of 5 February 1970, [1970] I.C.J. Rep. 19, paragraph 38. The Court's point is equally applicable in the investment treaty context. Treaty rules have been devised, but tribunals still examine the municipal law of the host State because it is pursuant to such law that investments are made and rights are acquired (*i.e.* the incorporation of a company under the corporate law of a host State or the entering into a contract governed by local law with a State entity).

56. To be sure, State responsibility can arise where a State's municipal law – in terms or in application – conflicts with its international legal obligations.[34] However, when one considers the enormous number of laws, regulations and other measures promulgated by States that regulate our daily lives, it is obvious that the vast majority never attract international scrutiny because they are seen as part and parcel of the modern State's regulatory regime, consistent with the State's international obligations.

57. I previously referred to the *Glamis Gold* award. In my opinion, this award reflects a typical approach taken by a tribunal when considering a respondent State's domestic law in an investment treaty arbitration. In the section of the award entitled "Historic and Cultural Preservation Law," the tribunal devoted 5 pages to describing applicable US Federal and State laws on cultural protection, specifically with regard to the cultural legacies of First Nations, as well as various UNESCO conventions and declarations relating to the preservation of cultural heritage to which the United States was a party. The tribunal noted that one of the latter required Member States to "adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate protection of that heritage into comprehensive planning programmes," as well as to enact "appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage."[35] The tribunal then examined at length the various archaeological and cultural heritage studies conducted in relation to the gold mining project. Extensive attention was given to a review of the interactions between the Quechen First Nation, the project proponents, and both the Federal and State of California governmental authorities. This illustrates my point that when applying an international treaty, tribunals do not disregard the content and operation of the State's municipal law.

58. At paragraph 48 above, I noted the absence of a centralized legislative and judicial authority in the international system and discussed the need for States to consent to the formation of international law rules in order for them to bind them. There is a second, crucially important aspect of consent, namely, that without its having consented to the jurisdiction of an international tribunal, no sovereign State can be compelled to submit to international adjudication:[36]

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[34] Article 3 of the Articles on State Responsibility, *Characterisation of an act of a State as internationally wrongful*, provides: "The characterization of an act of the State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterization of the same act as lawful by internal law."

[35] *United Nations Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, Can. T.S. 1976 No. 45 ("World Heritage Convention"), adopted by UNESCO in 1972, and ratified by the United States. Canada ratified the Convention on 23 July 1976.

[36] James Crawford, ed., Brownlie's Principles of Public International Law, 8th ed. (Oxford: OUP, 2012) at pp. 723-724 states that the principle that the jurisdiction of an international court or tribunal is founded upon the consent of the State "rests on international practice in dispute settlement and is a corollary of the sovereign equality of States[.]"; see, in particular, the Advisory Opinion of the Permanent Court of International Justice in the *Eastern Carelia (Request for Advisory Opinion)* (1923), Advisory Opinion, P.C.I.J. (Ser. B) No. 5 at p. 27, and the frequently cited decision of the International Court of Justice in the *Case of the Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America) (Preliminary Question)* [1954] I.C.J. Rep. 19 at p. 32.

> In international law, all tribunals – not only arbitral, but even judicial – are tribunals of attributed, hence limited jurisdiction (*jurisdictions d'attribution*). There is no tribunal or system of tribunals of plenary or general jurisdiction (*jurisdiction de droit commun*) that covers all cases and subjects, barring exceptions falling under – i.e. attributed to – the jurisdiction of a specialized tribunal. This is because, in the absence of a centralized power on the international level that exercises the judicial function through a judicial system empowered from above (or rather incarnating the judicial power as part of the centralized power), all international adjudicatory bodies are empowered from below, being based on the consent and agreement of the subjects (i.e. the litigants, *les justiciables*) themselves (with the very limited exception of tribunals created by international organizations in the exercise of their powers under their constitutive treaties, which are also ultimately based on the consent of the subjects that concluded or adhere to these constitutive treaties).[37] [Emphasis added.]

59. A resulting feature of the international legal system which makes it fundamentally different from that of a national legal system such as Canada's is the fact that there is no rule of *stare decisis*. The decisions of international tribunals are binding only upon the parties to the dispute and only in respect of that dispute. There is moreover no hierarchical structure of international courts.[38]

60. A further consequence of the absence of centralized judicial power is that international tribunals lack the enforcement power possessed by national courts to ensure compliance with their decisions. This is a key point of difference between the international and national legal systems and it manifests itself in the issue of remedies, a point to which I will return when discussing what the Canada-China Treaty does in respect of a tribunal's power to provide a remedy.[39]

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[37] *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Georges Abi-Saab, 7 ii). Although this general description of jurisdiction at international law is contained in a dissenting opinion, it is accurate as a general description. The question in that case in respect of which Mr Abi-Saab dissented was whether the respondent State had already provided consent to what amounted to a mass claim. It was not in dispute between the majority and the dissent that the State's consent had to be established. The majority noted: "In order for consent for ICSID's jurisdiction to be given, a State must not only have generally consented to ICSID's jurisdiction by becoming a party to the ICSID Convention, it must also have consented to ICSID's jurisdiction in the specific case at hand. This specific consent must then be matched by the consent of the concerned investor. Consent must be given in writing and be explicit. However, the Convention does not define the concept of written form, and in practice the form of such consent has evolved and may differ depending on the type, contractual- or treaty-based, of the dispute." *Abaclat and Others v. Argentine Republic*, Decision on Jurisdiction and Admissibility, paragraph 258.

[38] As shall be seen, insofar as review is provided for investment treaty awards, such review does not extend to a review on the merits, but rather is concerned with jurisdictional issues and the conduct of the procedure which led to the rendering of the award. This is reflected expressly in the Canada-China Treaty, Article 32 (1), *Finality and Enforcement of an Award*, which is drawn from the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America* (17 December 1992, Can. T.S. 1994 No. 2) or NAFTA, Article 1136: *Finality and Enforcement of an Award*: "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of that particular case." NAFTA Article 1135 uses the word "the", whereas Article 32 uses the word "that" in respect of a particular case.

[39] Indeed in the Canada-China Treaty, it is made clear by Article 31(1) and (3) that a tribunal cannot enjoin the application of the measure alleged to constitute a breach, nor can it order specific performance.

61. To summarize, in light of the foregoing features of the international legal system, at customary international law there is no compulsory jurisdiction to resolve disputes over the treatment of aliens and their property in accordance with relatively clear and widely accepted legal rules (in comparison to treaty standards agreed between States).

26. To put this in perspective in the investment context, this means that if State B has, for example, expropriated an investment owned by a Canadian investor without compensating it and Canada has no investment treaty with State B, there is no avenue provided at customary international law for Canada, let alone the investor, to compel State B to submit to international adjudication to resolve the claim of Canada's injured national. If so inclined, the Government of Canada could seek to exercise diplomatic protection in an attempt to seek redress for the injury caused to its national[40], but in the absence of State B's consent, Canada could not submit State B's measure to international adjudication, nor could the Canadian national.[41] The only avenue for potential redress available to the injured Canadian national would be to submit its dispute to the local courts of State B. However, that State's law governing expropriation (including on compensation) might not accord with international standards and its courts may or may not be independent of the Executive. As shall be seen, the absence of an avenue of recourse under international law in such circumstances was the legal issue that the 1965 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the "ICSID Convention") sought to address. I will now discuss that treaty, since it is fundamental to evaluating Professor Van Harten's opinion.

Part II: The Foundations for Modern-day Investment Treaty Arbitration

62. Professor Van Harten makes the point that typically "international adjudication takes place

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Rather, its jurisdiction is limited to making an award of monetary damages and applicable interest or an award of restitution of property, but in the event of the latter, the award must provide that the disputing Contracting Party may pay monetary damages and any applicable interest in lieu of restitution.

[40] One of the other problems with the exercise of diplomatic protection is that the investor may not be able to persuade its State of nationality to take up its claim because of foreign relations sensitivities with the injuring State. It may be deemed not to be expedient to espouse the claim of the injured national; moreover, once the State does agree to take up a claim, it becomes its own claim in international law and can be compromised as the State sees fit. See *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain),* Judgment of 5 February 1970, [1970] I.C.J. Rep. 19 at paragraphs 78-79: "...[A] State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own rights that the State is asserting. ... The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action."

[41] If the expropriating State was an ICSID Contracting State and the investor was a national of another Contracting State, it is possible that they could agree *ad hoc* to the submission of a dispute. This, however, would be based upon the Convention, a multilateral treaty, not on rules of customary international law which do not recognize rights of standing for private parties. Given that Canada is not currently a Contracting State to the ICSID Convention, on the hypothetical situation discussed above, it would not be open to a Canadian investor to seek ICSID arbitration. This was established by an ICSID tribunal in the case of *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, paragraphs 23-24.

between States" but that investment treaties differ because they "give foreign owners of assets – usually companies – the right to bring claims directly against states" and this "reflects a major development in international adjudication."[42] I agree that it is a major development, *but it is not a recent development.*

63. Modern day investor-State arbitration is founded upon the 1965 ICSID Convention[43] which was designed to lay the institutional foundations for this form of specialized international dispute settlement.[44]

64. When the initiative was launched in 1961, there was substantial disagreement amongst States as to the rules of customary international law governing the treatment of aliens and their property. Over the centuries, international law has evolved to deal with disputes between States over the treatment of their respective nationals.[45] After World War II, there were a number of disputes between capital-exporting States and capital-importing States over the treatment to be accorded to property and businesses owned by nationals of the former situated in the territory of the latter.[46] Such customary international law rules as were generally recognized by States were rudimentary and not particularly well-defined.[47] For other States, the rules' very existence was

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[42] Affidavit of Professor Gus Van Harten, p. 4.

[43] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 U.N.T.S. 160, Article 25 (1) ("*ICSID Convention*"). The Convention also provides for the conciliation of investment disputes, but I will not address that in this opinion.

[44] C Gray & B. Kingsbury, "Developments in Dispute Settlement: Inter-State Arbitration since 1945" (1992) 63 BYIL 97, p. 107. Long before the negotiation of the Convention was undertaken in 1961, there were international "mixed claims commissions" established by agreement of States that permitted individual claimants to bring their own claims to international tribunals.

[45] "Arbitration as a method of inter-State dispute settlement in the modern period is often treated as having been inaugurated in proceedings under the Jay Treaty of 1794." C Gray & B. Kingsbury, "Developments in Dispute Settlement: Inter-State Arbitration since 1945" (1992) 63 BYIL 97, p. 97.

[46] For example, in 1956, Egypt nationalized the Suez Canal Company after the withdrawal of American and British offers to assist in financing the Aswan Dam project: see Antonio R. Parra, The History of ICSID (United Kingdom: OUP, 2012) at pp. 23-24 ("History of ICSID"). See also, *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran),* Decision on Jurisdiction, [1952] I.C.J. Rep. 93, which dealt with the events surrounding the nationalization by Iran of its oil industry and consequent termination of the concession of British-owned Anglo-Iranian company. These instances were raised as examples of the activities of the Bank which would suggest it could play a role in the field of investment dispute settlement by its General Counsel Mr. Aron Broches in a note to the Executive Directors of the Bank on 19 January 1965: see Convention on the Settlement of Investment Disputes between States and Nationals of other States: Documents Concerning the Origin and Formulation of the Convention, Vol. II, Part 1, Note by the General Counsel transmitted to the Executive Directors, SecM 62-17 (January 19, 1962) at paragraph 5 (hereinafter referred to as "History of the Convention").

[47] See History of the Convention, pp. 418 to 420 (in particular comments of Mr. Aron Broches in Summary Record of Proceedings, Geneva Consultative Meetings of Legal Experts, Z 9 (February 17-22, 1964)). The International Law Commission at its fiftieth session, in 1963, considered the report of a subcommittee on State responsibility and agreed that the responsibility for injuries to persons or property of aliens required careful attention. Thereafter, at its twenty-first session, in 1969, the Commission after examining the first report of Special Rapporteur, Mr. Roberto Ago, laid down criteria to guide its future work, stating in particular that it would concentrate its work on the principles that would govern the responsibility for States of internationally wrongful acts rather than defining the rules that placed obligations on States, the violation of which may generate responsibility: "Report of the International Law Commission

disputed.[48] These disagreements played out in a series of divisive debates within the United Nations General Assembly.

65. Given this disagreement between States, the World Bank explored the idea of a treaty that would *not* lay down substantive rules of treatment on foreign investment, but rather would establish the institutional means for the conciliation and/or arbitration of investment disputes between States and directly affected investors, leaving it to the parties that agreed to use its facilities to specify the applicable law.[49]

66. It was thought that by creating this institutional structure, the Convention could provide greater legal security to investments and thereby stimulate the flow of private capital from capital-exporting to capital-importing States and contribute to their economic development.[50] Prior to this initiative, private investors had on occasion agreed with host States to submit to arbitration any disputes arising between them (typically under a concession contract). However, when a dispute later arose, the agreement to arbitrate sometimes turned out to be unenforceable.[51] The objective therefore was to make agreements to arbitrate binding.

67. The ICSID Convention was finalized on 30 March 1965 together with a Report of the Executive Directors recommending that the Bank's Member States consider acceding to it.[52]

68. After entering into force, the Convention created the International Centre for the Settlement of Investment Disputes ("ICSID"), seated in Washington D.C. (The current Secretary-

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to the General Assembly on the work of its twenty-first session, 2 June – 8 August 1969" in *Yearbook of the International Law Commission 1969*, vol. 2, paragraphs 80-81.

[48] See also, The Max Planck Encyclopedia of Public International Law, vol. VI (United Kingdom: OUP, 2012) at pp. 317-319: "Several efforts in the 1920s and 1930s under the auspices of the League of Nations to pull together these various strands and codify the international law on the treatment of foreigners and their property failed to receive widespread support on account of disparate views between capital-importing and capital-exporting States. With the advent of decolonization and newfound economic sovereignty after World War II, the issue again came to a head following the successive waves of nationalization, yet multilateral approaches to flesh out and systemize the substance of international economic law in a communally agreeable manner again remained elusive. The high-water marks of the surging anti-colonial sentiment were the 1974 UN Declaration on the Establishment of a New International Economic Order and the coincident UN Charter of Economic Rights and Duties of States ('1974 UN Charter')" (paragraphs 7-8).

[49] History of ICSID, pp. 25-26.

[50] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, paragraphs 9 and 12 ("*Report of the Executive Directors*"). The Report is available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=RulesMain.

[51] There had been cases in which States and investors had agreed to arbitration under the concession agreements which had resulted in a situation where once a dispute arose, the State declined to submit to the jurisdiction of the tribunal, arguing that the termination of the concession agreement had the effect of terminating the agreement's arbitration clause. In one famous case, after the Anglo-Iranian Oil Company's concession agreement was terminated by the Government of Iran, with the latter refusing to go to arbitration, the Government of the United Kingdom attempted to espouse the claim under a prior treaty between the two States. The Government of Iran successfully objected to the International Court of Justice's jurisdiction to hear the case. See the *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Decision on Jurisdiction, [1952] I.C.J. Rep. 93.

[52] History of ICSID, p. 94.

General of ICSID is in fact a Canadian national.[53]) ICSID administers conciliation and arbitration proceedings for, in the latter case, "legal disputes arising directly out of an investment."[54] The Convention's Preamble makes clear that the mere ratification of the Convention by a Contracting State does not oblige it to submit any legal dispute with a national of another Contracting State to international arbitration.[55] However, *if* a Contracting State consents to arbitration with a national of another Contracting State and the latter likewise consents to arbitration, both parties are bound by their agreement to arbitrate. Once consent to arbitration is given by the parties, neither party can unilaterally withdraw its consent.[56] The Convention is thus predicated upon the international legal rule of *pacta sunt servanda*.[57]

69. This rule was carried forward in other provisions of the Convention, such as those dealing with the enforceability of awards.[58] In his expert opinion, Professor Van Harten refers to the fact that "investment treaty arbitrators' awards are enforceable against state assets in Canada and in any foreign state that is party to the New York Convention or the ICSID Convention..."[59] This is correct, but it requires further context.

70. It may occasion surprise that international arbitration awards are more easily enforceable than the judgments of national courts, but this is the way in which States have chosen to deal with the two types of legal processes.[60] The 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, to which Canada is a party[61], was designed to facilitate the enforcement of international arbitration awards in signatory States and to reduce a party's grounds for resisting enforcement when a court was called upon to enforce a foreign award. (An

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53 Ms. Meg Kinnear.

54 See ICSID Convention, Article 25(1).

55 See Preamble to the ICSID Convention where it states "no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."

56 See ICSID Convention, Article 25(1), where it states "[w]hen the parties have given their consent, no party may withdraw its consent unilaterally." Consent can be given in different ways: through a contract between a host State and an investor, in a host State's investment promotion legislation, by compromissory agreement after a dispute arises, or in an investment treaty between States pursuant to which each party agrees (conditionally or unconditionally) in advance to submit a dispute with investors of the other party. This last form of consent now accounts for roughly three-quarters of ICSID's caseload. During the negotiations, it appears that the paradigm generally considered by the negotiators was one of a contractual agreement which contained an ICSID arbitration clause. As events transpired, treaty-based consents have become the main way by which ICSID jurisdiction is seised.

57 "Agreements must be kept." The "third preamble to the Vienna Convention notes that the 'principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised...The rule is stated in the one sentence of Art. 26, entitled *pacta sunt servanda*: 'Every treaty in force is binding upon the parties to it and must be performed in good faith'.": The Max Planck Encyclopedia of Public International Law, vol. VIII (United Kingdom: OUP, 2012) at p. 15.

58 See Article 53 and 54 of the ICSID Convention.

59 Affidavit of Professor Gus Van Harten, p. 6.

60 Gary B. Born, International Arbitration: Cases and Materials (Netherlands: Kluwer Law International, 2011) at pp. 1125-1126.

61 The NY Convention entered into force for Canada on 10 August 1986: see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

ordinary international commercial arbitration award against a State is plainly enforceable under the New York Convention.[62])

71. Influenced by the New York Convention's approach – and with the *pacta sunt servanda* rule in mind, the Convention's drafters sought to ensure that an ICSID award would be enforceable not only within the territory of the State party to the arbitration, but also in the territory of any other Contracting State.[63] They also agreed that the review of an ICSID award would not be conducted by the courts of any Contracting State, but rather by an *ad hoc* Annulment Committee created by ICSID (a point I will discuss when I examine the Canada-China Treaty's arbitral process). In other words, unlike the situation when it comes to enforcing a foreign arbitral award under the New York Convention, a court of an ICSID Contracting State presented with a certified copy of an ICSID award has no jurisdiction to review that award under the grounds stated in Article V of the New York Convention.

72. Although enforcement of awards was explicitly addressed by the drafters, neither the ICSID Convention (nor any of Canada's investment treaties) purports to regulate a Contracting State's law on sovereign immunity from execution. This is made clear by Article 55 of the Convention.[64] Professor Van Harten acknowledges this by noting that execution depends upon each State's domestic law.[65]

73. To summarize the Convention's basic effect: *if* it is in force between the host State and the investor's State, and *if* the host State and the investor give their consent to arbitration, either party

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[62] Many States routinely enter into commercial contracts with private parties for the supply of goods or services and agree to arbitrate any disputes that might arise.

[63] ICSID Convention, Articles 53 and 54. It warrants noting that this approach was designed with reciprocity in mind in that, a State might secure a damages or costs award against an investor and seek to enforce it in another Contracting State. See History of the Convention at p. 574 (Chairman's Report on Issues raised and Suggestions made at Regional Consultative Meetings of Legal Experts of Settlement of Investment Disputes, July 9, 1964, paragraph 74).

[64] The Report of the Executive Directors specifically addresses this issue: "43. The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed. In order to leave no doubt on this point Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

[65] Affidavit of Professor Gus Van Harten, p. 6.

has the right to make a claim before an international tribunal.[66] The private party could argue the claim as it saw fit and its own State would and could have no involvement in the proceeding.[67]

74. At present, 147 States (of the 193 members of the United Nations) have signed and ratified the Convention. Canada has signed, but not yet ratified it.[68] The People's Republic of China ratified it on 7 January 1993 and the Convention entered into force for China on 6 February 1993.

75. Investment promotion and protection treaties generally – not just Canadian treaties – have been heavily influenced by the ICSID Convention. Canada routinely provides for ICSID arbitration of disputes in the event of its ratifying the Convention.[69] (In the meantime, other arbitration rules apply to claims brought by Canadian investors and to claims brought against Canada.)

76. It took over twenty years after the Convention's entry into force before Canada began to negotiate foreign investment protection agreements. Thus, Canada did not join in the significant bilateral investment treaty-making engaged in by many other States starting in the late 1960s. This may explain the novelty of investor-State arbitral practice to Canadian lawyers. I personally experienced this. Although my practice was focused on international trade regulation during the 1980s, it was not until the NAFTA negotiations that I encountered investor-State arbitration. Having worked in the field for some time I have come to better understand the different strands of the substantial and long-standing body of international law and practice developed by States, the International Court of Justice and its predecessor, claims commissions, and international tribunals.

77. In order to complete my response to your Question #1, I now turn to briefly discuss treaties for the reciprocal promotion and protection of investment.

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[66] The consent can arise from a private agreement between the Contracting State and the investor of another Contracting State or two States party to the Convention could agree in an investment treaty that their respective nationals can submit disputes to ICSID arbitration against them. In such circumstances, it is entirely possible that the State would have a claim against the investor; although Professor Van Harten correctly points out that investment treaties contain obligations assumed by States, not by investors, there are instances where counterclaims have been brought by States when an investment treaty claim has been initiated by the investor.

[67] The Convention was drafted so as to provide for claims of nationals of a Contracting State against a Contracting State and for a Contracting State to claim against a national of another Contracting State. Professor Van Harten makes the point that investment treaties contain obligations undertaken by the States party thereto with no reciprocal obligations undertaken by investors. Affidavit of Professor Gus Van Harten, p. 6, where he describes arbitration under "the FIPPA and other investment treaties as asymmetrical in that actionable obligations are imposed on states but not on investors." Two comments can be made in response: First, the obligations are not "imposed" upon States, but rather agreed by States. Second, generally speaking, for the obligations imposed upon the actions of investors or their investments in the territory of a State, one would look to the domestic law of that State.

[68] Most of the members of the Organisation for Economic Co-operation and Development (OECD) quickly acceded to the Convention after it was recommended to the Member States of the World Bank. Canada is one of only 3 of the 34 OECD members to have yet to ratify the Convention (the others being Mexico and Poland).

[69] To my knowledge, starting with the NAFTA and continuing through all of its subsequent free trade agreements that contain investment protection obligations and FIPAs, Canada has agreed to investor-State arbitration provisions that include ICSID arbitration assuming that both the investor is a national of another ICSID Contracting State and the respondent is also a party to the Convention. See, for example, Article 1120 of the NAFTA and Article 22, *Submission of a Claim to Arbitration*, of the Canada-China Treaty.

Part III: The Negotiation of Treaties Providing for Investor-State Arbitration

78. While it was a largely unused remedy for the first 20 years of its existence, ICSID investment arbitration began in 1972 with the first claim brought by a Swiss corporation invoking a dispute settlement agreement under a contract it had with Morocco.[70] The first ICSID claim based on a bilateral investment treaty was filed in 1987 in a claim brought under the treaty between the United Kingdom and Sri Lanka.[71] Since the early 1990s, the number of claims brought by investors under such treaties has steadily grown, as has the number of investment treaties concluded by States which provide for this remedy.[72]

79. It is difficult to find a precise number of bilateral and other treaties concluded by pairs or groupings of States, but it is generally estimated that there are now some 3000 such treaties in existence.[73] These range from "bilateral investment treaties" ("BITs" or "FIPAs", in Canada's parlance), to trilateral or plurilateral treaties such as the *NAFTA*[74], the *Energy Charter Treaty*[75], and the *ASEAN Comprehensive Investment Agreement*.[76] The vast majority of such treaties provide for investor-State arbitration. I would be surprised if investor-State arbitration was not included in the free trade agreement currently under negotiation between Canada and the 28 Member-state European Union and the Trans-Pacific Partnership (TPP), a plurilateral negotiation between 11 States, including all three NAFTA Parties.[77]

Part IV: Analysis of the Canada-China Treaty and Comparison to Other Treaties

80. I now turn to Questions 2-6.

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70 *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1, extract from ICSID website at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded. The parties arrived at a settlement and the proceedings were discontinued at their request, this reflected in an Order taking note of the discontinuance issued by the Tribunal on 17 October 1978.

71 *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3.

72 History of ICSID, pp. 209-210.

73 Figure taken from the website of the International Institute for Sustainable Development at http://www.iisd.org/investment/law/treaties.aspx

74 *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America,* 17 December 1992, Can. T.S. 1994 No. 2.

75 *Energy Charter Treaty*, 17 December 1994, 34 I.L.M. 360. 50 States have signed and ratified the Treaty. Part V 'Dispute Settlement' of the Treaty provides for investor-State arbitration of alleged breaches of a certain obligations specified under Part III 'Investment Promotion and Protection' (see specifically, Article 26 of the Treaty).

76 The 2009 *ASEAN Comprehensive Investment Agreement*, signed on 26 February 2009 in Ch-Am, Thailand by the ASEAN Economic Ministers entered into force at the 20th ASEAN summit on 29 March 2012: see http://cil.nus.edu.sg/2009/2009-asean-comprehensive-investment-agreement-signed-on-26-february-2009-in-cha-am-thailand-by-the-economic-ministers/.

77 The 16th round of the TPP negotiations are taking place in Singapore as of the time of this writing: see http://www.international.gc.ca/media_commerce/comm/news-communiques/2012/12/03a.aspx?lang=eng&view=d.

81. I would begin by noting one key point about Professor Van Harten's expert opinion. He states that he supports the use of international adjudication to resolve major or sensitive disputes involving the treatment and activities of foreign investors, but at the same time notes that:

> "... I have criticized publicly and actively the Canada-China investment treaty (or FIPPA) due to what I see as its problems relative to other investment treaties concluded by Canada and due to my broader concerns about the lack of institutional safeguards of independence in international investor-state arbitration."[78]

82. I have therefore reviewed the Treaty in some detail in order to be able to comment on his concerns. In the sentence just quoted, they appear to be twofold: (i) the Treaty is thought to have problems relative to other Canadian treaties; and (ii) he has broader concerns about the "lack of institutional safeguards of independence" in investor-State arbitration more generally.[79]

83. In order to ascertain what problems, if any, this Treaty evidences relative to other investment treaties concluded by Canada, as requested in Question #2, I have evaluated it on an article-by-article basis and as a whole. My methodology was as follows.

84. I have compared the Treaty's substantive obligations and exceptions thereto to: (i) NAFTA Chapter Eleven; and (ii) the 2004 Canadian Model Agreement for the Promotion and Protection of Investments. I chose NAFTA Chapter Eleven because it entered into force almost 20 years ago with two other States, one of which is significantly the largest foreign investor in Canada, so we can consider Canada's experience thereunder, including its impact on Canadian governments (federal, provincial, municipal and First Nations).

85. I included the 2004 Model FIPA because it reflects the first 10 years of Canada's NAFTA experience and contains a more detailed specification of Parties' rights and obligations as well as the arbitral procedures. The Model FIPA is a point of departure for the negotiation of Canadian other treaties.[80] In addition, I will refer to two Chinese investment protection treaties currently in force[81] as well as China's Model Bilateral Investment Treaties series and various other treaties in order to illustrate particular points.[82]

86. Once I have discussed the Treaty's substantive obligations and the reservations and exceptions, I will then address Professor Van Harten's second set of concerns, first, by reviewing

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78 Affidavit of Professor Gus Van Harten, p. 3.

79 Affidavit of Professor Gus Van Harten, p. 3.

80 A number of States have developed such models, including France, Norway, the United States, Mauritius, Mongolia, Burundi, Malaysia, Denmark, Sweden, China, Chile, Finland, India, South Africa, the United Kingdom, Thailand, Peru and Turkey.

81 *Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China*, 7 April 2008 (entered into force on 1 October 2008). The Agreement can be found at http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php. *Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between the People's Republic of China and the Association of Southeast Asian Nations,* 15 August 2009 (entered into force on 1 January 2010). The Agreement can be found at http://fta.mofcom.gov.cn/inforimages/200908/20090817113007764.pdf.

82 Norah Gallagher and Wenhua Shan, Chinese Investment Treaties: Policies and Practice, (Oxford: OUP, 2009).

Section C of the Treaty (the investor-State arbitral mechanism) and then discussing the rules agreed by the international community with respect to the arbitral process.

(i) Evaluation of the Treaty's Substantive Obligations and Exceptions

87. It borders on trite to say that a State's proposed model will be subject to negotiation between the parties and one cannot expect in present-day circumstances that it will be accepted in its entirety by its negotiating counterparty.

88. That said, not having read the Canada-China Treaty until I was asked to provide this opinion, I was struck by how closely, in its fundamentals, the Treaty resembles the NAFTA and post-NAFTA treaties, going so far as to replicate many of NAFTA's provisions word for word in many parts. It also includes provisions from Canada's 2004 Model FIPA.

89. This is not to say that there are no differences between this Treaty and the other treaties. With a formerly completely centralized economy totally dominated by the State, China has followed a very different economic path than Canada. Until it began to engage in trade liberalization negotiations with other countries leading to its accession to the WTO Agreement, its economy was largely closed. In its first investment treaties, China sought to the maximum extent possible to agree on obligations that were still shaped by local rather than international law. This attitude has changed over the years.

90. This can be seen in China's relations with other Asia-Pacific States. After reviewing the Treaty and conducting more research, I realized that there is a good reason for the Treaty's strong resemblance to Canadian investment treaty-making practice: the NAFTA and in particular the post-NAFTA treaty models of Canada and the United States have been studied by Asian-Pacific governments and implemented in some of their treaties.

91. This in part is attributable to the fact that since 1994, all three NAFTA Parties have separately conducted treaty negotiations with governments in the region. For example, in the early part of the last decade, the United States and Singapore entered into free trade negotiations (Canada and Mexico also both engaged in negotiations with Singapore).[83] Thus, Singapore has had an intensive exchange of views on the structure and content of free trade agreements with all three NAFTA Parties in three separate negotiations. Chapter Fifteen, *Investment,* of the *Singapore-United States Free Trade Agreement* bears a very strong resemblance to US post-NAFTA treaty-making practice, which itself is very similar to Canadian post-NAFTA treaty-making practice.[84]

92. The 2009 *ASEAN Comprehensive Investment Agreement*, which according to a publication of the ASEAN Secretariat, is based on "international best practices"[85] is also built on post-NAFTA templates, as is the ASEAN States' agreement with China, the *Agreement on Investment of the*

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[83] See the *Singapore-United States Free Trade Agreement*, 6 May 2003 (entry into force, 1 January 2004), ongoing bilateral negotiations for the Canada-Singapore FTA which were launched in October 2001, ongoing bilateral negotiations for the Mexico-Singapore Free Trade Agreement which were launched in July 2000. More information on the US-Singapore Free Trade Agreement and the ongoing negotiations can be found at http://www.fta.gov.sg/sg_fta.asp.

[84] See *Singapore-United States Free Trade Agreement*, 6 May 2003 (entered into force on 1 January 2004) at http://www.fta.gov.sg/fta_ussfta.asp?hl=13.

[85] ASEAN Comprehensive Investment Agreement - An Introduction (Jakarta: ASEAN Secretariat, November 2012), p. 4. "ASEAN" stands for the "Association of Southeast Asian Nations."

Framework Agreement on Comprehensive Economic Co-operation between the People's Republic of China and the Association of Southeast Asian Nations.[86] Given that the post-NAFTA approach has propagated to other parts of the world, including China, it is not surprising, therefore, that the resulting Canada-China Treaty closely resembles Canadian (and US) practice.

93. This also leads me to one of my principal observations on Professor Van Harten's expert opinion with which I respectfully disagree on key points.[87] While there are differences between this Treaty and the NAFTA and other Canadian investment treaties, this is typical of the give-and-take of negotiations. While States seek to try to maintain a degree of uniformity in investment treaty making, it is erroneous to consider that Canada's pre-China treaty agreements are homogeneous. They are not. Each is a product of negotiation.

94. Turning to a review of the Treaty, I have already noted in the Summary of Opinion that like Canada's other investment treaties, this Treaty does not create *supra*-national institutions (akin to the institutional structures, including judicial bodies, of the European Union pursuant to the *Treaty of Rome*). It does not purport to change or disturb the allocation or distribution of governmental powers within the constitutional structures of either Contracting Party. Those are matters reserved to the exclusive jurisdiction of each State party. I will revert to this point after reviewing the Treaty because it is one in respect of which Professor Van Harten expresses concerns that I do not share.

95. The Treaty is divided into 4 parts followed by six annexes:

Part A contains definitions of key terms.

Part B sets out the scope and application of the Treaty, the substantive obligations, an exceptions clause, a subrogation clause, a taxation exclusion clause, a clause dealing with disputes between the State parties, a so-called "denial of benefits provision," an article dealing with the transparency of laws, regulations and policies, and a provision dealing with consultations between the Contracting Parties on the Treaty's administration.

Part C contains the investor-State dispute settlement provisions.

Part D contains a general exceptions clause, an exclusion clause and the clause dealing with the Treaty's entry into force and termination.

Six annexes elaborate further upon certain articles. For example, Annex B.8, *Exceptions*, relates to the Article 8, *Exceptions*, provision.

96. As a general comment, with one exception, the substantive obligations contained in Part B are standard obligations which are typical of Canadian treaty-making practice dating from the NAFTA and closely resemble Canada's prior treaties.

97. As noted in the Summary of Opinion, they are the following:

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[86] This followed the signing of the ASEAN *Comprehensive Investment Agreement*; it was signed on 2 June 2009.

[87] Affidavit of Professor Gus Van Harten, pp. 4-5, 12-13, 15.

(i) Promotion and Admission of Investment;[88]
(ii) Minimum Standard of Treatment;[89]
(iii) Most-Favoured-Nation Treatment;[90]
(iv) National Treatment;[91]
(v) Senior Management, Boards of Directors and Entry of Personnel;[92]
(vi) Performance Requirements;[93]
(vii) Expropriation;[94]
(viii) Compensation for Losses[95]; and
(ix) Transfers.[96]

98. The lineage of each of the above (except for Article 3, *Promotion and Admission of Investment*), is traceable directly back to the NAFTA.

99. To begin, I compared Article 1, *Definitions*, with Article 1139 of the NAFTA, *Definitions*, and confirmed that the definition of "investment" bears a very strong resemblance to the definition of "investment" therein, with some of the text drawn word for word from the NAFTA and other parts of the text being essentially the same, but adjusted for the fact that the Canada-China Treaty is a bilateral rather than trilateral treaty. Likewise, many of the Article 1 definitions are typical of investment treaty-making practice (such as, the definition of "investor", "investment of an investor of a Contracting Party", "measure", "financial institution", "enterprise", "territory", *etc*). (They are also consistent with the equivalent definitions contained in Article 1 of the 2004 Model FIPA, *Definitions*.) The term "covered investment", which is not drawn from the NAFTA, is used by the Canadian Model FIPA. I noted that it includes an interpretative gloss, namely that a covered investment "involves the commitment of capital or other resources, the expectation of gain or profit, with the assumption of risk."[97] This also appears in US post-NAFTA treaty-making practice.[98] There are, of course, party-specific definitions included in the Treaty.

100. Article 2(1), *Scope and Application*, is modelled after NAFTA Article 1101, *Scope and Application*.[99] Article 2(2) does not find a counterpart in Chapter Eleven of the NAFTA, but it is

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88 Treaty, Article 3, *Promotion and Admission of Investment*.
89 Treaty, Article 4, *Minimum Standard of Treatment*.
90 Treaty, Article 5, *Most-Favoured-Nation Treatment*.
91 Treaty, Article 6, *National Treatment*.
92 Treaty, Article 7, *Senior Management, Boards of Directors and Entry of Personnel*.
93 Treaty, Article 9, *Performance Requirements*.
94 Treaty, Article 10, *Expropriation*.
95 Treaty, Article 11, *Conversation for Losses*.
96 Treaty, Article 12, *Transfers*.
97 Article 1, *Definitions*, paragraph (4). See, for example, the definition of "investment" in Article 1, *Definitions*, of the 2012 US Model BIT. In footnote 15-1 of the *Singapore-US Free Trade Agreement*, it is stated: "Where an asset lacks the characteristics of an investment, that investment is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk."
98 I surmise that this text was introduced to focus a tribunal's attention on whether an interest not explicitly defined as an "investment" which is sought to be characterised as such, actually bears the characteristics of an investment.
99 It is the same as Article 2 of the Model FIPA.

clearly drawn from NAFTA Articles 1502(3) and 1503(2).[100] Even if it had not been included, the International Law Commission's Articles on State Responsibility, which set out the rules dealing with the responsibility of a State for a breach of international law, would support the finding that an entity exercising delegated regulatory, administrative or other governmental authority would be governed by the Treaty.[101] Article 2(3) is derived from NAFTA Article 105, *Extent of Obligations*.

101. Article 3, *Promotion and Admission of Investment*, does not have an equivalent in the NAFTA or in the Canadian Model FIPA. However, it is very common in bilateral investment treaties.[102]

102. Article 4, *Minimum Standard of Treatment*, comports with the text of NAFTA Article 1105, *Minimum Standard of Treatment*, together with the Free Trade Commission's Note of Interpretation of 31 July 2001. Paragraph 1 is very similar to the opening sentence of NAFTA Article 1105 (and Article 5(1) of the Model FIPA, *Minimum Standard of Treatment*). Article 4, paragraphs 2 and 3, are, in the case of the former virtually identical to the FTC Note of Interpretation, and in the latter, identical.[103] I will discuss Article 1105 later on in this opinion.

103. Article 5, *Most-Favoured-Nation Treatment*, tracks the text of NAFTA Article 1103, *Most-Favored-Nation Treatment*, with textual modification reflecting the bilateral nature of the agreement and its use of the term "covered investments," a term not used in the NAFTA (but used in the Model FIPA and other Canadian FIPAs). Article 5(1) tracks the language of Article 4(1) of the Model FIPA, *Most-Favoured-Nation Treatment* (and Article 5(2) tracks the language of Article 4(2) of the Model FIPA).

104. Article 5(3) is a new provision which reflects the view of some States that a bilateral investment treaty's MFN treatment standard should not apply to the treaty's dispute settlement provisions such as to allow for the importation of a more favourable set of dispute settlement provisions into the treaty.[104] Article 139(2), *Most-favoured-nation Treatment*, of the *Free Trade Agreement between the Government of New Zealand and the Government of the People*'s *Republic of China*, for example, includes a similar provision.[105]

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100 Those provisions deal with monopolies and State enterprises.

101 See Articles 4, 5 and 7 of the Articles on State Responsibility.

102 See, for example, *Agreement between the Government of the Republic of Turkey and the Government of the United States of America concerning the Development of Trade and Investment Relations*, 29 September 1999 (entered into force on 11 February 2000), Article 1; *Arrangement on Trade and Economic Cooperation between the Government of Canada and the Government of the Kingdom of Norway*, 3 December 1997 (entered into force on the same date), Article 3; *Agreement between Ukraine and Canada on Economic Cooperation*, 24 October 1994, Can. T.S. 1995 No. 37, Article 2.

103 *Notes of Interpretation of Certain Chapter 11 Provisions*, NAFTA Free Trade Commission, July 31, 2001, found at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d.

104 This is a reaction by States to the *Maffezini* decision. See *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction dated 25 January 2000.

105 Article 139(2) states "For greater certainty, the obligation in this Article does not encompass the requirement to extend to investors and the other Party dispute resolution procedures other than those set out in this Chapter." Similar examples can be found in the *Canada-Peru Free Trade Agreement*, 29 May 2008

105. Article 6, *National Treatment*, tracks NAFTA's Article 1102, *National Treatment* (and Article 3(1) and (2) of the Model FIPA, *National Treatment*), except that it does not apply to the establishment or acquisition of investments and it does not, within Article 6 itself, contain a national treatment obligation expressly applicable to provincial governments.[106]

106. With respect to the first difference, the Contracting Parties decided not to extend the national treatment obligation to establishment and acquisition. Many investment treaties apply only to post-establishment treatment of an investment. For example, a paper prepared by the European Commission noted that the investment treaties concluded by EU member-States (which number some 1200) tend to apply to the *post*-establishment life of an investment.[107] Other treaties, such as the NAFTA (and the Model FIPA), apply to *pre*-establishment activities as well. In this case, the Contracting Parties have agreed to accord national treatment after an investment is permitted to be made. Both Contracting Parties have reserved the right to screen acquisitions of existing investments as well as to maintain non-conforming measures that reserve particular commercial sectors to national investors.[108]

107. Article 6 represents a substantial step forward from prior Chinese treaty-making practice by China. China has had its own Model Bilateral Investment Treaty programme (Versions I (1982-1989), II (1990-1997) and III (1998-present)). In Version I, and in a number of its treaties concluded with other States, China refused to agree to the inclusion of a national treatment obligation at all.[109]

108. China's 1986 treaty with the United Kingdom was the first to include national treatment and even then it was only a "best efforts" clause requiring the contracting parties to implement it "to the extent possible."[110] Even in Version III[111], the national treatment obligation was still highly qualified by making it subject to domestic laws and regulations. Article 3 (2) provided that:

> "Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other

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(entered into force on 1 August 2009), Annex 804.1, and the *Japan-Switzerland Economic Partnership Agreement*, 19 February 2009 (entered into force on 1 September 2009), Article 88.

106 This is relegated to footnote 4.

107 A Paper prepared by the European Commission in 2010 noted that European bilateral investment treaties concluded by member-States of the European Union provide protection only for post-establishment activities of investments. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions: Towards a comprehensive European approach to international investment policy (COM (2010) 343 final, Brussels, 7 July 2010 at p. 5). Available at: http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf.

108 See Treaty, Articles 6 (3) and 8.

109 Chinese Investment Treaties, pp. 165-166.

110 In Article 3, *Treatment of Investment*, after setting out two MFN obligations in the first two paragraphs, paragraph 3 states: "In addition to the provisions of paragraphs (1) and (2) of this Article either Contracting Party shall to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations to the investments of nationals and companies of the other Contracting Party the same as that accorded to its own nationals or companies." *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning the Promotion and Reciprocal Protection of Investments*, 15 May 1986 (entered into force on the same date).

111 At least as of the time of the publication of Chinese Investment Treaties, 2009.

Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors."[112] [Emphasis added.]

109. For some time, therefore, China found it difficult to agree to a national treatment obligation that applies as extensively as that provided for in other countries' treaties.

110. Under this Treaty, the parties retained their right to apply their own laws and regulations to the question of establishment and acquisition of investments – and thus can deny national treatment to investors of the other Contracting Party at the pre-establishment stage. However, China agreed to Canada's approach of applying national treatment thereafter without qualification (other than for reserved or excluded measures – but these were in any event reservations which Canada itself requires).

111. Hence, under Article 6, all covered investments of Canadian investors and any subsequent investment of a Canadian investor in the territory of China must be accorded national treatment with respect to the expansion, management, conduct, operation and sale or other disposition of such investments. The same applies to an investment of a Chinese investor once it has been established in the territory of Canada.

112. With respect to the second difference, whereas NAFTA Article 1102 contained two paragraphs setting out the application of the National Treatment standard to subnational governments, the Contracting Parties to this Treaty dropped that to footnote 4. I do not see a difference in legal effect.

113. The first two paragraphs of Article 7, *Senior Management, Boards of Directors and Entry of Personnel*, comport with NAFTA Article 1107, *Senior Management and Boards of Directors* (again with minor wording adjustment). Both paragraphs are virtually identical to Article 6 of the Model FIPA, *Senior Management, Boards of Directors and Entry of Personnel*. Article 7(3) to some extent reflects the liberalisation of temporary business travel achieved in NAFTA, Chapter 16, *Temporary Entry for Business Persons*, and is very similar to Article 6(3) of the Model FIPA.

114. Article 8, *Exceptions*, is an analogue of NAFTA Article 1108, *Reservations and Exceptions*, and resembles Article 9 of the Model FIPA, *Reservations and Exceptions*.

115. Article 8(1) permits either Contracting Party to exempt from the MFN obligation any treatment accorded pursuant to an existing or future bilateral or multilateral agreement establishing, strengthening or expanding a free trade area or customs union; or relating to aviation, fisheries, or maritime matters including salvage, as well as treatment accorded under any bilateral or multilateral international agreement in force prior to 1 January 1994. Professor Van Harten queries the choice of this date as exposing the Treaty's limiting language and exceptions to "significant doubt."[113] The selection of the date is not an anomaly unique to this particular Treaty. It was also selected for the Canada-Jordan and Canada-Bénin FIPAs, Annex III(1).[114]

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112 Chinese Investment Treaties, Model Bilateral Investment Treaty, Version III, Article 3(2).

113 Affidavit of Professor Gus Van Harten, p. 10.

114 *Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments*, 28 June 2009 (entered into force on 14 December 2009). Available at: http://www.treaty-accord.gc.ca/text-texte.aspx?id=105176. See also, *Agreement between the Government of Canada and the Government of the Republic of Bénin for the Promotion and Reciprocal Protection of*

116. Question #6 requested me to discuss the scope of the aboriginal affairs' exception in the Treaty. Article 8(2) contains a series of exceptions from three substantive obligations (MFN, national treatment, and senior management, boards of directors and entry of personnel) for existing non-conforming measures "maintained within the territory of a Contracting Party" and permits such measures to be continue to be renewed or amended to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment. This is similar to NAFTA Article 1108(1)(a)-(c).

117. Article 8(3) excludes certain non-conforming measures provided for by both Contracting Parties in their respective bilateral free trade agreements with Peru from the same obligations. It so happened that both Contracting Parties had concluded FTAs with Peru and it appears that this was a convenient means by which to record some of their respective exceptions for the purposes of this Treaty. As in prior treaties dating back to the NAFTA, in its FTA with Peru, Canada used its quite broad NAFTA Annex II reservations for future non-conforming measures, with minor modifications. The reservations are from the national treatment, MFN treatment and 'senior management and board of directors' obligations for such sectors as aboriginal affairs, communications, government finance, minority affairs, social services, air transportation, and water transportation.

118. The reservations to national and MFN treatment and the 'senior management and boards of directors' obligations do not differ materially from NAFTA for matters relating to aboriginal affairs. Canadian governments are, for example, entitled to accord more favourable treatment to Canadian First Nations peoples by means of adopting or maintaining any measure denying investors of another Party and their investments any rights or preferences provided to aboriginal peoples without violating their two principal non-discrimination obligations (National and MFN treatment) or the 'senior management and board of directors' obligations.

119. Question #6 noted that section 2.f of Professor Van Harten's report makes the point that the Treaty's minimum standard of treatment and expropriation provisions are "absolute standards" to which the reservation for any rights or preferences provided to aboriginal peoples does not extend[115] and asks me to explain why this is the case. Professor Van Harten is correct that the standards are considered to be "absolute" insofar as the reservations are concerned. It is my understanding that Canada has consistently agreed to absolute standards when it comes to the minimum standard of treatment and expropriation. By its own terms, the "Minimum Standard of Treatment" is a minimum, not a maximum, standard of treatment and is considered to be a basic standard of treatment that all members of the international community are capable of meeting. The duty to provide compensation for an expropriation is equally considered to be a standard term. This is consistent with Canadian treaty-making practice dating back to NAFTA.

120. Article 8(4) permits a Contracting Party to derogate from the promotion and admission, MFN and national treatment obligations in respect of intellectual property rights, if it is in a manner

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Investments, January 2013, Annex III. Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/benin-text.aspx?lang=eng&view=d.

[115] Affidavit of Professor Gus Van Harten, p. 10.

consistent with international agreements regarding intellectual property rights to which both Contracting Parties are parties.[116] This resembles Article 9(4) of the Canadian Model FIPA.[117]

121. Article 8(5) closely follows NAFTA Article 1108(7) which exempts government procurement and the granting of subsidies from the national treatment, MFN treatment and senior management and board directors obligations. (It is also very similar to Article 9(5) of the Canadian Model FIPA.)

122. Article 9, *Performance Requirements*, is similar to NAFTA Article 1106, *Performance Requirements*, although it does not go quite as far as the NAFTA. NAFTA was negotiated in rough parallel with the Uruguay Round of Multilateral Trade Negotiations, but it pre-dated the WTO *Agreement on Trade-Related Investment Measures* (the "TRIMs Agreement") then under negotiation.[118] Thus, the NAFTA negotiators were to some extent anticipating what would emerge from the WTO negotiations. With the WTO TRIMs Agreement in force since 1995 and binding both parties, it is evident that Canada and China decided to reaffirm their obligations under that agreement and specifically incorporated Article 2 and the Annex of the regulated trade-related investment measures into their treaty.[119]

123. Professor Van Harten expresses concerns that this Treaty "does not incorporate a NAFTA-style carve-out for performance requirements on investors imposed by provincial governments..."[120] This is correct, but additional context is required; the WTO TRIMS Agreement did not permit WTO Members to take any reservations to its obligations. This means that any performance requirements that Canada adopts or maintains, at any level of government, must be WTO-consistent and from the WTO perspective, a Member that acted on reservations from its existing TRIMS obligations in a preferential trade agreement or in an investment treaty would be exposed to a WTO complaint. There is, therefore, little utility in attempting to reserve in this Treaty what has already been conceded by all WTO Members in 1995.

124. Article 10, *Expropriation*, generally tracks the text of NAFTA Article 1110, *Expropriation and Compensation*, (albeit with the bilateral Treaty's use of the term "covered investments") and the explicit extension of the article's coverage to "returns of investors." Much of Article 10(1) closely tracks the equivalent provisions of NAFTA Article 1110(1)-(3). It introduces a sentence not present in NAFTA Article 1110 but which is commonly used in investment treaty practice, namely,

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[116] These would include such agreements as the World Trade Organisation's *Agreement on Trade-Related Intellectual Property Rights* (Annex 1C of the Marrakesh Agreement Establishing the World Trade Organisation, signed in Marrakesh, Morocco, on 15 April 1994).

[117] It permits a party to derogate from National Treatment and MFN Treatment in respect of intellectual property rights "in a manner that is consistent with the WTO Agreement."

[118] The Uruguay Round of Multilateral Trade Negotiations was launched in September 1986 at Punta del Este, Uruguay. It resulted in the *Agreement Establishing the World Trade Organization* which entered into force on 1 January 1995. The NAFTA negotiations were launched in early 1991 and resulted in an initialed text in August 1992, which was then "scrubbed" for drafting consistency; after the election of President Bill Clinton, two "side agreements" on labour and environmental standards were negotiated by the three States and the three agreements entered into force on 1 January 1994.

[119] The express incorporation of obligations stated in other international treaties is a common treaty drafting technique. See, for example, Articles 301, *National Treatment*, and 309, *Import and Export Restrictions*, of the NAFTA, which incorporate Articles III and XI of the *General Agreement on Tariffs and Trade* (GATT).

[120] Affidavit of Professor Gus Van Harten, p. 4.

that the investor affected shall have a right, under the law of the Contracting Party taking the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment.[121] Such review must be conducted in accordance with the principles set out in Article 10(1).[122] This is consistent with the Canadian Model FIPA's Article 13(4).

125. At various places in his expert opinion, Professor Van Harten expresses concerns that the Treaty "will apply to legislative, executive, and judicial decisions at any level of the Canadian state."[123] This point is reflected in Question #5 which asks for my opinion as to what extent Canada could be held internationally responsible under the Treaty for legislative or judicial decisions and with respect to the Hupacasath First Nation. I agree with Professor Van Harten that the Treaty applies to legislative, executive, and judicial decisions at any level of the Canadian State. I also agree that exercise of governmental authority by First Nations authorities means that they are Canadian governmental organs for purposes of State responsibility.

126. Professor Van Harten goes on to note that since a First Nation could, for example, expropriate a covered investment of an investor of the other Contracting Party, this could engage State responsibility.[124] If it is assumed that the First Nation expropriated the investment without complying with Article 10, Professor Van Harten is correct. Assuming for the purposes of argument that an unlawful expropriation was effected, under the rules of State responsibility, Canada, not the expropriating First Nation, would be responsible.[125] This has been the case with Canadian subnational entities under NAFTA since its entry into force on 1 January 1994.

127. In this respect, it is also necessary to comment on another point made by Professor Van Harten where he lists various First Nations' law-making powers and suggests that decisions "in any of these areas may lead to a claim under the FIPPA..." and a finding of non-compliance with Canada's treaty obligations.[126] This too could equally occur under the NAFTA and Canada's other treaties, but other than the single notice of intent mentioned in the Summary of Opinion, I have seen no evidence of any claims against Canada for allegedly unlawful regulatory measures taken by First Nations or by other levels of government for measures relating to aboriginal rights. Obviously, one cannot rule out the possibility of a future claim, but any implication that this Treaty opens the floodgates is, in my respectful opinion, overstating the degree of exposure.

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121 This is a very common provision in UK investment treaty-making practice. See, for example, the *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Antiqua and Barbuda for the Promotion and Protection of Investments*, 12 June 1987 (entered into force on the same date), Article 5(1).

122 See the last sentence of Article 10(1) of the Treaty: "The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph."

123 Affidavit of Professor Gus Van Harten, pp. 11 *et seq.*

124 Affidavit of Professor Gus Van Harten, pp. 18-20.

125 Professor Van Harten expresses concern that the First Nation could be financially liable for its having taken an expropriation that breached Article 10; the Treaty is silent on this issue and the question of the financial liability is exclusively an internal matter for Canada.

126 Affidavit of Professor Gus Van Harten, p. 18.

128. In addition to noting the actual experience under NAFTA to date, I would make two fundamental points that explain my reasoning. First, it is important for the Court to understand the underlying logic of the National Treatment rule. The whole purpose of that rule is to provide that whatever policy choices are made by a government – *and the rule says nothing about those policy choices, but rather leaves this to the government to decide* – if it has a treaty obligation to accord national treatment, the government must apply its regulations in such a way as to accord "no less favourable treatment" to investors of the other Contracting Party than it accords to domestic investors in "like circumstances." Understood in this way, it is evident that this rule does not infringe on a government's freedom to choose the level of protection it considers desirable because it is concerned not with the policy objectives, but rather the *means* by which such objectives are realized.[127]

129. GATT/WTO jurisprudence, which now goes back over 60 years, makes it clear that the objective of a dispute settlement panel when analyzing an alleged breach of the national treatment standard is not to question the policy choices of the State concerned, but rather to see whether the measure it has chosen to employ discriminates either *de jure* or *de facto* against, in that context, imported products when compared to the "like domestic product." [128] The same kind of analysis can be expected to be made in the context of an investment treaty.

130. Second, it is crucial not to confuse governmental regulation with expropriation. There is a substantial body of international jurisprudence and writing on the State's right to engage in *bona fide* regulation. In doing so, consistent with the national treatment rule, it is open to a government, within its jurisdiction, to prescribe the level of public welfare protection that it seeks to attain and it is not bound by another government's own policy choices.

131. This accounts for the different approaches taken by governments around the world and States at the subnational level (provincial, state, aboriginal, regional, and municipal levels) in regulating matters pertaining to public health and safety, environment protection, *etc.* The fact that a regulatory measure affects an investment, increases its cost of doing business due to increased costs of compliance, or results in reduced profitability does not *ipso facto* mean that the State has engaged in an expropriation.[129] A tribunal's focus would be on whether there was a substantial

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[127] The idea of regulatory autonomy has been recognized by NAFTA and other international tribunals. See *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006, paragraph 127; *Saluka Investments BV (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paragraphs 253-265.

[128] The issue of regulatory autonomy has come up in the context of environmental protection under GATT Article XX. A typical view expressed by the WTO Appellate Body is as follows: "WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements." Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, p. 26. Likewise, it is been stated: "it is within the authority of a WTO Member to set the public health or environmental objectives it seeks to achieve, as well as the level of protection that it wants to obtain, through the measure with the policy it chooses to adopt." Appellate Body Report, *Brazil-Measures Affecting Importance of Retreaded Tyres*, WT/DS332/AB/R, adopted on 17 December 2007, paragraph 140.

[129] See *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL Case under Chapter 11, Award, paragraph 266, accessible at http://www.pca-

diminution of economic value or a substantial deprivation of the investor's control over the enterprise.[130] This is a fact-intensive exercise.[131]

132. Thus, *bona fide* First Nations regulation, like *bona fide* federal, provincial, or municipal regulation is not to be equated with an indirect expropriation. The tribunal's analysis would be a fact-based inquiry directed towards evaluating the measure's economic impact, the extent to which it interfered with the investor's expectations, and the measure's character. This is required by the Treaty's Annex B. 10, *Expropriation*, which goes on to state that:

> Except in rare circumstances, such as if a measure or a series of measures is so severe in light of its purpose that it cannot reasonably be viewed as having been adopted and applied in good faith, a non-discriminatory measure or series of measures of a Contracting Party that is designed and applied to protect the legitimate public objectives for the well-being of citizens, such as health, safety and the environment, does not constitute indirect expropriation.[132]

133. This is the shared understanding of Canada and China and under Article 35(4) is an integral part of the Treaty.

134. Article 11, *Compensation for Losses*, corresponds to NAFTA Article 1105(2), which requires that each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife. The same kind of provision is contained in the Model FIPA, Article 12, *Compensation for Losses*.

135. Article 12, *Transfers*, corresponds to NAFTA Article 1109, *Transfers*, in that it is designed to permit investors to make transfers to and from their investment in the territory of a Contracting Party "freely and without delay."[133] Although worded slightly differently to reflect the different structure of the FIPA, in my opinion, Article 12 is very similar to NAFTA Article 1109. Both contain exceptions which permit a Contracting Party to "prevent a transfer through the equitable, non-discriminatory and good faith application" of certain laws pertaining to bankruptcy in

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cpa.org/showpage.asp?pag_id=1278. In *Glamis Gold, Ltd. v. United States America*, UNCITRAL Case under Chapter 11, Award, the tribunal commented at paragraph 354: "The inclusion in Article 1110 of the term 'expropriation' incorporated by reference the customary international law regarding that subject. Under custom, a State is responsible, and therefore must provide compensation, for an expropriation of property when it subjects the property of another State Party's investor to an action that is confiscatory or that 'unreasonably interferes with, or unduly delays, effective enjoyment' of the property. A State is not responsible, however, 'for loss of property or for other economic disadvantage resulting from *bona fide* … regulation… if it is not discriminatory.'" (a copy of the award can be found at http://italaw.com/documents/Glamis_Award.pdf)

130 *Pope & Talbot v. Government of Canada*, UNCITRAL, Interim Award, paragraph 100; *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, paragraph 176; *Glamis Gold, Ltd. v. United States America*, UNCITRAL Case under Chapter 11, Award, paragraphs 354-358

131 *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL Case under Chapter 11, Award, paragraphs 242-247.

132 Canada-China Treaty, Annex B.10, paragraph 3.

133 Treaty, Articles 12(1) and 1109(1), respectively.

insolvency, etc, trading in securities, criminal or penal offences, and so on.[134] These exceptions, listed in five subparagraphs of the two treaties' articles, are identical. Paragraph 4(a) of Article 12 is virtually identical to the general rules found in NAFTA Article 2104, *Balance of Payments*. This provision finds an analogue in the Model FIPA.

136. There is article-specific language in this provision which reflects the specific circumstances of China due to the fact that the *yuan*, unlike the Canadian dollar, is not freely convertible.[135] This is supplemented by a China-specific Annex, B.12, which further elaborates China's obligations in respect of ensuring transferability and in this regard Canadian investors must be accorded no less favourable treatment than that accorded by China to third country investors or investments of such investors. There is a "ratchet" provision as well that would apply when formalities are no longer required according to Chinese law.

137. Article 13, *Subrogation*, is consistent with widespread treaty practice. Many States, including Canada, have political risk insurance schemes under which insurance may be purchased by an investor in order to protect its investment in another State against non-commercial risks such as expropriation.[136]

138. Thus, in the event that a Contracting Party expropriated a covered investment of an investor of the other Contracting Party and the latter made a payment to the insured, Article 13 requires the former to recognize the transfer of any right or claim of the investor to the insuring Contracting Party. The subrogated right is not greater than the original right or claim, but it may be exercised by the Contracting Party or any agent thereof so authorized. This provision is similar to Article 15 of the Model FIPA, *Subrogation*. It also precludes a disputing Contracting Party from asserting as a defence, counterclaim, right of set-off or otherwise, that the disputing investor has received or will receive insurance, indemnification or other compensation for all of its alleged damages. This is derived from Article 1137.1 of the NAFTA.

139. Treaties treat subrogation in different ways. Article 13(1) is very similar to Article 148(1) of the *China-New Zealand Free Trade Agreement*. In my view, Article 13 reflects a general and widespread treaty-making practice of States.

140. In addition to the exceptions listed in Article 8, the Canada-China Treaty contains an exclusion in Article 14, *Taxation*. This provision is similar to NAFTA Article 2103, *Taxation*, and excludes taxation measures from the application of certain of the Treaty's substantive obligations.

141. Article 15, *Disputes between the Contracting Parties*, addresses disputes that may arise between the Contracting Parties with respect to the "interpretation or application" of the Treaty. It does not have a directly corresponding clause in NAFTA Chapter Eleven because there is a general State-to-State dispute settlement mechanism provided for in Chapter Twenty which applies to the Agreement as a whole.

142. Article 16, *Denial of Benefits*, is derived from, but goes somewhat further than NAFTA Article 1113, *Denial of Benefits*, and is very similar to the article of the Model FIPA of the same

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134 The phrase is used in both treaties.

135 Article 12(2) of the Treaty.

136 For example, Export Development Canada offers political risk insurance coverage for investors for losses due to breach of contract, creeping or outright expropriation, political violence, curreny conversion of transfer *etc* (see http://www.edc.ca/en/our-solutions/insurance/pages/political-risk-insurance.aspx).

name.[137] This provision allows a Contracting Party to deny the benefits of the agreement to an investor of the other Contracting Party in certain circumstances (*e.g.*, if investors of a non-Contracting Party own or control the enterprise).

143. A gloss is added to the article in explicitly permitting a Contracting Party to deny benefits at any time, including after the institution of arbitration proceedings. I surmise that this was motivated by a decision of a tribunal in *Plama v. Republic of Bulgaria* which held that a similar clause in the *Energy Charter Treaty* could not be invoked by a Contracting State after arbitral proceedings had commenced.[138]

144. Article 17, *Transparency of Laws, Regulations and Policies*, is derived from NAFTA Article 1802, *Publication*, which itself is derived from Article X of the 1947 *General Agreement on Tariffs and Trade, Publication and Administration of Trade Regulations*. There is a similar provision in the Model FIPA, Article 19, *Transparency*. Article 17 extends the range of measures to which transparency obligations apply to policies that pertain to or affect a covered investment and contains a more explicit obligation to allow investors to become acquainted with a Contracting Party's law, regulations and policies pertaining to the conditions of admission of investments.[139]

145. Finally, Article 18, *Consultations*, is derived from NAFTA Article 2001, *The Free Trade Commission*. This type of provision is commonly found in investment treaties and institutionalizes what the parties thereto will do in any event, in terms of reviewing the treaty's application and discussing any issues arising between them. It also expresses a general power already recognized in the *Vienna Convention*, Article 31(3), namely, that as the authors of and the parties to a treaty, the States can authoritatively interpret it. Two paragraphs not found in the NAFTA are added: Paragraph 2 contemplates that the Contracting Parties can make and adopt rules supplementing the applicable arbitral rules and paragraph 3 incorporates a provision found in NAFTA Article 1117.

146. Turning to the *General Exceptions* clause, paragraph 1 of Article 33, *General Exceptions*, includes Canada's long-standing "cultural industries" exclusion. Paragraph 2 contains the investment treaty analogue to GATT Article XX which I will discuss further below. Paragraph 3 contains virtually word for word the NAFTA Article 1410(1) (and Model FIPA) prudential measures exceptions. Paragraph 4 contains the NAFTA Article 1410(2) (and Model FIPA) monetary policy exception. Paragraph 5 contains the NAFTA Article 2102, *National Security* exception. Paragraph 6(a) contains the NAFTA Article 2105, *Disclosure of Information* exception. Article 33(6)(b) also contains an exclusion for the protection of information under a Contracting Party's competition law. The NAFTA does not include such provision, but it has been included in the Model FIPA and other Canadian FIPAs and FTAs.[140] Finally, paragraph 7 contains the exception for the measures taken in conformity with the decision of the WTO, noted above.

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137 Article 18 of the Model FIPA.

138 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, paragraphs 161-165.

139 Article 17(2).

140 Model FIPA, Annex IV, paragraph 2; *Canada-Colombia Free Trade Agreement*, 15 August 2011, Can. T.S. 2011 No. 11, Article 2205 (2); *Canada-Jordan Free Trade Agreement*, 1 October 2012, Can. T.S. 2012 No. 22, Article 15-4. A typical such clause is found in Article 23.05(2) of the *Canada-Panama Free Trade Agreement* (signed on 14 May 2010) which states: "In the course of a dispute settlement procedure under this Agreement: a. a Party is not required to furnish or allow access to information protected under its

147. The Treaty contains one article which is quite different from NAFTA Chapter Eleven. It was plainly influenced by Article 10, *General Exceptions*, of the Model FIPA. For many years, States have included general exceptions to their treaty obligations. For example, the 1947 *General Agreement on Tariffs and Trade* ("GATT") contains a *General Exceptions* clause, Article XX. This clause permitted a GATT Contracting Party to take a measure that was otherwise inconsistent with its obligations if it could be justified under Article XX. (The reasons for such measures could be for example the protection of plant, animal or human life, or to protect public morals.[141])

148. For obvious reasons, the GATT's drafters did not wish to create a significant loophole that would permit States to evade their obligations at will; therefore, if a State were to rely upon Article XX, it had to demonstrate that it was not seeking to justify a GATT-inconsistent measure that would be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade (the requirements set out in the "*chapeau*" of Article XX), and further that it was *necessary* for it to take the measure at issue (*i.e.* that there was no other less trade-restrictive measure available to it). There is a large body of GATT (and latterly WTO) jurisprudence dealing with Article XX.

149. The NAFTA Parties incorporated Article XX into that Agreement's *General Exceptions* chapter, Chapter Twenty-one:

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competition laws; b. a competition authority of a Party is not required to furnish or allow access to information that is privileged or otherwise protected from disclosure."

[141] Article XX states: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (c) relating to the importations or exportations of gold or silver; (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; (e) relating to the products of prison labour; (f) imposed for the protection of national treasures of artistic, historic or archaeological value; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the Contracting Parties and not disapproved by them or which is itself so submitted and not so disapproved; (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination; (j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The Contracting Parties shall review the need for this sub-paragraph not later than 30 June 1960."

2101(1): "GATT Article XX and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement."

150. These exceptions applied only to measures covered by Parts 2 (*Trade in Goods*) and 3 (*Technical Barriers to Trade*) and were *not* applicable to Part 5 (*Investment*). Other exceptions, such as the *National Security* exception (Article 2102), applied to the Agreement as a whole, including investment.

151. The 2004 Canadian Model FIPA's *General Exceptions* clause was the first model text to include provisions derived from GATT Article XX and tailored to investment. This innovation has attracted some support in the international community. It was included in Canada's FIPAs with Bénin, Peru, Jordan, Romania, the Czech Republic, and the Slovak Republic.[142]

152. Other States have also agreed to this form of exception. For example, the *Agreement between Japan and the Republic of Singapore for a New-Age Economic Relationship* has an even more extensive *General Exceptions* clause which hews closer to GATT Article XX, as does the *Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between and the People's Republic of China and the Association of Southeast Asian Nations*.[143] It has now been replicated in materially the same terms in Article 33 of the Canada-China Treaty.

153. Professor Van Harten describes the Article 33(2) exceptions as "important, if largely untested, exceptions for health, environmental, and conservation measures" and asserts that it is "difficult to predict how arbitrators will apply conditional language associated with these exceptions, such as necessity requirements", noting further that some tribunals "have taken a strict approach to the concept of necessity."[144] In the investment context, he is correct that such exceptions are untested. In the GATT/WTO context, from which Article 33 is derived, there is an extensive body of jurisprudence dealing with exceptions, including dealing with the meaning of the word "necessary." I would expect that this jurisprudence would be seen as relevant to the interpretation of a clause such as Article 33(2), with appropriate allowance made for the different drafting of that article. That said, as noted, the NAFTA does not include this exception for its Chapter Eleven and I do not see it as being deficient as a result.

154. To summarize this part of my opinion, the lineage of the Canada-China Treaty can be traced back to NAFTA and to Canada's post-NAFTA treaty-making practice. Although there are

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142 For example, see *Free Trade Agreement between Canada and the Republic of Peru*, 1 August 2009, Can. T.S. 2009 No. 15; Article 808(3), *Reservations and Exceptions*; *Free Trade Agreement between Canada and the Hashemite Kingdom of Jordan*, 1 October 2012, Can. T.S 2012 No. 22, Article 15-1, *General Exceptions* ("*Canada-Jordan Free Trade Agreement*"); *Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments*, 24 November 2011, Can. T.S. 2011 No. 27, Article VI, *Miscellaneous Exception*; *Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments*, 23 November 2011, Can. T.S. 2011 No. 26, Article VI, *Miscellaneous Exception*.

143 *Agreement between Japan and the Republic of Singapore for a New-Age Economic Relationship*, 30 November 2002, Article 83; *Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between and the People's Republic of China and the Association of Southeast Asian Nations*, Article 16.

144 Affidavit of Professor Gus Van Harten, p. 9.

differences between this Treaty and other prior Canadian treaties, I do not consider them to be sufficiently material to give rise to concern and I do not consider them to be problems.

155. One other comment can be made about the Treaty as a whole, before turning to the arbitral mechanism. Unlike NAFTA and other Canadian investment protection treaties, which do not specify a term and are therefore expected to continue in force indefinitely, as Professor Van Harten correctly notes, this Treaty does.[145] It has an initial 15 year period in which it shall continue to be in force, following which either Contracting Party may any time thereafter terminate it. It also contains a "survivorship" clause in that with respect to investments made prior to the date of termination, Articles 1 to 34 (*i.e.* the substantive provisions, exclusions, exceptions, dispute settlement provisions and so on) continue to be effective. The idea of fixing a term is common in international investment treaties. NAFTA did not contain such a provision, but Canada has agreed to termination provisions in other treaties.[146]

(ii) Evaluation of the Treaty's Arbitral Mechanism

156. I now turn to the Treaty's investor-State arbitral mechanism set out in Part C.

157. It is plainly derived from Section B of NAFTA Chapter Eleven, entitled, *Settlement of Disputes between a Party and an Investor of Another Party*, but it adds detail and further clarification to the arbitral process consistent with the approach taken in the Model FIPA's equivalent section, *Settlement of Disputes between an Investor of the Host Party*.

158. In summary terms, Section C permits an investor of a Contracting Party to submit certain types of claims to an international tribunal. Unlike many investment treaties, which confer a fairly broad subject-matter jurisdiction upon a tribunal, the jurisdiction of a tribunal under this Treaty is restricted to the consideration of alleged breaches of those substantive articles listed in Article 20(1)(a) and (b). The investor must comply with conditions precedent to the submission of a claim to arbitration. It may submit the arbitration under the rules of one of two choices: (i) the ICSID Convention, provided that both Contracting Parties are parties thereto, or the Additional Facility Rules of ICSID, provided that one Contracting Party, but not both, is a party to the ICSID Convention[147]; or (ii) the UNCITRAL Arbitration Rules. Both disputing parties may appoint one arbitrator and the third, presiding arbitrator, shall be appointed by agreement of the disputing parties. A tribunal is *ad hoc* and established solely to determine the claim. After completing the award (subject to any application for post-award rectification, interpretation or supplementary reasons), the tribunal is *functus officio*. The award has no binding force except between the disputing parties and in respect of that particular case.

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145 Affidavit of Professor Gus Van Harten, p. 11.

146 See *Agreement between the Government of Canada the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments*, 6 April 1990 (entered into force on 22 November 1990), Can. T.S. 1990 No. 43, Article XIV, available at: http://www.treaty-accord.gc.ca/text-texte.aspx?id=101511; *Agreement between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments*, 21 November 1993 (entered into force on the same date), Can. T.S. 1993 No. 14, Article XIV, available at: http://www.treaty-accord.gc.ca/text-texte.aspx?id=101513.

147 Until such time as Canada ratifies the ICSID Convention, it will only be able to use the ICSID Additional Facility Rules. After ratification, the claimant would only be able to choose the ICSID Convention or the UNCITRAL Arbitration Rules.

159. I now turn to discuss those features of Section C which were not present in NAFTA Chapter Eleven.

160. First, since this Treaty includes a *General Exceptions* clause not found in NAFTA Chapter Eleven, provision is made for a tribunal to seek a report in writing from the Contracting Parties as to whether and to what extent Article 33(3) is a valid defence to the claim.[148] The technique of using an agreement of the State parties to shape the tribunal's consideration of a claim is not unusual.

161. Second, although NAFTA Article 1121 was entitled, "*Conditions Precedent to Submission of a Claim to Arbitration*", it was not entirely clear to tribunals whether or not a claimant's failure to comply with the conditions precedent deprived the tribunal of jurisdiction or could be cured. In my view, the NAFTA Parties were concerned that the conditions precedent be complied with in full and I note that both Canada and the United States have made it clear in subsequent treaty-making practice that they require compliance with the conditions precedent. (This type of provision was included in the 2004 Model FIPA, Article 26, *Conditions Precedent to Submission of a Claim to Arbitration*.)

162. The Treaty's Article 21 states that a disputing investor may submit a claim to arbitration "*only if*" it complies with six stipulated conditions. This is buttressed by Article 22, *Submission of a Claim to Arbitration*, where it is reiterated that a disputing investor *"who meets the conditions precedent* provided for in Article 21 may submit the claim to arbitration" and Article 23, *Consent to Arbitration*, in which each Contracting Party "consents to the submission of a claim *to arbitration in accordance with the procedure* set out in this Agreement." The second sentence of that article clarifies that a: "Failure to meet any of the conditions precedent provided for in Article 21 *shall nullify that consent*." [Emphasis added.]

163. The third difference concerns arbitrators' qualifications. NAFTA Chapter Eleven did not specify such qualifications. The ICSID Convention, Article 14, does so in respect of persons designated to serve on the ICSID Panel of Arbitrators, requiring that:

> Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgement. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.[149]

164. The Convention requires further that persons who have not been designated to the Panel of Arbitrators but who are appointed to a tribunal "shall possess the qualities stated in paragraph (1) of Article 14."[150]

165. Article 24(1)(a) and (b) of the China-Canada Treaty states that an arbitrator shall "have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment

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148 A similar process is contemplated in Article 20 (2) (b) and (c) of the Treaty with respect to claims involving prudential measures taken by a State.

149 ICSID Convention, Article 14.

150 ICSID Convention, Article 40 (2). The 2010 UNCITRAL Arbitration Rules do not specify arbitrator qualifications.

agreements" and "be independent of, and not be affiliated with, or take instructions from, either Contracting Party or disputing party." I will discuss Article 24(1)(c) below.

166. Article 24(3) adds a gloss on the arbitrators' qualifications if the dispute involves measures relating to financial institutions, or investors of the other Contracting Party and covered investments of such investors in financial institutions. If the disputing parties agree, the arbitrators shall, in addition to the criteria set out in Article 24(2), "have expertise or experience in financial services law or practice, which may include the regulation of financial institutions." If the disputing parties do not agree, each disputing party may select an arbitrator who possess the basic qualifications of in Article 24(2), but "if the disputing Contracting Party invokes Article 33(4) [the financial services exception], the presiding arbitrator shall meet the qualifications set out in subparagraph (a)" of Article 24(3). This provision is derived from NAFTA Article 1414(3)-(4).

167. Thus, if the dispute involves measures relating to financial institutions, the respondent Contracting Party can require that at least the presiding arbitrator shall have specific expertise or experience in financial services law or practice, including the regulation of financial institutions. It is of course open to it to also appoint an arbitrator with financial institutions experience.

168. The fourth difference from the NAFTA is that the Canada-China Treaty contains more explicit provisions on the transparency of investor-State arbitration than did Chapter Eleven. The early experience of NAFTA showed that there was substantial public interest in such arbitrations. Therefore, on 31 July 2001, the Free Trade Commission ("FTC") adopted an interpretation addressing the publication of documents pertaining to Chapter Eleven claims.[151] All three NAFTA Parties maintain websites that publish their pleadings as well as procedural orders, decisions, and awards of tribunals.

169. The FTC's Note of Interpretation was followed by another agreement on *amicus curiae* interventions by private parties, non-governmental organisations, *etc.*[152] At that time, the Government of Canada also stated that it would seek to obtain disputing investors' consent to hold public hearings:

> 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 11 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 determining 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.[153] [Emphasis added.]

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[151] Free Trade Commission Note of Interpretation of Certain Chapter 11 Provisions, 31 July 2001 (accessible at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d). The FTC comprises the trade ministers of the three Parties.

[152] Free Trade Commission Statement on non-disputing party participation, 7 October 2003 (accessible at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf).

[153] Statement of Canada on open hearings in NAFTA Chapter Eleven Arbitrations, October 2003 (accessible at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-lena/open-hearing.aspx?lang=eng&view=d).

170. This was worded as a statement of intention in that Canada provided its own consent but it could not bind any investor/claimant because under the three sets of potentially applicable arbitration rules, both parties must agree to open hearings.[154]

171. Thus, under the NAFTA (and in the rules that are typically used in investor-State arbitrations), the attendance of observers at hearings requires the agreement of the parties, with the default provision being that in the event of disagreement, the hearings shall be held *in camera*.[155] Both Canada and the United States have sought to negotiate provisions in subsequent agreement that the proceedings shall in general be held in public.[156]

172. Article 28 thus does not go quite as far as Article 38 of the Model FIPA and some post-NAFTA treaties[157] in that it leaves the decision to the disputing Contracting Party as to whether or not the hearings shall be public, but it goes further than the NAFTA and the three existing sets of applicable arbitral rules.

173. Article 28 preserves Canada's right to maintain its policy of conducting public hearings in cases involving Canadian measures. Nothing in the Treaty requires Canada to vary its practice, and I would be surprised were to it do so, both because of its consistent practice under NAFTA and in other investment treaty negotiations and because Canada has championed increased transparency for investment treaty arbitration generally.

174. The NAFTA Parties' decision to increase the transparency of investor-State arbitration has been followed, albeit at a slower pace, by the international community more generally. When the revision of what would become the 2010 UNCITRAL Arbitration Rules was initiated, the Government of Canada submitted observations to the Secretariat of UNCITRAL entitled, "The Government of Canada's Position on the Need to Enhance Transparency in Investor-State Arbitration" and urged the Working Group to enhance transparency in this form of arbitration under the rules in light of the public interests often at stake in such dispute settlement.[158] I recall

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154 For example, Rule 32(2) of the ICSID Arbitration Rules presently in force states: "Unless either party objects, the Tribunal, and after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall be such cases establish procedures for the protection of proprietorially or privileged information." [Emphasis added.] See also Article 39(2) of the ICSID Additional Facility Rules and Article 28(3) of the 2010 UNCITRAL Arbitration Rules.

155 ICSID Arbitration Rules, Rule 32 (2), ICSID Additional Facility Rules, Article 39(2) and 2010 UNCITRAL Arbitration Rules, Article 28(3).

156 See for example Article 29, *Transparency of Arbitral Proceedings*, paragraph 2, of the 2012 US Model BIT, which provides that: "the tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements…" This is consistent with Article 38, *Public Access to Hearings and Documents*, of the 2004 Canadian Model FIPA.

157 Under the *Central American and Dominican Republic Free Trade Agreement with the United States* (CAFTA-DR), all hearings are public (see Decision of the Free Trade Commission establishing Model Rules of Procedure which states hearings "shall be open to the public"). Full text of the CAFTA-DR and the Decision is available at http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

158 United Nations Commission on International Trade Law, 41st session, New York, 16 June-3 July 2008, Document A/CN. 9/662 (Revision of the UNCITRAL Arbitration Rules: Observations by the Government of Canada).

that the initial response to Canada's proposal was lukewarm if not downright hostile in some quarters; however, attitudes have changed and at a recent meeting of the United Nations Commission on International Trade Law held in February 2013, new rules on the transparency of investor-State arbitrations conducted under the UNCITRAL rules were agreed, subject to approval by the Commission at its next meeting in Vienna in July.

175. Hence, to the extent that Professor Van Harten expresses a concern about "the scaled-back transparency in investor-state arbitration process (relative to NAFTA and other FIPPAs)"[159], were a claim to be brought against Canada under this Treaty, Canada would be able to require the hearings to be public.

176. The balance of Article 28 of the Treaty is consistent with international arbitral practice where hearings are held in public, in that it may be necessary to hold portions of the hearing *in camera* in order to protect confidential information.[160] Even those treaties that provide for public hearings require the tribunals to protect confidential information such as business proprietary information.

177. At paragraph 169 I adverted to the NAFTA Parties deciding to formally provide for *amicus curiae* interventions so as to offer an avenue to interested non-disputing parties to make their views known to NAFTA tribunals. In this regard, the NAFTA Parties were in the vanguard of the transparency movement which as more latterly gained some momentum. The Canada-China Treaty is consistent with that trend in permitting non-disputing parties to make application to tribunals for leave to file a submission.

178. I previously referred to the *Glamis Gold* award for the example of a NAFTA tribunal taking note of the cultural preservation regulatory framework of the respondent State. It also warrants noting that in that case the Quechen Nation applied to intervene in the proceeding, and was granted leave to file an *amicus curiae* brief.[161] This is a not uncommon feature of NAFTA arbitral practice and can be expected to continue under the Canada-China Treaty.

179. The fifth, in my view minor, difference between the Treaty and NAFTA concerns a relatively minor difference in the expression of the governing law. However, since the issue of the governing law is an important one, I will make a few comments.

180. When an international investment treaty is invoked by an investor/claimant, the tribunal is obliged to resolve the dispute in accordance with the applicable law (which may or may not be explicitly stated in the treaty itself). The Contracting Parties have explicitly stated this in Article 30(1), *Governing Law*:

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159 Affidavit of Professor Gus Van Harten, p. 3.

160 This happens under Canadian administrative law as well. For example, when the Canadian International Trade Tribunal conducts injury hearings with respect to anti-dumping or countervailing duty petitions, the Tribunal (as well as all participating legal counsel and experts) is under a legal duty to protect the confidential information of the disputing parties. Thus when confidential business information is the subject of a hearing, the proceeding will be closed to the public and only the tribunal and staff members as well as counsel who have given written undertakings to protect its confidentiality will be permitted to attend.

161 The *amicus curiae* submission is available at:
http://www.state.gov/documents/organization/75016.pdf

> "A Tribunal established under this Part shall decide the issues in dispute in accordance with this Agreement, and applicable rules of international law, and where relevant and as appropriate, take into consideration the law of the host Contracting Party. An interpretation by the Contracting Parties of a provision of this Agreement shall be binding on the Tribunal established under this Part, and any award under this Part shall be consistent with such interpretation."

181. Like NAFTA Article 1131, *Governing Law*, under this Treaty, the tribunal must decide the dispute in accordance with the Treaty's provisions and applicable rules of international law. With respect to the applicable rules of international law, there are a number of sources of international law to which investment treaty tribunals routinely refer. For example, tribunals apply the *Vienna Convention*, itself a multilateral treaty that sets out rules that *inter alia* govern the interpretation of a treaty. (Canada and China are both parties to the *Vienna Convention*.[162])

182. In addition, tribunals routinely refer to the Articles on State Responsibility and commentaries. Some 50 years in the making, the Articles are written in a form similar to an international treaty, but they are not a treaty; nevertheless, they are in general considered to be an authoritative expression of the *secondary* rules of international law (*i.e.*, "the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flowed therefrom"[163]). They do not define the content of the international obligations that may be at issue; that content is found in the *primary* rules, *i.e.* the rules of customary international law (if applicable and not modified by treaty) and the applicable treaty obligations, set out in this Treaty's Article 30(1).

183. Tribunals also consider the decisions of the International Court of Justice and its predecessor, international claims commissions, *ad hoc* international tribunals, national courts, supranational courts such as the European Court of Justice and the European Court of Human Rights, WTO panel and Appellate Body decisions, and other arbitral tribunals. There is a large body of non-binding jurisprudence to which tribunals can refer when applying the rules of international law. International arbitral and judicial awards are a "subsidiary means for the determination of the rules of law" pursuant to Article 38 of the *Statute of the International Court of Justice*.[164]

184. At paragraph 179, I mentioned that there is a minor difference between NAFTA Article 31 and the Treaty's Article 30, and that is that the latter also mandates a tribunal to "*where relevant*

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[162] Canada ratified the *Vienna Convention* on 14 October 1970, China on 3 September 1997.

[163] Commentaries to the draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session, November 2001, extract from the "Report of the International Law Commission on the work of its fifty-third session", Official Records of the General Assembly, fifty-sixth session, Supp. No. 10 (A/56/10) 59 at pp 61-62 ("*Commentary to the ILC Articles on State Responsibility*").

[164] Article 38 states: 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

and as appropriate, take *into consideration* the law of the host Contracting Party." [Emphasis added.] In my experience, even in cases where the Treaty pursuant to which the tribunal derives its jurisdiction is silent on the governing law, tribunals frequently consider the host State's law.[165]

185. Another feature of Article 30 is that any interpretation by the Contracting Parties is binding on a tribunal. This is consistent with NAFTA Article 1131(2) and the Treaty includes a phrase not included in the NAFTA, but which has been included in Canadian and US post-NAFTA treaty-making that "...any award rendered this Part shall be consistent with such interpretation."[166]

186. As noted above at paragraph 102 in the discussion of the lineage of Article 4 of the Canada-China Treaty, *Minimum Standard of Treatment*, the responsible ministers of the NAFTA Parties, acting jointly as the Free Trade Commission, issued a Note of Interpretation with respect to the equivalent NAFTA Article.[167]

187. The 2001 Note of Interpretation has been applied by many NAFTA tribunals[168], and a typical view was expressed by the tribunal in *ADF Group Inc. v. United States of America*:

> "... we have the Parties themselves – all the Parties – speaking to the Tribunal. No more authentic and authoritative source of instruction of the Parties intended to convey in a particular provision of the *NAFTA*, is possible. Nothing in *NAFTA* suggests that a Chapter Eleven tribunal may determine for itself whether a document submitted to it as an interpretation by the Parties acting through the FTC is in fact an 'amendment' which presumably may be disregarded until ratified by all the Parties and their respective internal

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[165] *Mondev v. United States of America*, ICSID Case No. ARB(AF)/99/2, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL Case under NAFTA Chapter 11, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL Case under NAFTA Chapter 11, and *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL Case under NAFTA Chapter 11 are four examples.

[166] The 2012 US Model BIT provides in its Article 30 (3): "A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of the provision of this Treaty shall be binding on the tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision." Likewise, Article 40 (2) of the 2004 Canadian Model FIPA provides that: "an interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section, and any award under this Section shall be consistent with such interpretation."

[167] Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001; see the Award in *The Loewen Group Inc. and Raymond L Loewen v. United States of America,* ICSID Case No. ARB (AF)/98/3, where the tribunal stated at paragraph 128: "The effect of the Commission's interpretation is that "fair and equitable treatment" and "full protection and security" are not free-standing obligations. They constitute obligations only to the extent that they are recognized by customary international law. Likewise, a breach of Article 1105(1) is not established by a breach of another provision of NAFTA. To the extent, if at all, that *Metalclad Corp v United Mexican States* ICSID Case No. ARB(AF)/97/1 (Aug 30, 2000), *S.D. Myers, Inc. v Government of Canada* (Nov 13, 2000) and *Pope & Talbot, Inc. v Canada*, Award on the Merits, Phase 2, (Apr 10, 2001) may have expressed contrary views, those views must be disregarded."

[168] For example, *Mondev v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, paragraph 121-122; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL Case under NAFTA Chapter 11, Award, paragraphs 192-193; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL Case under NAFTA Chapter 11, Award, paragraph 599 and *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL Case under NAFTA Chapter 11, Award, paragraphs 119-120.

> law. We do not find persuasive the Investor's submission that the tribunal is impliedly authorized to do that as part of its duty to determine the governing law of a dispute. A principal difficulty with the Investor's submission is that such a theory of implied or incidental authority, fairly promptly, will tend to degrade set at naught the binding and overriding character of FTC interpretations. Such a theory also overlooks the systemic need not only for a mechanism for correcting what the Parties themselves become convinced are interpretative errors but for consistency and continuity of interpretation, which multiple *ad hoc* arbitral tribunals are not well suited to achieve and maintain."[169] [Emphasis added.]

188. The *ADF* tribunal's approach reflects the view that the States that are party to a treaty play a role in jointly interpreting it (a further reflection of the absence of a centralized form of legislative and judicial power at the international level). Article 30 of the Canada-China Treaty appears to be intended to make what was already clear even clearer: a binding interpretation is precisely that.

189. I note that at various parts of his opinion, Professor Van Harten expresses concerns about the powers of arbitral tribunals. This raises a series of important questions and is one to which I will now turn as it is important for the Court to understand what this type of treaty does and does not do. There are four key points to be borne in mind when considering this part of his opinion.

190. First, I have already noted in the Summary of Opinion that the Treaty does not purport to change the allocation or distribution of governmental powers in either Contracting Party. These remain undisturbed by the Treaty.

191. Secondly, as stated in the Summary of Opinion, the Treaty does not supplant Canadian law, which remains fully in effect. Chinese investors who invest in Canada, like investors from any other country, are already subject to the full force of Canadian law and this would continue to be the case under the Treaty.

192. Third, as noted in the Summary of Opinion, a tribunal has no power under this Treaty to enjoin a governmental measure. It can award monetary damages and any applicable interest or restitution of property, but in the latter case, it must recognize that respondent may decline to make restitution (and therefore in such a case the award shall provide that the Contracting Party may pay monetary damages and any applicable interest in lieu of restitution). [170]

193. The fourth point concerns Professor Van Harten's comments about the role of international tribunals *vis-à-vis* the domestic courts of a State. He asserts that the "FIPPA (and many other investment treaties) do not require foreign investors to resort to domestic remedies of the host state, where reasonably available, as a procedural precondition for an international claim."[171]

194. This is generally correct, but it is important to note that the approach was modified almost 50 years ago in the ICSID Convention.[172] Thus, States can require partial or complete exhaustion of

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[169] *ADF Group Inc. v. United States of America*, Award, 9 January 2003, ICSID Case No. ARB(AF)/00/1, paragraph 177.

[170] Article 31, *Interim Measures of Protection and Final Award.*

[171] Affidavit of Professor Gus Van Harten, p. 5.

[172] At customary international law, before the claim of an injured national could be taken up by its State of nationality, the national had to exhaust all local remedies (at least until they were manifestly futile). This is

local remedies or explicitly or implicitly waive the rule and many States have chosen the latter. (That said, this is not an issue in respect of which it is easy to make generalized statements because the relationship between local remedies and access to international jurisdiction depends upon the precise terms of the applicable treaty and the nature of the claim being advanced.)

195. If the local courts have spoken, it is quite possible that their treatment of the investor's claim under local law could be the subject of review by an international tribunal. Professor Van Harten and I agree that the courts, as an organ of the State, can engage the State's responsibility at international law. This is made clear by Article 4, *Conduct of Organs of a State*, of the Articles on State Responsibility, which confirms that the conduct of any State organ shall be considered an act of that State under international law, "whether the organ exercises legislative, executive, *judicial* or any other functions... and whatever its character as an organ of the central government or of a territorial unit of the State."[173] This is how – by the common agreement of States – international law treats every State.[174]

196. That said, it has frequently been found that when an international tribunal reviews the decisions of a national court, it does not act as an international court of review with plenary jurisdiction to review the court's application of domestic law.[175] Its "angle of examination" is

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known as the "local remedies rule". Article 26 of the ICSID Convention retained the right of a Contracting State to require local remedies, but reversed the operation of the rule. The second sentence of that article provided: "A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention." The implication of the rule was that local remedies need not be resorted to if the investor and the host State agreed to arbitrate in disputes under the Convention.

[173] See Commentary to ILC Articles on State Responsibility at pp. 84-92.

[174] For that reason, the State is treated as a single entity. It follows from that, that in the event of a finding of State responsibility arising out of any measure taken by any governmental entity of Canada at any level, it is Canada, not the entity that took the measure, that is internationally responsible. Professor Van Harten's comment that it is an "outstanding question for Canada" how the responsibility for an award against Canada is to be allocated among governments in Canada, especially when the acts leading to the award were not acts of the Parliament of Canada, the federal government or a federal court, is correct, but it is not something which is in any way unique to the instant Treaty. This arises for all international treaties to which Canada is a party.

[175] *Robert Azinian, Kenneth Davitian, and Ellen Baca v. United Mexican States*, ICSID Case No. ARB/AF/97/2, Award, at paragraph 99: "The possibility of holding a State internationally liable for judicial decisions does not, however, entitle the claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. *What must be shown is that the court decision itself constitutes a violation of the treaty*. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not *per se* be conclusive as to a violation of NAFTA. More is required: the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end." [Emphasis in original.] This has been cited with approval by such tribunals: see *The Loewen Group Inc and Raymond L. Loewen v. United States* Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, ICSID Case No. ARB(AF)/98/3 at paragraph 48: "the *Azinian* Tribunal pointed out... that State responsibility for judicial decisions does not entitle a claimant to a review of national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is neither true generally nor for the NAFTA. As the Tribunal said, 'What must be shown is that the court decision itself constitutes a violation of the treaty'."; likewise, the tribunal in *Waste Management Inc. v. United Mexican States*, ICSID Case No ARB(AF)/00/3, Decision on Jurisdiction, at

different. Put in very general terms (and depending of course upon the precise terms of the applicable treaty), the objective is to determine whether the court has met the basic procedural requirements of international law so as to afford the alien a fair trial. If it is alleged that, for example, a trial judge has failed to accord a fair trial, an international tribunal will inquire as to whether there were effective mechanisms in place under the State's law for appeal or review of the lower court's decision. There are many cases where tribunals have said that the examination is one focused on the overall operation of the State's legal system as a whole.[176]

197. If the investor/claimant has chosen to immediately bring an international claim in respect of a measure without submitting to available local remedies, the juridical nature of the international claim may change by virtue of the claimant's decision not to employ readily available domestic legal remedies. Thus, while it is entirely possible that a tribunal could review legislative or government decisions that are still open to adjudication in the domestic courts, when it comes to doing so, there are particular rules applied by international tribunals.

198. Finally, although international tribunals will apply the treaty and applicable rules of international law, in my experience they also will frequently hear expert evidence on the relevant rules of municipal law. It is common practice for experts in the law of the host State to prepare written reports and testify before tribunals as to the precise meaning of the relevant domestic legal rules so that the tribunal can consider their consistency with the State's international obligations. It is also common for international tribunals to consider the respondent State's legislative framework, including its provisions for administrative or judicial review, when evaluating them under the applicable international legal standards.

199. Once again, there is an actual example of this in the context of the protection of aboriginal rights and interests. In *Glamis Gold*, the tribunal found that a legal opinion rendered by the Solicitor of the U.S. Bureau of Land Management varied a long-standing and settled doctrine under United States federal law that "arguably surprised Claimant."[177] The question was whether this

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paragraph 47, drew the parties' attention "to what was said in *Azinian v. United Mexican States*: a NAFTA tribunal does not have 'plenary appellate jurisdiction' in respect of the decisions of national courts, and whatever may have been decided by those courts as to national law will stand unless shown to be contrary to NAFTA itself." In *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, paragraph 126, the tribunal cited *Azinian* for the same proposition, noting that: "it is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, the parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal."; in *ADF Group Inc v. United States of America*, ICSID Case No. ARB(AF)/00/1, the tribunal cited *Mondev* for the view that "[o]n the approach adopted by *Mondev*, NAFTA tribunals would turn into courts of appeal, which is not their role" and expressed agreement with Mexico's submission as a non-disputing intervenor, that the tribunal was not called upon to sit as a court of appeals; and finally in *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, paragraph 291, it is stated: "...It is indeed common ground that the role of an investment tribunal is not to serve as a court of appeal for national courts."

[176] *Robert Azinian, Kenneth Davitian, and Ellen Baca v. United Mexican States*, ICSID Case No. ARB/AF/97/2, Award, at paragraphs 96 *et seq.*; *Grand River Enterprises Six Nations, Ltd. et al v United States of America*, UNCITRAL, Award, paragraphs 223-224; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Award, at paragraphs 122 and 225.

[177] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL Case under Chapter 11, Award, paragraph 759.

divergence from prior practice amounted to a breach of the United States' NAFTA obligations, specifically, the minimum standard of treatment and expropriation provisions.

200. With respect to the legal opinion, the tribunal commented:

> To begin addressing this question, the Tribunal first notes that it is not for an international tribunal to delve into the details of and justifications for domestic law. If Claimant, or any other party, believed that Solicitor Leshy's interpretation of the undue impairment standard was indeed incorrect, the proper venue for its challenge was domestic court. In the context of this claim, this Tribunal may consider only whether the M-Opinion occasioned "a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons." The Tribunal finds that it does not.[178] [Emphasis added.]

201. Applying the minimum standard, the tribunal found that the legal opinion was not arbitrary, did not exhibit a manifest lack of reasons, did not exhibit "blatant unfairness or evident discrimination" towards the investor, even though it entailed a delay in the project, and did not entail a breach of a quasi-contractual relationship between the government authorities and the investor such as to amount to a breach of the latter's legitimate expectations.[179]

202. With respect to the claimant's challenge of cultural reviews conducted by the authorities, the tribunal declined to second-guess the authorities' evaluation of the factual material before them:

> ... It is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency. Indeed, our only task is to decide whether Claimant has adequately proven that the agency's review and conclusions exhibit a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons so as to rise to the level of a breach of the customary international law standard embedded in Article 1105.[180] [Emphasis added.]

203. When it came to considering a California Senate Bill that changed the requirements for backfilling an open pit mine situated close to an obvious cultural heritage site, the tribunal noted:

> To begin its assessment of Claimant's argument that SB 22 is actionably arbitrary in that it does not protect cultural resources and may even cause environmental harm, the Tribunal notes the standard articulated above as to when an act is so manifestly arbitrary as to breach a State's obligations under Article 1105: this is not a mere appearance of arbitrariness – a tribunal's determination that an agency acted in way with which the tribunal disagrees or a State passed legislation that the tribunal does not find curative of all the ills presented; rather, this is a level of arbitrariness that, as *International Thunderbird* put it, amounts to a "gross denial of justice or manifest arbitrariness falling below acceptable international standards." The act must, in other words, "exhibit a manifest lack of reasons." The Tribunal finds that Respondent has presented a prima facie showing that SB 22 was rationally related to its stated purpose

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178 *Glamis Gold, Ltd. v. United States of America*, UNCITRAL Case under Chapter 11, Award, paragraph 762.

179 *Id.*, see paragraphs 22, 616, 627, and 765 for statements to this effect.

180 *Id.*, paragraph 779.

> and reasonably drafted to address its objectives. It is Claimant's burden to prove a manifest lack of reasons for the legislation, and the Tribunal holds that it has not met this burden.[181] [Emphasis added.]

204. I refer to this award not to suggest that it is the only approach that could be taken by a tribunal, but rather simply to illustrate the approach that has been taken in an actual case involving complex legislative schemes designed to protect the cultural heritage of an aboriginal First Nation.

205. I now turn to Professor Van Harten's comments with respect to the differences between national courts and international arbitral tribunals.[182]

206. There are various strands to Professor Van Harten's argument, stemming from: (i) the different views of tribunals as to the meaning of substantive obligations;[183] (ii) the way in which tribunals are constituted;[184] (iii) the fact that there is no review for error of law;[185] and (iv) the fact that arbitrators are not tenured in the sense that national judges (in some States) are[186], and some arbitrators also act as counsel.[187] The responses to these arguments are to some extent interrelated, but I will deal with each in turn.

207. His first point is that the obligations "established by the FIPPA have been interpreted in different ways by arbitrators acting under similar investment treaties" and some interpretations "are more expansive than others."[188] As a general statement, I agree with it, and I see the argument that this complicates the use of prior awards as "precedents" in the sense that decisions of the Canadian courts are binding precedents. There is no doubt that there have been different approaches taken by tribunals on key issues and, in,some instances, sharp divergences in the approaches taken. In one instance in nearly 2000s, two tribunals considering claims based on the same facts (but brought under different treaties) arrived at virtually diametrically opposed outcomes.[189] But this must be considered in proper context.

208. First, it must be understood that although investment treaties generally deal with the same range of substantive obligations, the obligations are expressed differently. There is no universally agreed single expression of, for example, fair and equitable treatment. Thus, while a tribunal under Treaty A may interpret that standard as a customary international law standard, a tribunal established under Treaty B – which expresses the obligation in different terms – may interpret the standard more broadly.[190] It would be wrong to assume that because treaties are facially similar, they must always be interpreted in the same way. Each tribunal is constituted pursuant to the terms

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181 *Glamis Gold, Ltd. v. United States of America*, UNCITRAL Case under Chapter 11, Award, paragraph 803.

182 Affidavit of Professor Gus Van Harten, pp. 5-9.

183 Affidavit of Professor Gus Van Harten, p. 7.

184 Affidavit of Professor Gus Van Harten, p. 6.

185 Affidavit of Professor Gus Van Harten, p. 6.

186 Affidavit of Professor Gus Van Harten, p. 6.

187 Affidavit of Professor Gus Van Harten, p. 6.

188 Affidavit of Professor Gus Van Harten, p. 7.

189 *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Award. I recall that this generated much commentary in the profession.

190 See, for example, the *Glamis Gold, Ltd. v. The United States of America* tribunal's discussion of different formulations of the standard in its Award at paragraphs 541-543. In my experience, there can be significantly different ways of expressing the same general menu of obligations.

of a specific treaty and is mandated to apply the terms of *that* treaty, not the terms of some other treaty. There are many examples of tribunals examining the terms of a treaty pursuant to which another award was rendered in order to determine whether or not the award is of assistance or distinguishable.[191]

209. Second, certain obligations are heavily fact-intensive in their application. This is, for example, the case with an alleged indirect expropriation[192] or an alleged breach of the fair and equitable treatment standard. Thus, the tribunal's findings of fact are crucial to its application of the treaty standard.

210. Third, I have already noted that awards are binding only upon the parties to the dispute and in respect of the particular matter. They do not possess any further binding effect and are merely subsidiary means for determining the rules of international law. They are useful reference points for future tribunals but there are numerous instances where subsequent tribunals decline to follow an approach taken by a prior tribunal. Disputing parties and tribunals alike tend to examine the decisions of prior tribunals for their general reasoning and to discern the basic principles that motivated them.

211. Professor Van Harten notes the development of the 'legitimate expectations' doctrine as a "novel" requirement developed by arbitrators and "not laid out expressly in the treaties or in customary international law."[193] In my opinion, one would generally not expect to find highly developed doctrines in customary international law. As for the criticism that the doctrine is not expressed in the treaties themselves, it must be recognized that although investment treaties constitute an advance over customary international law rules, they can be worded in general terms and thus require tribunals to give meaning to their terms and concepts when applying them to concrete facts. This is not unlike what domestic courts must do, for example, in judicial review cases where they elaborate doctrinal bases for the application of general rules.

212. Some cases do acquire a kind of jurisprudential quality in that although not binding upon subsequent tribunals, they are nevertheless seen to be authoritative. While there certainly are (sometimes wide) differences in approaches, there are also many examples in which tribunals act quite consistently in their approach to the same or similar obligations. NAFTA jurisprudence has become more consistent on the interpretation of the key obligations and the diverging approaches taken in the early years with respect to the minimum standard of treatment have been harmonized by the action of the Free Trade Commission.

213. Fourth, to the extent that there is a perceived need for more detailed expression of substantive and procedural provisions, this is precisely what Canada, the United States and many other States have been doing. As I have shown in my review of the substantive obligations of this particular Treaty, some of its provisions are not found in the NAFTA but rather are derived from Canadian post-NAFTA treaty-making practice and others are more detailed in comparison to their NAFTA equivalents.

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[191] The recent Award rendered by the tribunal in *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12 is an example.

[192] This is reflected in the Treaty's Annex B.10's elaboration of the test for finding an indirect expropriation, discussed above.

[193] Affidavit of Professor Gus Van Harten, p. 8.

214. Professor Van Harten's second objection to the Treaty is expressly stated to reflect "*broader* concerns about the lack of institutional safeguards of independence in international investor-state arbitration."[194] I have already pointed out that this objection is not rooted in this Treaty *per se* but rather is reflective of his more general concerns about all extent investment treaties that provide for investor-State arbitration, including NAFTA.

215. I have already noted that investment treaty arbitration, like almost all international arbitration, is *ad hoc*. Due to the principle of party autonomy, under existing practice, tribunal members are appointed by the disputing parties. Most tribunals are constituted with the involvement of the disputing parties, in that typically each disputing party will appoint one arbitrator and they will either agree on the presiding arbitrator or request an "appointing authority" to appoint the presiding arbitrator.[195] Professor Van Harten is therefore correct to observe that the latter do not have judicial tenure and therefore not independent in the sense of, for example, Canadian judges. He is also correct to observe that some arbitrators also act as counsel, although this is not a universal practice, and it is one which in recent years has been debated in the international bar.

216. For those of us who have worked within a national legal system with independent superior and appellate courts, it is fair to ask why States have conferred adjudicatory decision-making power, including the power to order restitution or award monetary damages, upon *ad hoc* international arbitration tribunals that are subject to limited review. Having personally sought to better understand the differences between domestic and international adjudication, this led me to study why States concluded that international arbitration was the preferred means for resolving many kinds of disputes.

217. The short answer is that *ad hoc* arbitration was at the time of the ICSID Convention's negotiation, and seems to be at present, the best achievable mechanism and reflected long-standing State practice. In 1953, the International Law Commission described arbitration as "a procedure for the settlement of disputes between States by binding award on the basis of law and as a result of an undertaking voluntarily accepted" and noted further that *"the arbitrators chosen should be either freely selected by the parties* or, at least... the parties should have been given the opportunity of a free choice of arbitrators."[196] [Emphasis added.]

218. Throughout the 1950s, the ILC studied international arbitration with a view to arriving at an international legal instrument, potentially a convention, which would institutionalize best practices in international arbitration. The idea of developing a treaty was ultimately jettisoned, but in 1958 the ILC did promulgate its Model Rules on Arbitral Procedure.[197] Such rules contemplated that the parties to a dispute would agree on the constitution of the arbitral tribunal and failing that,

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[194] Affidavit of Professor Gus Van Harten, p. 3.

[195] There are special rules that apply in the event that a disputing party declines to participate in the proceeding, even to the extent of declining to appoint an arbitrator.

[196] "Report of the International Law Commission covering the work of its fifth session, 1 June – 14 August 1953" in *Yearbook of the International Law Commission 1953*, vol. 2, p. 202 (Document A/2456).

[197] International Law Commission, Model Rules on Arbitral Procedure with a general commentary, extract from "Report of the International Law Commission on the workd of its tenth session", in *Yearbook of the International Law Commission 1958*, vol. 2 at p. 83 ("*ILC Model Rules*").

either party would be able to apply to the President of the International Court of Justice to appoint any of the arbitrators not yet designated.[198]

219. The choice of *ad hoc* arbitration was made by States being aware of the possibility of inconsistent decisions. The point was made by the World Bank's General Counsel, Mr. Aron Broches, during the ICSID Convention's elaboration when discussing the possibility that *ad hoc* tribunals considering the same facts could end up rendering contradictory decisions. In his view, which was accepted:

> "... The possibility of contradictory decisions in cases arising between different parties, but based on similar facts, was inherent in any system of *ad hoc* arbitration. The only way to avoid, or at least limit that danger – or to put it in a positive way, to promote uniformity of decisions – would be to have a standing tribunal, and that is clearly impractical in the present context.[199]

220. This continues to be the case for investment treaty arbitration. Although the idea of a standing tribunal has been mooted, I have seen no evidence of a movement in the international community to agreeing to the establishment of such an institution. In part, this is due to the fact that there are so many bilateral and plurilateral investment treaties in force, as opposed to one overarching treaty to which many States are party. Another concern is the desirability of finality of results. Another is cost.

221. One way that inconsistency in awards could in principle be resolved, assuming – and these are important assumptions – first, that the inconsistency resulted from error of law, and second, that the inconsistency arises in cases decided under the same treaty or under treaties containing the same text – would be to provide for appellate review. So far, there does not seem to be a strong appetite to do so.

222. This leads to my next comment on Professor Van Harten's concerns. The fact is that there is presently no review for error of law in international arbitration generally, or in investment treaty arbitration, in particular. This is the case whether it is an ICSID award reviewed by an *ad hoc* Annulment Committee or whether it is a non-ICSID award reviewed by a national court, such as a Canadian court applying the federal (or a provincial) *International Commercial Arbitration Act*.

223. With respect to the Convention, from the beginning, appeal for error of law was ruled out. This is because the drafters took the grounds specified in the ILC's Model Rules for Arbitral Procedure (for the review of arbitral awards issued in State-to-State proceedings) and adopted them with minor modifications in what became Article 52 of the Convention.[200] The Model Rules did not contemplate appeal for error of law.

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198 ILC Model Rules, Article 3.

199 History of the Convention, Volume II, Part 1, p. 117.

200 See History of the Convention, p. 216, comments on the Preliminary draft of the Convention dated 15 October 1963, Article IV, Section 14, Enforcement of the Award (Preliminary Draft Convention: Working Paper for the Consultative Meetings of Legal Experts (COM/AF/WH/EU/AS/1); see also, comments of Mr. Aron Broches in the Consultative Meeting of Legal Experts to discuss the draft Convention in Bangkok, Thailand in the History of the Convention at p. 522 (20 July 1964, Consultative Meeting of Legal Experts in Bangkok, Thailand, April 27-May 1, 1964, Summary Record of Proceedings (Z10)).

224. Article 52 establishes an *ad hoc* Annulment Committee process which permits a party to a proceeding to seek the annulment in part or in full of an award on the basis of one or more of five grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.[201]

225. Unlike ICSID awards, which are subject to a self-contained internal annulment process, tribunals operating under other rules must designate a "place of arbitration", the courts of which will exercise curial jurisdiction over the tribunal. For example, since neither Canada nor Mexico are parties to the ICSID Convention, all NAFTA Chapter Eleven arbitrations to date have been sited either in Canada or the United States. Hence, certain Canadian and US courts have been given curial review power. Canadian courts have reviewed five NAFTA awards.[202]

226. Like some other States, Canada – at the federal and provincial levels – has enacted legislation implementing the UNCITRAL *Model Law on International Commercial Arbitration*, Article 34 of which sets out the grounds for the review of an arbitration award. Article 34 represents the international consensus of States, including Canada, as to the appropriate grounds of review and all judicial reviews of NAFTA awards conducted by Canadian courts have been conducted in accordance with the UNCITRAL Model Law. Once again, like many other features of the investor-State arbitral process, the review process reflects the consensus view of States arrived at in negotiations, in this instance, conducted under the auspices of the United Nations.

227. This is not to rule out the possibility of establishing an appellate mechanism for the review of the awards of investor-State tribunals.[203] There has been much discussion about this issue in recent years. Indeed, in 2004, the ICSID Secretariat itself released a discussion paper which considered the possibility of establishing rules for the appellate review of investor-State awards.[204] Although the establishment of an appellate mechanism has been mooted, starting with the 2004 US Model BIT[205], to my knowledge, there has to date been no significant groundswell of international support for the creation of such a mechanism.

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[201] ICSID Convention, Article 52. Arbitrator misconduct would fall within the scope of the grounds for review.

[202] *Attorney General of Canada v. S.D Myers, Inc.*, [2004] 3 F.C.R. 368; *United Mexican States v. Metalclad Corporation*, [2001] B.C.S.C. 664; *United Mexican States v. Marvin Roy Feldman Karpa,* 2003 CanLII 34011 (ON SC), *Bayview Irrigation District et al v. United Mexican States*, 2008 CanLII 22120 (ON SC), and *United Mexican States v. Cargill Inc.* 2010 O.N.S.C. 4646.

[203] Since the 1994 US Model Bilateral Investment Treaty, the United States has regularly included treaty text which contemplates the possibility of the establishment of a multilateral appellate mechanism or investment treaty disputes. However, there has been little movement to establish such mechanism.

[204] Available at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf

[205] Article 29 (10) of the Model Agreement provided: "If a separate multilateral agreement enters into force as 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 agree that such appellate body will review awards rendered under Article 34 of this Section in arbitrations commenced after the multilateral agreement enters into force as between the Parties." Thereafter, it has been standard US treaty making practice to include such provision. See, for example,

228. Turning to the third and fourth strands of Professor Van Harten's argument, it follows from the rule of party autonomy that each disputing party is entitled to appoint one arbitrator and to agree on the presiding arbitrator, that they have the freedom to choose who to appoint and they are not limited to a previously established list of persons deemed to be suitable.[206] It is true that some arbitrators also act as counsel. However, the applicable arbitral rules impose a continuing obligation upon arbitrators to disclose any information that may touch upon their independence and impartiality, including on potential issues conflict. For example, the ICSID Administrative Council, comprising representatives of all of the ICSID Contracting States, promulgates rules governing the conduct of ICSID arbitrations. From the beginning, the rules have prescribed certain standards of conduct by arbitrators.[207] (The ICSID Arbitration Rules and the ICSID Additional Facility Arbitration Rules were developed by the ICSID Administrative Council.[208])

229. In respect of other arbitral rules that might be used for *non*-ICSID investor-State arbitration, those too have been formulated by the international community. The UNCITRAL Arbitration Rules (recently updated in 2010) are developed by the United Nations Commission on International Trade Law, seated in Vienna, to which many states, including Canada, regularly send governmental representatives (and in many cases private sector representatives as well).[209]

230. The ICSID Arbitration Rules, the Additional Facility Arbitration Rules and the UNCITRAL Arbitration Rules thus represent the consensus view of the international community.

231. I note in this regard that the Canada-China Treaty contemplates possibly going further than the foregoing rules. Article 24(2)(c) goes further than the NAFTA or the current ICSID and UNCITRAL rules by contemplating that the Contracting Parties can agree additional rules on the conduct of arbitrators. It provides that arbitrators shall "comply with any additional rules where such rules are agreed to by the Contracting Parties." Article 24(2)(a) stipulates that arbitrators shall have "expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade international investment agreement"[210], paragraph (b) requires arbitrators to "be independent of, and not be affiliated with, or take instructions from, either Contracting Party or disputing party."[211] Neither of these provisions is stated in NAFTA Chapter Eleven.

232. Once again, this is not to rule out the possibility of future changes, such as institutional rather than party appointments, new codes of conduct, and so on. The key point, in my respectful view, is that Professor Van Harten's systemic criticisms are precisely that and I do not see the

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Article 15.19 (10) of the *Singapore-United States Free Trade Agreement.* The 2012 US Model BIT retains this type of provision in Article 28(10).

206 The ICSID Convention, Article 39, expressly permits a disputing party to appoint an arbitrator who is not on the ICSID Panel Arbitrators.

207 See ICSID Arbitration Rules, (1968), Rule 6(2); ICSID Arbitration Rules (1984), Rule 6(2), ICSID Arbitration Rules (2003), Rule 6(2); ICSID Arbitration Rules (2006), Rule 6(2).

208 ICSID Convention, Article 6(1)(c): The Administrative Council shall "adopt the rules of procedure for conciliation and arbitration proceedings".

209 More information about the preparation of the revised rules can be found at the UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html

210 This is analogous to Article 14 of the ICSID Convention.

211 This is reflected in the ICSID Arbitration Rules (2010): see its Model Statement of Independence pursuant to Article 11 of the Rules. "

Canada-China Treaty as differing substantially from Canada's prior treaty-making practice. His broader concerns do not reflect the many areas on which States, including Canada, have collaborated to progressively develop international law's primary, secondary, institutional and procedural rules.

233. This is not to say that the system will not change over time. The point is rather that the kinds of issues which Professor Van Harten has touched upon have been and continue to be debated in the international community. In my opinion, the system will continue to evolve as more and more States develop greater experience with it. This is the experience of Canada with the NAFTA, as reflected in its 2004 Model FIPA, and it can be expected to continue in the future.

234. This concludes my response to your questions.

Yours truly,

J. Christopher Thomas, Q.C.

This is Exhibit "D"

as referred to in the Affidavit of J. Christopher Thomas Q.C. this 13th day of March 2013

Before me

Commissioner for Oaths

EXHIBIT D

A.	TREATIES
A1.	*2009 ASEAN Comprehensive Investment Agreement*, 26 February 2009
A2.	*Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments*, 28 June 2009
A3.	*Agreement between Japan and the Republic of Singapore for a New-Age Economic Relationship*, 30 November 2002
A4.	*Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments*, 24 November 2011, Can. T.S. 2011 No. 27
A5.	*Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments*, 23 November 2011, Can. T.S. 2011 No. 26
A6.	*Agreement between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments*, 21 November 1993, Can. T.S. 1993 No. 14
A7.	*Agreement between the Government of Canada and the Government of the Republic of Bénin for the Promotion and Reciprocal Protection of Investments,* January 2013, Annex III
A8.	*Agreement between the Government of Canada the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments,* 6 April 1990, Can. T.S. 1990 No. 43
A9.	*Agreement between the Government of the Republic of Turkey and the Government of the United States of America concerning the Development of Trade and Investment Relations*, 29 September 1999
A10.	*Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning the Promotion and Reciprocal Protection of Investments*, 15 May 1986
A11.	*Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Antiqua and Barbuda for the Promotion and Protection of Investments*, 12 June 1987
A12.	*Agreement between Ukraine and Canada on Economic Cooperation*, 24 October 1994, Can. T.S. 1995 No. 37
A13.	*Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between the People's Republic of China and the Association of Southeast Asian Nations,* 15 August 2009
A14.	*Arrangement on Trade and Economic Cooperation between the Government of Canada and the Government of the Kingdom of Norway*, 3 December 1997
A15.	*Canada-Colombia Free Trade Agreement*, 15 August 2011, Can. T.S. 2011 No. 11, Chapter Twenty-Two
A16.	*Canada-Jordan Free Trade Agreement*, 1 October 2012, Can. T.S. 2012 No. 22, Chapter 15
A17.	*Canada-Panama Free Trade Agreement*, 14 May 2010, Chapter Twenty-Three
A18.	*Convention on the International Maritime Organisation*, 6 March 1948, 289 U.N.T.S. 3.
A19.	*Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 U.N.T.S. 160
A20.	*Energy Charter Treaty*, 17 December 1994, 34 I.L.M. 360
A21.	*Free Trade Agreement between Canada and the Hashemite Kingdom of Jordan*, 1 October 2012, Can. T.S 2012 No. 22
A22.	*Free Trade Agreement between Canada and the Republic of Peru*, 1 August 2009, Can. T.S. 2009 No. 15, Chapter Eight
A23.	*Free Trade Agreement between the Government of New Zealand and the Government*

	of the People's Republic of China, 7 April 2008
A24.	*General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187
A25.	*International Covenant on Civil and Political Rights*, 19 December 1996, 999 U.N.T.S. 171
A26.	*Japan-Switzerland Economic Partnership Agreement*, 19 February 2009
A27.	*North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, Can. T.S. 1994 No. 2.
A28.	*Singapore-United States Free Trade Agreement*, 6 May 2003
A29.	*United Nations Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972
A30.	*United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S 3
A31.	*United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*
A32.	*Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S 331
A33.	World Trade Organisation's *Agreement on Trade-Related Intellectual Property Rights*
A34.	World Trade Organisation's *Agreement on Trade-Related Investment Measures*

B.	**ARBITRATION RULES**
B1.	ICSID Additional Facility Rules (2006)
B2.	ICSID Arbitration Rules (1968)
B3.	ICSID Arbitration Rules (1984)
B4.	ICSID Arbitration Rules (2003)
B5.	ICSID Arbitration Rules (2006)
B6.	UNCITRAL Arbitration Rules (2010)

C.	**CASES**
C1.	*Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Georges Abi-Saab
C2.	*Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility
C3.	*ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award
C4.	*Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Decision on Jurisdiction, [1952] I.C.J. Rep. 93
C5.	*Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award
C6.	*Attorney General of Canada v. S.D Myers, Inc.*, [2004] 3 F.C.R. 368
C7.	*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1970, [1970] I.C.J. Rep. 19
C8.	*Bayview Irrigation District et al v. United Mexican States*, 2008 CanLII 22120 (ON SC)
C9.	*Brazil-Measures Affecting Importance of Retreaded Tyres*, Appellate Body Report, 17 December 2007
C10.	*Case of the Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America) (Preliminary Question)* [1954] I.C.J. Rep. 19
C11.	*Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL Case under Chapter 11, Award
C12.	*CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Award
C13.	*Eastern Carelia (Request for Advisory Opinion)* (1923), Advisory Opinion, P.C.I.J. (Ser. B) No. 5
C14.	*Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision

	of the Tribunal on Objections to Jurisdiction dated 25 January 2000
C15.	*Fireman's Fund Insurance Company v. United Mexican States,* ICSID Case No. ARB(AF)/02/01, Award
C16.	*Glamis Gold, Ltd. v. United States America*, UNCITRAL Case under Chapter 11, Award
C17.	*Grand River Enterprises Six Nations, Ltd. et al v United States of America*, UNCITRAL, Award
C18.	*Holiday Inns S.A. and others v. Morocco* (ICSID Case No. ARB/72/1), unpublished award, extract from ICSID website
C19.	*International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL Case under NAFTA Chapter 11, Award
C20.	*Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Award
C21.	*John R. Andre v. Government of Canada*, Notice of Intent to Submit a Claim, 19 March 2010
C22.	*Metalclad Corp v United Mexican States* ICSID Case No. ARB(AF)/97/1, Award
C23.	*Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka,* ICSID Case No ARB/00/2, Award
C24.	*Mondev v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award
C25.	*North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* Judgment of 20 February 1969, [1969] I.C.J. Rep. 3
C26.	*Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction
C27.	*Pope & Talbot Inc v. The Government of Canada,* UNCITRAL, Interim Award
C28.	*Robert Azinian, Kenneth Davitian, and Ellen Baca v. United Mexican States*, ICSID Case No. ARB/AF/97/2, Award
C29.	*Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award
C30.	*Saluka Investments BV (the Netherlands) v. Czech Republic,* UNCITRAL, Partial Award
C31.	*Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award
C32.	*The Case of the S.S. 'Lotus' (France v. Turkey)* (1927), Judgment of September 1927, P.C.I.J. (Ser. A) No. 10
C33.	*The Loewen Group Inc. and Raymond L Loewen v. United States of America,* ICSID Case No. ARB (AF)/98/3, Award
C34.	*The Loewen Group Inc. and Raymond L Loewen v. United States of America,* ICSID Case No. ARB (AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction
C35.	*United Mexican States v. Cargill Inc.* 2010 O.N.S.C. 4646
C36.	*United Mexican States v. Marvin Roy Feldman Karpa,* 2003 CanLII 34011 (ON SC)
C37.	*United Mexican States v. Metalclad Corporation*, [2001] B.C.S.C. 664
C38.	*United States-Standards for Reformulated and Conventional Gasoline,* WTO Appellate Body Report, 20 May 1996
C39.	*Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Jurisdiction

D.	**TREATISES AND OTHER REFERENCES**
D1.	Antonio R. Parra, The History of ICSID (United Kingdom: OUP, 2012) pp 23-26, 94, 209-210
D2.	Convention on the Settlement of Investment Disputes between States and Nationals of other States: Documents Concerning the Origin and Formulation of the Convention, Vol. II, Part 1 at p. 522 (20 July 1964, Consultative Meeting of Legal Experts in Bangkok, Thailand, April 27-May 1, 1964, Summary Record of Proceedings (Z10)

D3.	Convention on the Settlement of Investment Disputes between States and Nationals of other States: Documents Concerning the Origin and Formulation of the Convention, Vol. II, Part 1, Note by the General Counsel transmitted to the Executive Directors, SecM 62-17 (January 19, 1962)
D4.	Convention on the Settlement of Investment Disputes between States and Nationals of other States: Documents Concerning the Origin and Formulation of the Convention, Vol. II, Part 1, at p. 574 (Chairman's Report on Issues raised and Suggestions made at Regional Consultative Meetings of Legal Experts of Settlement of Investment Disputes, July 9, 1964, paragraph 74)
D5.	Convention on the Settlement of Investment Disputes between States and Nationals of other States: Documents Concerning the Origin and Formulation of the Convention, Vol. II, Part 1, p. 216, (Comments on the Preliminary draft of the Convention dated 15 October 1963, Article IV, Section 14, Enforcement of the Award (Preliminary Draft Convention: Working Paper for the Consultative Meetings of Legal Experts (COM/AF/WH/EU/AS/1))
D6.	Convention on the Settlement of Investment Disputes between States and Nationals of other States: Documents Concerning the Origin and Formulation of the Convention, Vol. II, Part 1, pp 418 to 420 (Summary Record of Proceedings, Geneva Consultative Meetings of Legal Experts, Z 9 (February 17-22, 1964))
D7.	Convention on the Settlement of Investment Disputes between States and Nationals of other States: Documents Concerning the Origin and Formulation of the Convention, Volume II, Part 1, p. 117
D8.	Gary B. Born, International Arbitration: Cases and Materials (Netherlands: Kluwer Law International, 2011) at pp. 1125-1126
D9.	James Crawford, ed., Brownlie's Principles of Public International Law, 8th ed. (Oxford: OUP, 2012), pp 9, 723-724
D10.	Norah Gallagher and Wenhua Shan, Chinese Investment Treaties: Policies and Practice, (Oxford: OUP, 2009), pp 165-166, and extract from Model Bilateral Investment Treaty, Version III
D11.	The Max Planck Encyclopedia of Public International Law, vol. II (United Kingdom: OUP, 2012), pp 937-940
D12.	The Max Planck Encyclopedia of Public International Law, vol. II (United Kingdom: OUP, 2012), pp 941-949
D13.	The Max Planck Encyclopedia of Public International Law, vol. VI (United Kingdom: OUP, 2012) at pp. 317-319
D14.	The Max Planck Encyclopedia of Public International Law, vol. VIII (United Kingdom: OUP, 2012) at pp 15-16

E.	**GOVERNMENT DOCUMENTS**
E1.	NAFTA Free Trade Commission Note of Interpretation of Certain Chapter 11 Provisions, 31 July 2001
E2.	NAFTA Free Trade Commission Statement on non-disputing party participation, 7 October 2003
E3.	Statement of Canada on open hearings in NAFTA Chapter Eleven Arbitrations, October 2003
E4.	Decision of the Free Trade Commission of the Central American and Dominican Republic Free Trade Agreement with the United States establishing Model Rules of Procedure, 23 February 2011

F.	**OTHER**
F1.	"Report of the International Law Commission covering the work of its fifth session, 1 June – 14 August 1953" in *Yearbook of the International Law Commission 1953*, vol. 2, p. 202 (Document A/2456)
F2.	"Report of the International Law Commission to the General Assembly on the work

	of its twenty-first session, 2 June – 8 August 1969" in *Yearbook of the International Law Commission 1969*, vol. 2, paragraphs 80-81
F3.	2004 Canadian Model Foreign Investment Protection Agreement
F4.	2012 U.S. Model Bilateral Investment Treaty
F5.	ASEAN Comprehensive Investment Agreement - An Introduction (Jakarta: ASEAN Secretariat, November 2012), p. 4
F6.	C Gray & B. Kingsbury, "Developments in Dispute Settlement: Inter-State Arbitration since 1945" (1992) 63 BYIL 97, pp 97 and 106-108
F7.	Commentaries to the draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session, November 2001, extract from the "Report of the International Law Commission on the work of its fifty-third session", Official Records of the General Assembly, fifty-sixth session, Supp. No. 10 (A/56/10) 59 at pp 61-62, 84-92
F8.	Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions: Towards a comprehensive European approach to international investment policy (COM (2010) 343 final, Brussels, 7 July 2000 at p. 5)
F9.	*Council of Canadians and Dale Clark, Deborah Bourque and George Kuehnbaum on their own behalf and on behalf of all members of the Canadian Union of Postal Workers v Canada*, Court File No. 01-CV-208141 (ON SC), Affidavit of James Crawford, 15 July 2004
F10.	International Centre for Settlement of Investment Disputes, "Possible Improvements of the Framework of ICSID Arbitration" (ICSID Secretariat, 22 October 2004)
F11.	International Law Commission, "Model Rules on Arbitral Procedure with a general commentary" in *Yearbook of the International Law Commission 1958*, vol. 11, p. 83
F12.	International Law Commission, "Responsibility of States for Internationally Wrongful Acts 2001" in *Yearbook of the International Law Commission* 2001, vol. 2, part 2 (New York: UN, 2001)
F13.	Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965
F14.	Revision of the UNCITRAL Arbitration Rules, Observations by the Government of Canada, United Nations Commission on International Trade Law, 41st session, New York, 16 June-3 July 2008, Document A/CN. 9/662

This is Exhibit "E"

as referred to in the Affidavit of J. Christopher Thomas Q.C. this 13th day of March 2013

Before me

Commissioner for Oaths

Court File No. T-153-13

FEDERAL COURT

BETWEEN:

HUPACASATH FIRST NATION

Applicant

And

THE MINISTER OF FOREIGN AFFAIRS CANADA and
THE ATTORNEY GENERAL OF CANADA

Respondents

Certificate Concerning Code of Conduct for Expert Witness

I, J. Christopher Thomas, Q.C., having been named as an expert witness by the Respondents, certify that I read the Code of Conduct for Expert Witnesses set out in the schedule to the *Federal Court Rules* and agree to be bound by it.

DATED at DISTRICT 11, Singapore, this 13TH MARCH, 2013.

J. Christopher Thomas, Q.C.

NUS Centre for International Law,
Bukit Timah Campus, Second Storey, Block B,
469 Bukit Timah Road, Republic of Singapore
Tel: 65 6516 4103
Fax: 65 6469 2312

52.2 (1) An affidavit or statement of an expert witness shall

- (*a*) set out in full the proposed evidence of the expert;
- (*b*) set out the expert's qualifications and the areas in respect of which it is proposed that he or she be qualified as an expert;
- (*c*) be accompanied by a certificate in Form 52.2 signed by the expert acknowledging that the expert has read the Code of Conduct for Expert Witnesses set out in the schedule and agrees to be bound by it; and
- (*d*) in the case of a statement, be in writing, signed by the expert and accompanied by a solicitor's certificate.

CODE OF CONDUCT FOR EXPERT WITNESSES

GENERAL DUTY TO THE COURT

1. An expert witness named to provide a report for use as evidence, or to testify in a proceeding, has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise.

2. This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.

EXPERTS' REPORTS

3. An expert's report submitted as an affidavit or statement referred to in rule 52.2 of the *Federal Courts Rules* shall include

- (*a*) a statement of the issues addressed in the report;
- (*b*) a description of the qualifications of the expert on the issues addressed in the report;
- (*c*) the expert's current *curriculum vitae* attached to the report as a schedule;
- (*d*) the facts and assumptions on which the opinions in the report are based; in that regard, a letter of instructions, if any, may be attached to the report as a schedule;
- (*e*) a summary of the opinions expressed;
- (*f*) in the case of a report that is provided in response to another expert's report, an indication of the points of agreement and of disagreement with the other expert's opinions;
- (*g*) the reasons for each opinion expressed;
- (*h*) any literature or other materials specifically relied on in support of the opinions;
- (*i*) a summary of the methodology used, including any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out, and whether a representative of any other party was present;
- (*j*) any caveats or qualifications necessary to render the report complete and accurate, including those relating to any insufficiency of data or research and an indication of any matters that fall outside the expert's field of expertise; and
- (*k*) particulars of any aspect of the expert's relationship with a party to the proceeding or the subject matter of his or her proposed evidence that might affect his or her duty to the Court.

4. An expert witness must report without delay to persons in receipt of the report any material changes affecting the expert's qualifications or the opinions expressed or the data contained in the report.

EXPERT CONFERENCES

5. An expert witness who is ordered by the Court to confer with another expert witness

- (*a*) must exercise independent, impartial and objective judgment on the issues addressed; and
- (*b*) must endeavour to clarify with the other expert witness the points on which they agree and the points on which their views differ.