Notes

The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health

I. INTRODUCTION

As the 21st century approaches, it would seem that the inexorable forces of free market economics and capitalism are encompassing the world. Globalization, liberalization, and reform are among the "buzzwords" bandied about as a panacea for the economic and social ills of developing nations.[1] It is in this spirit that many international trade and investment treaties have been and are in the process of being drafted.[2] The treaties purport to ensure increases in

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1. The World Bank and the International Monetary Fund programs are generally seen as promoting and structuring the liberalization and reform of developing country economies through their various programs, including loans and restructuring requirements. Against the backdrop of this process is the growing interdependence of the world's economies through the process of globalization. Liberalization, reform and globalization represent the tools advocated to bring about socioeconomic development outside the developed world.

2. The preambular language of treaties like the North American Free Trade Agreement (NAFTA) and the draft Multilateral Agreement on Investment (MAI) tends to include language that establishes a positive relationship between investment and development, or the possibility of promoting both simultaneously; e.g., the Preamble of the MAI includes the following language:

> Considering that international investment has assumed great importance in the world economy and has considerably contributed to the development of their countries;
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> Recognising that agreement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, the creation of employment opportunities and the improvement of living standards . . . .

Multilateral Agreement on Investment, Negotiating Text (as of April 24, 1998) (visited Sept. 15, 1999) <http://www.oecd.org//daf/cmis/mai/negtext.htm> [hereinafter MAI].

The preamble of NAFTA has the following language:

> Create new employment opportunities and improve working conditions and living standards in their respective territories; Undertake each of the preceding

capital and monetary flows to developing countries by providing a "level playing field" or a "global constitution of the economy" for investors, corporations and the like.[3] Among other defenses for investments, the protections against expropriation (direct or indirect) and associated remedies provided by these treaties are hoped to be sufficient to engender greater confidence in investing in developing countries.[4] This heightened confidence is expected to increase foreign direct investment in these nations and, in so doing, to generally promote economic and social development throughout the world.[5]

On the surface, the generalized link between investor confidence and socioeconomic development may seem sound. But among the confidence-building measures to be found in these treaties is the grant of standing to private actors to directly pursue claims against sovereign governments through international arbitration.[6] As discussed *infra*, an examination of several arbitrations initiated under these investor-state dispute mechanisms (ISDMs) reveals an attack on the capability of sovereign governments to protect their citizenry.[7] The advent of these new powers under international treaty agreements has not been without controversy.[8] The creation of the North

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in a manner consistent with environmental protection and conservation; Preserve their flexibility to safeguard the public welfare; Promote sustainable development; Strengthen the development and enforcement of environmental laws and regulations; and Protect, enhance and enforce basic workers' rights;

North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, 297 [hereinafter NAFTA].

3. Renato Ruggerio, the Director General of the World Trade Organization, was quoted as saying that the MAI negotiations were part of "writing the constitution of a single global economy." Preamble Collaborative, *The MAI in the Words of Framers, Proponents and Opponents* (visited Dec. 30, 1998) <http://www.islandnet.com/~ncfs/maisite/chaptr06.htm>.

4. *See generally* Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541 (1994); *see also* Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850 (1996-97).

5. *See* Taylor, *supra* note 4.

6. *See* NAFTA, *supra* note 2, at ch. 11, § B; MAI, *supra* note 2, § v.

7. *See* discussion *infra* Part IV.

8. *See, e.g.*, Canadian Labour Congress, *Submission by the Canadian Labour Congress to the House of Commons Sub Committee on International Trade, Trade Disputes, and Investment Regarding the Multilateral Agreement on Investment (Nov. 6, 1997)* (visited Dec. 30, 1998) <http://www.islandnet.com/~ncfs/maisite/clconmai.htm>; World Confederation of Labour, *Declaration on the Occasion of the 2nd Ministerial Conference of the WTO (Geneva, 18-20 May 1998)* (visited Dec. 30, 1998) <http://www.islandnet.com/~ncfs/maisite/pov-wto.htm>; Michael McMcloskey, Remarks on the Environmental Implications of the MAI at the MAI Conference (Dallas, Tex., Jan. 17, 1998) (visited Dec. 30, 1998) <http://www.islandnet.com/~ncfs/maisite/sc-pov.htm>; Lori Wallach, *Impact of NAFTA on the U.S. Economy: NAFTA's Failure at 41 months, Testimony*

American Free Trade Agreement (NAFTA) and the recently abandoned process of drafting the Multilateral Agreement on Investment (MAI) engendered much protest and dissent from environmental and labor groups throughout the world.[9]

The ability of private actors to challenge governmental legislation, regulatory safeguards, etc., under the ISDM has been highlighted by environmental and labor groups as one of the ISDM's principal drawbacks.[10] Both the power to contest the validity of legislation and the freedom with which that power may be exercised cause consternation. There are no checks or balances as to the use of the ISDM as embodied in NAFTA or the MAI.[11] The need to evaluate the merits of the claims of investors makes it impossible to dismiss claims readily. The freedom with which investors can bring claims presents governments with the prospect of fending off an unlimited number of claims.

Yet, the dispute mechanisms are legitimized by treaties as avenues for redress and protection of investments. The ISDM is structured by various sets of rules, including those of the International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL).[12] If an investor believes that his investment has been directly or indirectly "harmed" through violation of the guarantees provided in treaties like the NAFTA or the draft MAI, the ISDM provides a process by which the harm may be removed or the investor may be compensated.[13] This ability of a private party to directly file suit against a foreign government is of relatively recent vintage.[14] In

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Before the International Trade Commission (May 15, 1997) (visited Dec. 30, 1998) <http://www.islandnet.com/~ncfs/maisite/failure.htm> [hereinafter *Impact of NAFTA*]; Christopher Chamberlain, *The Role of World Bank Group in the Multilateral Agreement on Investment Negotiations and Administration (Jan. 12, 1998)* (visited Dec. 30, 1998) <http://www.islandnet.com/~ncfs/maisite/bic.htm>.

9. *See* sources cited *supra* note 8.

10. *See* sources cited *supra* note 8.

11. *See* NAFTA, *supra* note 2, at ch. 11, § B; MAI, *supra* note 2, § v.D.1.a (noting that, in the MAI, the Scope and Standing section of the Investor-State Procedures provides no other restriction than that the dispute concerns "an alleged breach of an obligation . . . which causes loss or damage to the investor or its investment").

12. *See* MAI, *supra* note 2, § v.D.2.

13. *See id.*; *see also* NAFTA, *supra* note 2, at ch. 11, § B.

14. *See* James H. Carter, *Investor-Host State Investment Dispute Settlement Procedures*, *in* THE NORTH AMERICAN FREE TRADE AGREEMENT: ITS SCOPE AND IMPLICATIONS FOR NORTH AMERICA'S LAWYERS, BUSINESSES AND POLICYMAKERS *at* § D.1 (Claire Reade ed., 1993) (noting that, prior to the international arbitration conventions, "the paradigm was protection by the investor's sovereign . . . by investor state intervention with the host state (diplomatically or otherwise) when a dispute arose. If formally espoused by the investor's

the past, only the investor's sovereign could bring the claim. Not only is the dispute mechanism characteristic of a movement away from the traditional role of the state as sole possessor of legal personality in international fora, but it also represents a departure from the requirement to first exhaust all other legal avenues within the host country.[15] Under the ISDM paradigm, an investor is free to initiate a claim against a sovereign government without consulting his home government and without litigating in the courts of the host country.

For example, if Philip Morris had a cigarette manufacturing plant in Thailand and the Thai Government were to introduce legislation completely banning advertising on all tobacco products, what could happen? Assuming both the United States and Thailand were under treaty obligations including the ISDM, Philip Morris could call for arbitral proceedings against the Thai Government to challenge the legislation. Philip Morris would not have to approach the United States Government before initiating the process and would not have to go in front of Thai courts. The fact that the Thai Government's interest in protecting public health through restrictive tobacco legislation would receive lesser importance than the investor rights of Philip Morris is problematic.

Accordingly, the arbitrations that have arisen under the ISDM in NAFTA are of specific concern to those interested in a government's power to protect public health. The paramount interests of public health are just as threatened by possible misuse of the ISDM as those concerns raised by environmental and labor groups. The public health arguments against an unrestricted ISDM overlap to a certain extent both logically and practically with that of the environmentalists. The overlap is in areas like pollution and hazardous substances. However, there is a larger arena within public health which is distinct and includes government provision of health services, universal access to health care, regulation of tobacco and alcohol consumption, and government monopolies in the healthcare field, to name a few.[16] What makes the public health standpoint

government, the claim passed from the investor's direct control.").

15. Both NAFTA and MAI permit investors to submit a claim for arbitration without litigating in domestic courts. In fact, in NAFTA, if the claim is submitted to arbitration, litigation in domestic courts is barred except to enforce arbitral awards and such after the arbitration has ended. *See* NAFTA, *supra* note 2, at ch. 11, § B; MAI, *supra* note 2, § v.

16. *See generally* Audrey R. Chapman, *Conceptualizing the Right to Health: A Violations Approach*, 65 TENN. L. REV. 389 (1998); F. Michael Willis, Note, *Economic Development, Environmental Protection, and the Right to Health*, 9 GEO. INT'L ENVTL. L. REV. 195 (1996); Steven D. Jamar, *The International Human Right to Health*, 22 S.U. L. REV. 1 (1994); Dieter Giesen, *A Right to Health Care?: A Comparative Perspective*, 4 HEALTH MATRIX 277 (1994).

transcend the overlap with the environmental concerns is that the right to health and what it encompasses is a disputed concept in the international context.[17] There is no consensus as to the relationship between the elements of the larger arena of public health and the right to health.[18] Therefore, the automatic classification of these elements of public health as being in the public purpose and so within the legitimate exercise of government power may also be disputed.

This Note will examine the ISDM in relation to the power of a sovereign state to protect public health because the ISDM may prove a challenge to that power. Part II discusses the evolution of the ISDM. Part III explores the reasons behind the development of the ISDM and its implications in the context of health concerns. Part IV examines several arbitrations which have arisen under NAFTA's ISDM which have a direct bearing on public health issues. Part V discusses the interplay between the right to health and the ISDM. Finally, Part VI provides some preliminary insight into alternatives to the ISDM.

II. WHAT IS THE ISDM?

In Henkin's casebook on International Law, the legal personality of a state to address an injury to one of its nationals is addressed:

> Under customary international law . . . an alien may properly seek from the state of which he or she is a national, and it may properly accord, diplomatic protection against an act or omission by a foreign state causing injury to the alien that may give rise to international responsibility . . . . The protecting state may intercede to protect its national's human rights, personal safety, property or other interests . . . if the alien has suffered an injury as a result of a violation of a substantive rule of international law attributable to a foreign state, the state of which he or she is a national may assert, on the state-to-state level, a claim against the offending state that is based on the injury to the alien. The injured alien may be a natural or a judicial person (e.g., a corporation) . . . . [W]hat originated as the claim of the private party can be elevated to the

17. *See* sources cited *supra* note 16.

18. *See* sources cited *supra* note 16.

> international plane, provided that the state of which the private party is a national elects to assert a claim against the allegedly responsible state.[19]

The derivative nature of international claims where the wrong is not directly inflicted on one state by another, but rather where injury is caused by one state to a national of another state, is being challenged.[20] The trend in international trade and investment treaties of sanctioning a direct ISDM eliminates the need for a state to intercede on behalf of its national. In the past, as identified by Henkin, private actors could not directly take up a cause of action against sovereign states, for the private actors did not have the standing to do so; the government of the country of which the private actor was a national had to agree to take the case on its behalf.[21] That government would have standing to pursue the foreign sovereign in an international forum.[22] The establishment of the ICSID in 1965 by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States was critical to the process of moving away from the law of nations, which granted international legal personality only to nations and international governmental organizations.[23] In addition to the rules of arbitration, the center provided a venue, secretariat, and expertise for these arbitrations between investors and foreign governments.

The government of the United States is leading the departure from the traditional constraints of standing. The U.S. has signed numerous Bilateral Investment Treaties (BITs) under which nationals can take disputes with foreign governments to arbitral panels for decisions under either ICSID or UNCITRAL rules.[24] Under these ISDMs, the U.S. government need not be consulted by the U.S.

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19. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 677-678 (3d ed. 1993).

20. *Id.*

21. *See id.; See generally* Carter, *supra* note 14.

22. *See* HENKIN, *supra* note 19, at 677-78.

23. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 17 U.S.T. 1270.

24. *See* Carter, *supra* note 14, at 9; *See also* Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty,* 92 AM. J. INT'L L. 621, 632 (1998); *See generally* Emmanuel Gaillard, *The International Centre for Settlement of Investment Disputes,* N.Y.L.J., Apr. 2, 1998 (visited Feb. 14, 1999) <http://www.ljx.com/practice/arbitration/0402intarb.html> (noting that "more than 1,200 bilateral investment treaties are currently in force around the world. Of these, more than 900 specify ICSID as the arbitral institution to which disputes will be submitted. Four major multilateral treaties (NAFTA, MERCOSUR, the Cartegena Free Trade Agreement and the Energy Charter Treaty) also provide for resolution of disputes under ICSID.").

national in its decision to take the dispute in front of a tribunal.[25] These measures for the creation of an ISDM have been imitated in NAFTA and have been included in the draft MAI.[26] Thus, the ISDM seems to be in the process of being multilateralized.

Against the backdrop of this multilateralization and the deterioration of the traditional paradigm of standing in international law, several arbitrations under NAFTA have challenged regulatory actions taken by sovereign governments in the arenas of environmental concerns and public health.[27] Among the various claims that investors have made, the claim for compensation for expropriation is the most serious. This challenge to the sovereign powers of governments does not necessarily entail the direct taking away of the power to legislate in the interests of the populace.[28] Indeed, it is the possibility of having to pay reparations for expropriation of the business of the private actor, as defined in these various treaties, which may serve as an even more effective indirect attack.[29] The prospect of crushing liability claims or the chilling effect of the number and size of claims that may result under ISDMs can deter governments from legislating in the interest of the public.[30]

Under an ISDM, the interests of investors constitute the limiting factor in determining whether a dispute will be taken to an arbitral panel. This concept is fundamental to understanding how governments will interpret their respective situations with regard to their legislative powers. For example, if the government of a nation wants to implement legislation banning the advertising of hard alcohol on television, there are several prudential considerations that must be taken into account with the advent of the ISDM. First, how many foreign investors can claim that the ban on advertising will result in a loss of sales and profits and hence will constitute a taking by the government? Second, how large will those claims be? Third, how likely is it that the arbitral panels will rule in favor of the investors? And finally, in the worst-case scenario where all claims are brought and the government loses all arbitrations, can the government afford to take that loss given the benefit to its people? These considerations show that the ISDM allows the interests of foreign

25. *See* Carter, *supra* note 14, at 9; Vandevelde, *supra* note 24, at 632.

26. *See* NAFTA, *supra* note 2, at ch. 11, § B; MAI, *supra* note 2, § v.

27. *See* discussion *infra* Part IV.

28. *See generally* Appleton & Associates International Lawyers, *The Multilateral Agreement on Investment (MAI)* (visited July 9, 1998) <*http://www.appletonlaw.com/MAI*>.

29. *See id.*

30. *See id.*

investors to be as central to a government's calculations and decisions as are the public interests of its people, despite the obvious inappropriateness of foreign investors determining the legislative agenda of a sovereign government.

Furthermore, that an investor can bypass the courts of his country as well as those of the host country and bring a claim under the ISDM lends credence to the belief that treaty negotiators have been misguided in their approach. The indifference of treaty negotiators to public health, the environment and labor is discussed *infra*.[31] In the treaties with ISDMs, the various levels of litigation required before arbitration and the limitation on claims that the traditional paradigm of standing provided are removed, and so is the disincentive for an investor to pursue a claim. It appears that the primary interest of negotiators in these ISDM-containing treaties has been to protect investors.[32]

In comparison, the limitations on standing and the freedom to litigate in U.S. federal case law arise from the Article III "case or controversy" requirement of the U.S. Constitution and "prudential considerations."[33] Standing to litigate is restricted by stringent standards set out by Justice Scalia in *Lujan v. Defenders of Wildlife*: (1) an "injury in fact;" (2) a causal connection between the injury and the conduct complained of; and (3) it must be "likely" that the injury will be "redressed by a favorable decision."[34] The strict standard for standing under U.S. law contrasts sharply with the lack of any comparable requirements for pursuing claims under ISDMs.[35] Furthermore, following the logic of prudential considerations, the litigation of an issue that falls outside the "zone of interests" protected by the law in question is prohibited.[36] An argument can be made that

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31. *See* discussion *infra* Part III.

32. *See* discussion *infra* Part III.

33. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 30-45 (13th ed. 1997).

34. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992), *reprinted in* GUNTHER & SULLIVAN, *supra* note 33, at 38-40.

35. *See* NAFTA, *supra* note 2, at ch. 11, § B; MAI, *supra* note 2, § v.

36. *See* Valerie Hinko, *Recent Decisions of the United States Court of Appeals for the District of Columbia: Constitutional Standing*, 66 GEO. WASH. L. REV. 748, 749 n.8 (1998) (noting that "prudential limits include prohibitions against . . . litigating an issue that falls outside the 'zone of interests' protected by the law in question . . . . Miami residents lacked prudential standing to challenge less restrictive immigration laws because Congress did not intend to permit their suit."); Robert S. Nix, Comment, *Bennett v. Spear: Justice Scalia Oversees the Latest 'Battle' in 'War' Between Property Rights and Environmentalism*, 70 TEMP. L. REV. 745, 757-758 (1997) (noting that "prudential requirements are self-imposed by the courts to distinguish the types of cases they are willing to hear. Prudential limitations on jurisdiction generally fall into one of three types. The third type of prudential standing

expropriation or takings claims by investors against regulations serving the public interest, such as public health legislation, would fall outside the "zone of interests" that such regulations were intended to protect.

In any case, the language of the ISDMs in NAFTA and in the MAI both provide for the following:

1. broad scope and standing for alleged breach of obligations under the treaties which caused loss or damage to an investor or its investment;
2. the ability of an investor to bring arbitration against a foreign host government, under the rules of ICSID or UNCITRAL (the MAI also provides for International Chamber of Commerce (ICC) rules), without clearance from its own national government;
3. the ability of an investor to bypass the domestic courts of the host government;
4. the confidentiality of the arbitral proceedings;
5. the privilege of each party to choose an arbitrator and have the presiding arbitrator be chosen by the agreement of the two disputants, where the majority votes of the three-member arbitral tribunal decides the arbitration;
6. the composition of the applicable law being the language of the treaties, interpreted and applied in accordance with the applicable rules of international law; and
7. the final award being binding and enforceable under either the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (for both MAI and NAFTA), the Inter-American Convention on International Commercial Arbitration, or the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the latter two conventions for NAFTA only).[37]

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requirement has become known as the 'zone of interests' test .... The 'zone of interests' test first appeared as a prudential standing requirement in *Association of Data Processing Service Organizations v. Camp* .... The United States Supreme Court held that, apart from the Article III case or controversy requirement, a plaintiff ... must also show that the interest sought to be protected is 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question' .... After *Data Processing*, the federal courts began using the 'zone of interests' test more liberally as a prudential restriction on standing. Eventually, however, the Supreme Court was moved to revisit the question of 'zone of interests' in *Clarke v. Securities Industry Ass'n* .... The Clarke Court reaffirmed the validity of the 'zone of interests' test as set forth in *Data Processing*.").

37. *See* MAI, *supra* note 2, § v; NAFTA, *supra* note 2, at ch. 11, § B; Gloria L.

Both NAFTA and the MAI require a period of notice which begins with the filing of a notice of intent to submit a claim.[38] That notice of intent must precede the filing of a claim for arbitration.[39] In all cases, negotiation and consultation are encouraged before any arbitral process is initiated.[40] NAFTA bars initiation or continuance of proceedings before any administrative tribunal or court under the law of any party, or any other dispute settlement process with regard to the same claim.[41] The MAI allows a contracting party to limit its consent to arbitration based on a similar bar on initiation or continuance of proceedings.[42]

The ISDM structure under either NAFTA or the MAI accomplishes several advantageous things for the investor. First of all, the unpredictability of enforcement of any judgment rendered is removed by the binding nature of the arbitral process and the clear delineation of conventions under which the resulting awards will be enforced.[43] The concern that details of the dispute will be available to the public is covered by the standards on confidentiality under the rules of arbitral institutions and conventions such as ICSID, UNCITRAL, and ICC.[44] The chance that potentially harmful information could be used by the public to distort the process and result in unfavorable consequences for the investor is thereby reduced. The costs of litigation in the courts of the host country and/or in the domestic courts of the investor are removed, and so an economic obstacle to fully pursuing the claim is eliminated.[45] Finally, the apprehension that the technical expertise of a jury may be limited

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Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259 (1994). *See generally* Noemi Gal-Or, *Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines*, 21 B.C. INT'L & COMP. L. REV. 1 (1998); Rodolpho Sandoval, *Chapter Eleven: Investments Under the North American Free Trade Agreement*, 25 ST. MARY'S L.J. 1195 (1994); Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes*, 2-SUM NAFTA: L. & BUS. REV. AM. 82 (1996); Lawrence L. Herman, *Settlement of International Trade Disputes-Challenges to Sovereignty-A Canadian Perspective*, 24 CAN.-U.S. L.J. 121 (1998).

38. *See* MAI, *supra* note 2, § v; NAFTA, *supra* note 2, at ch. 11, § B. *See generally* Gal-Or, *supra* note 37; Sandoval, *supra* note 37; Levin & Marin, *supra* note 37.

39. *See* sources cited *supra* note 38.

40. *See* sources cited *supra* note 37.

41. *See* NAFTA, *supra* note 2, at ch. 11, § B.

42. *See* MAI, *supra* note 2, § v.

43. *See* Hope H. Camp, Jr., *Dispute Resolution and U.S.-Mexico Business Transactions*, 5 U.S.-MEX. L.J. 85, 89-92 (1997).

44. *See id.*

45. *See id.* at 92-93.

in the host country or that, simply, a jury, a court, and the general law may be more sympathetic to the government in the host country is assuaged by the investor's ability to use the arbitral forum, appoint competent arbitrators, and have the law of either NAFTA or MAI applied to the claim.[46]

Ironically, the three most serious challenges to the power of a government to regulate in the public interest and, specifically, in the arena of public health are the ability of an investor to bypass host country courts, appoint party arbitrators, and have the law of either NAFTA or MAI be applied to the claim. The issue of party arbitrators revolves around arbitrator bias. The selection of party-appointed arbitrators is technically supposed to involve only those independent of the parties and those having impartial judgement in these matters.

> Arbitrators on international panels are expected to be both independent of the party appointing them and impartial: Apparently there is 'no room for debate' that a party-appointed arbitrator may be partisan.... Nevertheless it is usually conceded that without violating in any way this theoretical obligation of independence, the arbitrator may quite acceptably share the nationality, or political or economic philosophy, or 'legal culture' of the party who has nominated him—and may therefore be supposed from the very beginning to be 'sympathetic' to that party's contentions or 'favorably disposed' to its position.... Indeed one occasionally comes across the argument that the code of ethics mandating impartiality... gives... some sort of 'moral protection' against the pressure to rule in favor of their nominating party—an argument that itself illustrates nicely the sort of dynamic that must often arise.... In the course of discussions aimed at selecting party-appointed arbitrators in international cases, the highest praise one can give, apparently—one actually hears this said—is that the potential arbitrator 'knows just how far he can go in advocacy' without losing all credibility with his colleagues. By contrast, to recognize quite openly the inevitability of partisanship once party-appointed arbitrators are used might instead, as Judge Clifford has written, be 'the only intellectually honest approach

46. *See id.* at 89-96.

to the situation.'[47]

The expectation, under the various rules of arbitration offered by the ISDMs, that the party-appointed arbitrators will be impartial and will not advocate for their nominating party is an aspirational one. Actual practice indicates pressure to advocate for the nominating party and to do so in a way that does not clearly violate the codes of ethics set by the chosen arbitration rules. One would assume that since both the host country government and the investor get to appoint one arbitrator, those two arbitrators would cancel each other out because of the offsetting biases and create an effectively neutral tribunal with the neutral chairman in charge. However, in the case of the ISDM, the judgment of the panel can only be made by a majority of the panel. "The need to obtain a majority often leads to a process of negotiation and compromise, in which the neutral feels obliged to trim or adjust his position in the search for a coalition with one of his colleagues—and ultimately perhaps to concur, reluctantly, in an award different from the one he might have preferred."[48] The danger in this process can affect either the investor or the host country government depending upon the discreet advocacy abilities of their respective appointees. But as the possible appointees are usually knowledgeable about trade and investment issues and not well versed in issues of public health concerns, there is a greater chance that the investor will appoint an arbitrator with a trade and investment background and only agree to a neutral chairman with the same type of background. The government, in trying to appoint public health-oriented arbitrators, will be faced with the relative dearth of available choices and may have to concede the choice of background of the neutral arbitrator to the investor. Such a result would further prejudice

47. Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 506-509 (1997). *See also* W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION §§ 12.04, 13.03, 13.05, at 212, 233 (2d ed. 1990); Andreas Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L.J. 59, at 60, 69 (1995); William W. Park, *Neutrality, Predictability and Economic Co-operation*, 12 J. INT'L ARB. 99, 105 (1995); Murray L. Smith, *Impartiality of the Party-Appointed Arbitrator*, 6 ARB. INT'L 320, 333 (1990); Robert Coulson, *An American Critique of the IBA's Ethics for International Arbitrators*, 4 J. INT'L ARB. 103, 107-109 (1987); Francis J. Higgins & William G. Brown, *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035, 1043-1044 (1980).

48. Rau, *supra* note 47, at 501. *See also* Rau, *supra*, at 501 n.64 (noting that, in *In Re Publisher's Ass'n of N.Y. & N.Y. Typographical Union*, 36 Lab. Arb. Rep. (BNA) 706, 711-12 (1961), "[T]he chairman of the arbitral panel voted to join with employer representatives to discharge a worker, but wrote that he would have preferred a lesser penalty such as a 'severe disciplinary suspension,' and that discharge had been 'forced' upon him. With an unusual degree of candor, he conceded that the result was 'less desirable than the one I might have reached but the more reasonable of the two widely divergent positions.'").

the arbitral process against the government's case to protect its public health regulations.

Beyond the selection of arbitrators, the ability to bypass domestic courts of the foreign government enables the investor to avoid potentially unfavorable domestic laws of the host countries and judiciaries sympathetic to the government's cause. At the same time, this enables investors to have applied to their claims the language of treaties like NAFTA or the MAI, which, as discussed *infra*,[49] has been negotiated by those schooled in investment analysis and protection, as opposed to public health protection, and which may reflect law that is more advantageous to investors than that found in customary international law or in the domestic law of host-countries. Mexican courts have been known to favor the Mexican Government in cases of expropriation, favoring lower standards of compensation if there is any compensation at all.[50] Under Canadian law there is no constitutional requirement that property taken by the state be taken for a public purpose or that just compensation be provided; this, of course, would include regulatory takings.[51] Carla Hills (a former U.S. trade representative who negotiated the terms of NAFTA), in a legal opinion given to cigarette manufacturers who were trying to combat a plain packaging proposal in Canada, "considered whether there [were] any exceptions to NAFTA's obligations when it comes to laws which are designed to promote health measures."[52] Hills determined that "Article 2101 provide[d] for a health exception but only to specified parts of NAFTA. Neither the investment chapter (chapter 11) nor the intellectual property chapter (chapter 17) [were] included in this exception clause. Therefore, Hills concluded, there was no exception for measures designed to promote health which offend either chapter."[53] Chapter 11 of NAFTA includes the language that

49. *See* discussion *infra* Part III.

50. *See* Kristin L. Oelstrom, *A Treaty for the Future: The Dispute Settlement Mechanisms of the NAFTA*, 25 LAW & POL'Y INT'L BUS. 783, 801-03 (1994) (noting that "The problems with Mexico . . . made the dispute resolution provision an important negotiation goal for the United States . . . . Prior to any international monitoring of investment disputes, investors were forced to rely on the host countries' laws for resolving their concerns. This practice was unsatisfactory to investors for many reasons, including refusals by domestic courts to enforce awards, disagreement on international law standards of treatment for foreign investment, and the 'politicization and high visibility' of many disputes . . . . Previous international investors have learned the lesson that domestic courts will 'bend over backwards' to protect what they consider to be important national interests.").

51. *See* David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499, 522 (1996).

52. *Id.* at 526.

53. *Id.*

structures its ISDM and the language which defines the standards for expropriation and compensation for expropriation.[54] Both NAFTA and MAI specifically mention the requirement of compensation for indirect expropriation, a concept which includes regulatory takings.[55] Though the state international law on expropriation is not fully clear and stable, regulatory takings are generally not compensable.[56] As discussed *infra*, this rule favoring a sovereign's power to legislate in the public interest is essentially compromised by the NAFTA and MAI expropriation language.[57] Given the examples above of the various freedoms and protections afforded to investors by an ISDM, the expense to the sovereignty of host-country governments seems alarming.

Nevertheless, the freedoms and protections provided to investors under the ISDM are part of the current reality. The international arena has tentatively accepted the ISDM as part of its workings. The answers that are needed are how and why this has happened. Globalization and its associated forces and motives provide a foundation for an answer.

III. GLOBALIZATION OF TRADE AND INVESTMENT, THE ISDM, PUBLIC HEALTH AND THE CONFLICT OF PERSPECTIVES

State borders have yielded to a large extent to the drive towards globalization. The cross-border mobility of capital, technology, goods and services is leading to economic integration transcending these borders.[58] In this integrated global political economy, those schooled in pure investment analysis see the promotion of national treatment, most-favored nation status, compensation for expropriation, and the enforcement of these principles through ISDMs as essential for the foreign investor.[59] However, the interests of wealth and profit maximization are the primary motives for these beliefs, which do not recognize that not all globalization and not all liberalization and reform are necessarily

54. NAFTA, *supra* note 2, at ch. 11.

55. *Id.*; MAI, *supra* note 2, § v.

56. *See* discussion *infra* Part IV.

57. *See* discussion *infra* Part IV.

58. Interview with Dr. Douglas Bettcher, Coordinator of Framework Convention on Tobacco Control Team, World Health Organization, in Geneva, Switz. (Aug. 3, 1998).

59. *See* Jan Huner, *Environment Regulation and International Agreements: Lessons from the MAI* (visited Feb. 15, 1999) <http://www.islandnet.com/~ncfs/maisite/pov-mai3.htm>.

beneficial.[60] When the interests and livelihoods of people are compromised at the altar of free-market reforms without some equitable protection from global economic pressures and forms of economic instability, the intentions of those doing the compromising must be questioned. The recent Asian economic crisis is, at the very least, proof that blind faith in the process of globalization, as it stands, is not without its dangers.

Nonetheless, a major catalyst for the liberalization of global trade has been the eight rounds of multilateral trade negotiations in the form of the General Agreement on Tariffs and Trade (GATT); the most recent of the sessions were the Uruguay and Tokyo Rounds.[61] The conclusion of the Uruguay Round, marked by the Final Act (GATT, 1994), transformed the General Agreement on Tariffs and Trade into a permanent organization, the World Trade Organization (WTO). The WTO provides the normative framework for approximately 90% of world trade.[62] As the WTO provides such a large percentage of the normative framework for international trade, it can be said that the WTO is the primary international institution for managing such trade.

In the arena of investment, strong opposition from developing countries confined the scope of the GATT talks to the trade-restrictive and distortive effects of a narrow range of trade related investment measures (TRIMS).[63] In fact, it can be claimed that negotiations on investment issues in the Uruguay Round never really got started. Despite the modest inroads made in the area of investment at the global level through the GATT and WTO, the U.S. has signed numerous BITs with other countries in order to protect the investments of U.S. nationals.[64] These BITs, mostly negotiated in the latter half of the 20th century, have expanded the liberalization of foreign direct investment standards.[65] Within a higher level of

60. *See id.*

61. *See generally* Eric M. Burt, *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 AM. U.J. INT'L L. & POL'Y 1015 (1997).

62. *See* Claudia Brewster, Note & Comment, *Restoring Childhood: Saving the World's Children from Toiling in Textile Sweatshops*, 16 J.L. & COM. 191, 204 (1997); Alberto Bernabe-Riefkohl, *'To Dream the Impossible Dream': Globalization and Harmonization of Environmental Laws*, 20 N.C. J. INT'L L. & COM. REG. 205 n.3 (1995); Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361, 391 (1995).

63. *See* Burt, *supra* note 61, at 1033.

64. *See supra* note 14 and accompanying text; *See also* Kenneth J. Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621 (1993).

65. *See* sources cited *supra* note 64.

multilateralization belongs the North American Free Trade Agreement between the U.S., Canada, and Mexico.[66] NAFTA was formulated, in part, to ensure equal protection of trade and investment among the three countries.[67] Finally, until the December 3rd declaration of the discontinuation of talks, negotiations amongst the 29 member states of the Organization for Economic Co-operation and Development (OECD) had focused on reducing impediments to the cross-border flow of investments.[68] The intended result was to have taken the form of the MAI and was to have been open to accession by non-member states after its completion.[69] The MAI, if realized, would have been the only agreement of sufficient scale to serve as a counterpart to the WTO in investment matters.[70] Whatever the present fate of the MAI, it cannot be ignored that negotiations for the agreement came about because of the convergence of political and corporate will. The majority of participants still desire some form of global agreement on investment, be it through the OECD's MAI or through some other suitable forum, like the WTO. The momentum for the globalization of foreign investment standards remains and so does the need to carefully examine its repercussions.

As mentioned above, the momentum for globalization has caused negative reactions. In fact, there were mass demonstrations in Geneva against the WTO and the MAI in May of 1998 during the 50th anniversary celebrations.[71] At issue was the promotion of the interests of investors over the rights of a state to regulate sensitive areas like the environment and labor.[72] A group of thirty Non-Governmental Organizations (NGOs) released the Joint NGO Statement on the MAI severely attacking its current form.[73] In

66. NAFTA is necessarily within a higher level of multilateralization, as it is a treaty between three countries as opposed to two as the title bilateral investment treaty implies.

67. *See generally* David A. Gantz, *Symposium: NAFTA and the Expansion of Free Trade: Current Issues and Future Prospects: The United States and the Expansion of Western Hemisphere Free Trade: Participant or Observer?*, 14 ARIZ. J. INT'L & COMP. LAW 381 (1997).

68. *See generally* MAI, *supra* note 2.

69. *See id.*

70. The United States Council for International Business has been quoted as saying that "[w]hen concluded, the MAI will become the next pillar in the global system of trade, finance, and investment." *The MAI in the Words of Framers, Proponents and Opponents, Compiled by Preamble Collaborative* (visited Dec. 30, 1998) <http://www.islandnet.com/~ncfs/maisite/chaptr06.htm>.

71. *See* Martin Khor, *WTO Party Marred by Anti-Globalisation Protests, 50th Anniversary of the GATT/WTO Agreement* (visited Dec. 30, 1998) <http://www.islandnet.com/~ncfs/maisite/wto-50.htm>.

72. *See id.*

73. *See Joint NGO Statement on the Multilateral Agreement on Investment*

response to the criticism, negotiators tried to include language addressing the issues or took reservations to the treaties in order to protect the sectors.[74] The ultimate negotiating text of the MAI still has references to the environment and labor in brackets, indicating that negotiators have not been able to agree on how to protect these areas, or if to protect them at all.[75] In addition, the MAI's placement of some of the language in its preamble belies the supposed importance attached to the efforts to safeguard the environment and labor. For example, the Vienna Convention on the Law of Treaties clearly states that preambular language is not binding on parties to a treaty.[76] In NAFTA, reservations were created and language inserted to address the concerns of the environmental and labor lobbies, but the results to date are still questionable.[77]

These various treaty agreements tend to follow a purely market-driven approach to development. The negotiations for the

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(NGO/OECD Consultation on the MAI, Paris, France, 27 October 1997) (visited Dec. 30, 1998) <http://www.globalexchange.org/education/economy/JointStatementOnMAI.html> This statement notes that:

> The MAI contains no binding, enforceable obligations for corporate conduct concerning the environment, labour standards and anti-competitive behaviour. The MAI gives foreign investors exclusive standing under a legally binding agreement to attack legitimate regulations designed to protect the environment, safeguard public health, uphold the rights of employees, and promote fair competition.
>
> Further, citizens, indigenous peoples, local governments and NGOs do not have access to the dispute resolution system, and subsequently can neither hold multinational investors accountable to the communities which host them, nor can they comment in cases where an investor sues a government.
>
> The MAI will be in conflict with many existing and future international, national and sub-national laws and regulations protecting the environment, natural resources, public health, culture, social welfare and employment laws, will cause many to be repealed, and will deter the adoption of new legislation, or the strengthening of existing ones.
>
> The MAI is explicitly designed to make it easier for investors to move capital, including production facilities, from one country to another despite evidence that increased capital mobility disproportionately benefits multinational corporations at the expense of most of the world's peoples.
>
> We call on the OECD and National Governments to:
>
> Eliminate the investor state dispute resolution mechanism .... Eliminate the MAI's expropriation provision so that investors are not granted an absolute right to compensation for expropriation. Governments must ensure that they do not have to pay for the right to set environmental, labour, health and safety standards even if compliance with such regulations imposes significant financial obligations on investors.

74. *See, e.g.*, Huner, *supra* note 59.

75. *See* MAI, *supra* note 2.

76. *See* HENKIN, *supra* note 19, at ch. 6.

77. *See Impact of NAFTA*, *supra* note 8.

MAI provide a prime example of this outlook. Even when the negotiators moved to address environmental concerns, their attempts were flawed. Their "three-anchor" approach to the environment included: (1) preambular language; (2) a provision built on NAFTA Article 1114, stating that environmental and social standards as contained in national laws and regulations should not be lowered in order to attract an investment; (3) an outline for ensuring investor performance on environmental protection through the OECD Guidelines for Multinational Enterprises.[78] As mentioned above, however, preambular language is not binding on parties.[79] The provision based on NAFTA Article 1114 only says that lowering of standards is not appropriate and is directed at governments trying to attract investment.[80] The OECD Guidelines are guidelines that merely serve to suggest directions for investor behavior.[81] This left the issue of the right of a government to legislate more stringent provisions untouched or, rather, open to examination in the context of expropriation and ISDMs.

Jan Huner, the assistant to the sometime Chairman of the OECD's Negotiating Group on the MAI, Frans Engering, has discussed the effects of environmental lobbies on the MAI negotiations.[82] He states that the negotiators were surprised at the portrayal of the MAI as a threat to the environment, and ascribes their surprise to their being essentially investment specialists who brought that narrow vision to the negotiations.[83] The negotiators brought an agenda based on the elements that they considered "logical and essential parts of an investment discipline."[84] Investor-state dispute settlement and compensation for expropriation were two of these elements.[85] Huner comments on the negotiations include the following:

> The negotiations [for the MAI] formally began in 1995, but were preceded by 3 years of preparatory work in the context of the OECD Investment Committee. These preparations identified the main

78. *See* Huner, *supra* note 59.

79. *See id.*

80. Needless to say, there was major debate on whether this should be a binding provision.

81. *See* MAI, *supra* note 2.

82. *See* Huner, *supra* note 59.

83. *See id.*

84. *Id.*

85. *See id.*

> concepts of the MAI . . . . It is noteworthy that the environment was not an issue in this group. The focus was almost exclusively on other agreements that contain investment rules . . . . But the issue of how the MAI relates to multilateral environmental agreements (MEAs) was not discussed. This would suggest that it was not a subject for debate in capitals either . . . . I am quite sure, though, that the environment has been debated in Washington in the context of preparing for the MAI negotiations. After all, this issue figured fairly prominently in the NAFTA negotiations, and the NAFTA investment chapter contains explicit provisions on environmental concerns. It is in fact the NAFTA which provided the model for the proposed 'not lowering of standards' provision in the MAI.[86]

A rather serious lack of interest in issues outside of pure investment-driven analysis is apparent. The relationship of the MAI to multilateral environment agreements was not discussed until pressure was brought to bear by the environmental lobby.[87] Moreover, it seems the inaction was born not of avoidance but rather of indifference, a potentially more dangerous attitude.

However, despite the impaired tactics, the treatment of the environment is on a higher level than that accorded public health in these types of treaties. "Human health" is barely mentioned within the environmental clauses and is treated by negotiators as an environmental issue.[88] But, even though "piling on social clauses" in these multilateral agreements may impede advancement in improved trade integration and engender dissent among nations, the public health implications of trade and investment liberalization should not be neglected.[89] Social improvements in public health ought to be seen as a mandatory strategy in fashioning a sustainable globalization process. Health improvements have been increasingly associated with positive macroeconomic and microeconomic effect. Moreover, the critical relationship between health and human capital formation has become an important area of recent health policy research.[90]

Yet, there is evidently a wide gap between what ought to be

86. *Id.*

87. *See id.*

88. *See generally* MAI, *supra* note 2.

89. *See* Bettcher, *supra* note 58.

90. *See id.*

and the present reality. Regulation, be it environment, labor, or public health-related, can still be challenged under investor-state dispute mechanisms, and compensation for expropriation or other harms claimed as a result of the regulation can still be required under the arbitration process.

IV. ARBITRATIONS UNDER NAFTA'S ISDM

Most of the arbitrations affecting public health have arisen out of NAFTA's Chapter 11 provisions.[91] The onset of the first ICSID arbitrations precede those arising under NAFTA, and so precede NAFTA in positing an ISDM.[92] But the earlier ICSID arbitrations and those arising under the ISDM clauses of the many BITs of the U.S. are beyond the scope of this Note. There are no arbitrations to be examined under the MAI, as it has not entered into force. However, the MAI investor-state dispute provisions are modeled after those of NAFTA, and so the NAFTA arbitrations take on even more significance.[93]

Chapter 11 of NAFTA gives any U.S., Mexican or Canadian investor the unprecedented right to sue a sovereign nation in which it has invested.[94] Not only do these suits bypass the domestic courts of each country involved, they also bypass NAFTA's binational and trinational dispute-settlement process.[95]

Prior to NAFTA, those disputes among the parties were resolved through binational or trinational arbitral proceedings.[96] Mexico had never accepted the ISDM as part of its international treaty obligations.[97] No OECD countries had accepted treaty obligations among themselves including an ISDM.[98] Yet, "Chapter 11's dispute-settlement mechanism is patterned after the investor-state dispute-settlement mechanism of the standard U.S.

91. *See* Matthew Nolan & Darin Lippoldt, *Obscure NAFTA Clause Empowers Parties: Investor-Protection Clause Lets Companies Haul Signatories into Arbitration for Violation of Pact*, NAT'L L.J., Apr. 6, 1998, at B08 (visited Feb. 14, 1999) <http://www.ljextra.com/practice/internat/0406nafta.html>.

92. *See generally* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 23.

93. *See* sources cited *supra* note 8.

94. *See* Nolan & Lippoldt, *supra* note 91.

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

bilateral investment treaty and permits an investor to submit a claim to binding arbitration under internationally accepted rules."[99]

The three main objectives of Chapter 11 are:

> 1. to establish a secure investment environment through transparent rules for fair treatment of foreign investment and investors; 2. to remove barriers to investment; and 3. to provide an effective means of resolving disputes between a foreign investor and a host country.[100]

The chapter applies to all governmental measures relating to investment, except those covering financial services, which are governed by Chapter 14.[101] "Investment is broadly defined in Chapter 11 to include ownership or other interests in an enterprise, and both existing and future investments are covered."[102] The most important Chapter 11 protection for foreign investment is that it may not be expropriated except if it is "done for a public purpose, on a nondiscriminatory basis, in accordance with due process of law and in accordance with international law. Payment for an expropriation should be fair-market value of the investment and should be paid without delay in a G7 currency or its monetary equivalent, including interest."[103] So, a public health regulation which, in effect, expropriates an investment would have to be for a public purpose to remain in force. In any case, the investor would have to be compensated at "fair-market value."

NAFTA seems to follow the dictates of the *Restatement (Third) of the Foreign Relations Law of the United States* in its language. The *Restatement* addresses expropriation in § 712, entitled *Economic Injury to Nationals of Other States*:

> A state is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state that (a) is not for a public

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99. *Id.*

100. *Id.* (citing Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement,* 27 INT'L LAW. 727 (1993)).

101. *See* Nolan & Lippoldt, *supra* note 91 ("Subchapter A sets out each party's obligations with respect to investors from other NAFTA countries and to their investments in its territory. Subchapter B affords investors the right to seek compensation through international arbitration for damage to their investment due to a violation of the provisions of Subchapter A.").

102. *Id.*

103. *Id.* G7 is the grouping that includes the seven most industrialized nations in the world: U.S., Japan, Germany, U.K., Italy, France and Canada.

> purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation; For compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking and in a form economically usable by the foreign national . . . .[104]

Though outside the scope of this Note, there is a conflict over whether in actual practice the requirement under international law of a public purpose for expropriation is seriously examined by jurists, given the broad discretion of a government in defining the public interest.[105] Moreover, not all of the language on expropriation in the *Restatement* and NAFTA is universally accepted as part of customary international law (e.g., the standards for compensation for expropriation).[106] Thus, the validity of arbitral proceedings under the ISDM for compensation of regulatory expropriation can also be disputed.

However, the requirement of a public purpose for expropriation is an element that is significant in determining whether an expropriation is legal or illegal, for the lack of public purpose renders an expropriation illegal. An illegal expropriation requires a higher standard of compensation. Hence, a lack of public purpose is also significant in determining the level of compensation:

> It is by now well settled in law that expropriation is not *per se* unlawful. Contrarily, its legitimacy and lawfulness is derived from the permanent sovereignty of States over their national wealth and natural resources and from their inalienable right to freely choose their own economic and social structure, on which no court can sit in judgement. However, it is

104. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987), *reprinted in* HENKIN ET AL., *supra* note 19, at 727.

105. *See generally* Tali Levy, Note, *NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the 'Prompt, Adequate and Effective' Standard*, 31 STAN. J. INT'L L. 423 (1995); Michael P. Avramovich, *The Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD's Multilateral Agreement on Investment?*, 31 J. MARSHALL L. REV. 1201 (1998); Ginger Lew & Jean Heilman Grier, *The Role of International Law in the Twenty-First Century: A Role for Governments in the Resolution of International Private Commercial Disputes*, 18 FORDHAM INT'L L.J. 1720 (1995).

106. *See* sources cited *supra* note 105.

> also true that even a lawful expropriation imposes 'on the government concerned the obligation to pay compensation,' though 'the exercise of a sovereign right . . . is not subject to review by an international Tribunal.' However, as noted by the Tribunal in *Amoco International Finance Corporation*, the first principle established by the Permanent Court of International Justice in *Chorzów Factory Case* and recently confirmed by the arbitral award in *AMINOIL* 'is that a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking.'[107]
>
> . . . .
>
> [T]here are mainly three elements, namely the requirement of: 1) "public purpose," 2) "non-discrimination" and 3) "prompt payment," which form, in international writings and decisions, the ground for all the discussions on lawfulness or unlawfulness of all types of expropriatory measures . . . . [I]t "is generally accepted that some types of expropriation are *inherently unlawful*—among those one can cite cases in which foreign assets are taken on a discriminatory basis or for something other than a public purpose." This same understanding is clearly stated in an . . . award dealing with the nationalization of [an] . . . insurance company, wherein the Tribunal ruled that it could not hold "that the nationalization of Iran America was by itself unlawful . . . under customary international law . . . as there is not sufficient evidence before the Tribunal to show that nationalization was not carried out for a public purpose as part of a large reform program, or was discriminatory."[108]

The lack of a public purpose in promulgating a regulatory measure that is deemed expropriatory would also cause the

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107. ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN-U.S. CLAIMS TRIBUNAL 321-324 (Developments in Int'l Law No. 17, 1994); *see also* Concerning the Factory at Chorzów ("Chorzów Factory") (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13); Kuwait v. American Independent Oil Company, *reprinted in* 21 I.L.M. 976 (1982).

108. MOURI, supra note 107, at 324-325.

expropriation to be considered unlawful, requiring a higher standard of compensation, including damages, and/or rendering the measure ineffective.[109]

However, the standard for what constitutes a public purpose is far from settled. It was stated in the award in *Amoco International Finance Corporation v. Government of the Islamic Republic of Iran* that the "precise definition of the 'public purpose' for which an expropriation may be lawfully decided had neither been agreed upon in international law nor even suggested."[110] The Tribunal further noted that "[i]t is clear that, as a result of the modern acceptance of the right to nationalize, this term [public purpose] is broadly interpreted and that States, in practice, are granted extensive discretion."[111] Yet, even given the broad discretion that States may be given in determining what is for the public purpose, that does not prevent an investor from challenging a regulation in front of an arbitral panel on the basis that it was not promulgated for such a

109. *See* Brice M. Claggett & Daniel B. Poneman, *The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law*, 22 INT'L LAW. 35, 60-61 (1988) (noting that the consequences of an unlawful or illegal expropriation are "[f]irst, under sound (though not undisputed) principles, whether a taking is wrongful or not determines whether or not the taking effectively passes title to the expropriating state under international law and under domestic systems that incorporate international law. This issue has been extensively litigated in such cases as *The Rose Mary*. In that case, the Anglo-Iranian Oil Company claimed title to oil sold by the Government of Iran to the defendants. The latter argued, *inter alia*, that the company did not own the cargo of oil because it had been expropriated pursuant to the law of Iran. The court held that the company's title had not been extinguished, because of the failure of the Government of Iran to provide for any compensation to the company under the Oil Nationalization Law or any other measure. For that reason, the court held the nationalization law to be contrary to international law and ineffective to pass title. In concluding that the disputed oil remained the property of the company, the court determined that an expropriation that was wrongful under international law could not give rise to the passage of title to the oil from the former owner to the expropriating state. The same result should follow . . . as the touchstone of state liability . . . . The second consequence of wrongfulness relates to the standard of compensation for economic injuries. Under the doctrine established in [sic] the *Chorzów Factory Case*, the proper measure of compensation for a lawful taking is the 'value of the undertaking at the moment of dispossession, plus the interest to the day of payment.' But if an expropriation is unlawful (wrongful), then 'reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.' The remedy for a wrongful taking should be restitution, or if that is impossible, the amount in money that has a value equivalent to restitution."); *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. k (1987) ("A taking that is unlawful because of lack of just compensation gives rise to a claim for damages. A taking that is unlawful only because it was discriminatory or not for a public purpose, but was accompanied by just compensation, might bring only nominal damages."); MOURI, *supra* note 107, at 374-377.

110. 15 Iran-U.S. Cl. Trib. Rep. 189, 233 (1987), *quoted in* MOURI, *supra* note 107, at 326.

111. Amoco International Finance Corp., *supra* note 110, at 233, *quoted in* MOURI, *supra* note 107, at 327.

purpose. Given the uncertain status of the definition of public purpose, there is a chance that the panel would accept the challenge as valid.

The danger that such a challenge would be accepted is aggravated by the fact that the test for a public purpose "sometimes overlaps with the 'non-discrimination' requirement because it may be said that a taking which is not for a public purpose is to some extent discriminatory . . . ."[112] As discussed *infra*, in the hypothetical case of legislation authorizing privatization of a state-run healthcare system, restricted to private stakeholders who are nationals of the state, the legislation may run afoul of the requirements of public purpose and non-discrimination for lawful expropriation.[113] Furthermore, the Tribunal in *Amoco International Finance Corporation* stated that an "expropriation, the only purpose of which would have been to avoid contractual obligations of the State or of an entity controlled by it, could not, nevertheless, be considered as lawful under international law."[114] Then, for example, could a decision to violate the terms of a contract and not export a vital natural resource for public health, such as clean water, leave room for a declaration of unlawful expropriation? Determining whether such a regulation is truly in the public interest or actually meant to avoid contractual obligations is a difficult enough task to warrant an answer in the affirmative. As is the case, one of the pending arbitrations examined *infra* has this very same fact pattern.[115] On the other hand, the same Tribunal which pronounced these tests which can be used by investors to assail regulatory measures also gave some comfort to governments in that even "if financial considerations were considered in the adoption of . . . such a decision . . . this fact would not be sufficient, in the opinion of the Tribunal, to prove that this decision was not taken for a public purpose."[116] The very act of governing involves taking into account financial considerations in interests of the public. Regulating with a public purpose necessarily requires the same. The question remains, however, can regulating with a public purpose be deemed expropriatory?

Historically, under international law, the act of regulation by a

112. MOURI, *supra* note 107, at 328.

113. *See* discussion *infra* Part V.

114. Amoco International Finance Corp., *supra* note 110, at 233, *quoted in* MOURI, *supra* note 107, at 327.

115. *See* discussion *infra* Part IV.

116. Amoco International Finance Corp., *supra* note 110, at 233-34, *quoted in* MOURI, *supra* note 107, at 327.

government which caused negative effects to the investment of a foreign national without physical invasion or seizure (indirect or creeping expropriation) was not necessarily compensable.[117] The line between indirect loss for which no compensation could be claimed and expropriation entitling the investor to compensation was "not always easy to draw, especially when the alleged loss [was] . . . merely the deprivation of an uncovenanted benefit."[118] But there was an inclination to support governments in their regulatory activities and not restrict them by labeling such measures as expropriatory. B. A. Wortley, in his 1959 book entitled *Expropriation in Public International Law*, speaks directly to the issue of health legislation:

> In *Gallagher v. Lynn* . . . it was laid down that expropriation does not normally occur through the incidental effect of legislation. In that case it was held that a law safeguarding the health of the inhabitants of Northern Ireland by permitting the sale only of inspected milk was not intended to affect trade with the adjoining district of Southern Ireland, and to cause a loss of 'goodwill' attaching to Southern Irish business, even though this was its indirect effect, but its intent was to 'secure the health of the inhabitants of Northern Ireland by protecting them from the dangers of an unregulated supply of milk.'[119]

This concept of regulation in the public interest being generally characterized as non-expropriatory is echoed in Rosalyn Higgins' (a current jurist on the International Court of Justice) lectures at the Hague Academy in 1982, but she questions the intellectual viability of this distinction between formal and indirect takings:

> It would seem to be the case that while it is acknowledged that property may be indirectly 'taken' through regulation, this does not attract the duty to compensate. The position seems to be (and the present writer finds the underlying policy difference hard to appreciate) that a taking for public use requires just compensation to be paid; whereas an indirect taking for regulatory purposes does not. The distinction seems to lie not between formal and indirect taking, but rather

117. *See* B. A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 50-53 (1959).

118. *Id.* at 51.

119. *Id.* at 53.

in the purposes of the taking . . . .

> Is this distinction intellectually viable? Is not the State in both cases (that is either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of scope and effect) to a taking, would need to be 'for a public purpose' (in the sense of . . . the general, rather than for a private interest). And just compensation would be due.[120]

The questioning of the distinction aside, the 1985 award in *SEDCO, Inc. v. National Iranian Oil Company* stated "a State is not liable for economic injury which is a consequence of bona fide 'regulation' within the accepted police power of states."[121] Moreover, in his book Mouri states that "[u]nder the rules of international law, measures by States or attributable to them are not considered to be wrongful or to depart from the international standards of justice which may entail liability for compensation of damages inflicted, . . . if they were taken to maintain the public order and to regulate the internal affairs of the country, such as to . . . preserve or protect the environment, health and safety of the nation."[122]

The MAI language on expropriation states:

> A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as "expropriation") except: a) for a purpose which is in the public interest, b) on a non-discriminatory basis, c) in accordance with due process of law, and d) accompanied by payment of prompt, adequate and effective compensation . . .[123]

This language is similar to that found in NAFTA and § 712 of the *Restatement.* Both NAFTA and MAI specifically mention

120. Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 259, 330-331 (1982).

121. SEDCO, Inc. v. National Iranian Oil Co., 9 Iran-U.S. Cl. Trib. Rep. 248-75 (1985), *reprinted in* MOURI, *supra* note 107, at 249.

122. MOURI, *supra* note 107, at 248.

123. MAI, *supra* note 2, § v.

indirect expropriation. Yet, the Chairman of the MAI negotiations' proposal to change the MAI expropriation language considers excluding the reference to "directly or indirectly" expropriating and replacing "any measure or measures having equivalent effect" with "any measure tantamount to expropriation."[124] The proposal is explained by an interpretive note:

> Articles . . . on Expropriation and Compensation, are intended to incorporate into the MAI existing international legal norms. The reference in Article IV.2.1 to expropriation or nationalisation and 'measures tantamount to expropriation or nationalisation' reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur, through regulation, revenue raising and other normal activity in the public interest undertaken by governments.[125]

The interpretative note would have us believe that the MAI is not introducing new rights in international law when stating that normal regulation in the public interest, if having effects tantamount to expropriation, requires compensation, it is only acknowledging the current state of international law. Whether or not the requirement of compensation for regulatory expropriation is valid under international law, the interpretive note indicates that the MAI was drafted by those who believe that the requirement of compensation in these situations is proper. These same negotiators would probably agree with Higgins in not finding the distinction between regulatory expropriation and general expropriation intellectually viable, and NAFTA negotiators were probably of the same mindset. This mindset would, for instance, also favor looking to the expropriatory effect of regulatory measures versus looking to the intent of a government to expropriate as posited in the language of the award in *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*: "The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."[126] The general lack of

124. *Id.*

125. *Id.*

126. Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219, 225-26 (1984); *See also* MOURI, supra note 107, at 259-260.

preference for the sanctity of a sovereign's power to regulate and protect the public interest is clear. Arbitrators judging disputes under the MAI or NAFTA would have to use the language of the treaties as applicable law and so would be bound by this viewpoint which is inherently tied into that language.

In contrast, U.S. case law on regulatory takings in property law errs on the side of the government unless all economically viable use of the property is eliminated.[127] Even then, there is no taking if the limitation imposed by the regulation inheres in the background principles of the state property law.[128] This leaning towards the side of government in takings cases may be symbolized by picturing a "thumb on the scale" in the balancing of private and public interests. Takings law in the U.S. is based on the Fifth Amendment language which states that "nor shall private property be taken for public use, without just compensation."[129] Throughout the case law on regulatory takings in the U.S. Supreme Court there emerges a consensus that regulation without physical invasion rarely is a taking, even when there is substantial economic loss. In a recent case the Court affirmed that its "cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."[130] One of the early and most important takings cases considered by the Court is *Pennsylvania Coal Co. v. Mahon*.[131] Justice Holmes announced that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[132] This case established a new doctrine whereby a regulation which goes "too far" is tantamount to a taking of property on the level of a physical taking or invasion. However, the fact that Justice Holmes, in his opinion, left the requirement that the regulation go "too far" to trigger a regulatory

127. Interview with Cynthia Estlund, Professor of Law at Columbia Law School, in New York (May 7, 1999); *See generally* William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813 (1998); John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994); Paul W. Garnett, *Forward-Looking Costing Methodologies and the Supreme Court's Takings Clause Jurisprudence*, 7 COMMLAW CONSPECTUS 119 (1999); Blaine I. Green, *The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection*, 15 YALE J. ON REG. 329 (1998).

128. Interview with Cynthia Estlund, Professor of Law at Columbia Law School, in New York (May 7, 1999).

129. U.S. CONST. amend. V.

130. Concrete Pipe and Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 645 (1993).

131. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

132. *Id.* at 415.

taking leaves intact the understanding that government regulation which is not considered that extreme is to be viewed in a light favorable to the government interests. For, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[133] The test for what is "too far" in the parlance of the Court has been left indeterminate. Some cases have seemingly limited what can be seen as too extreme and yet others have promoted the interests of the private party in deciding what is excessive.[134]

More than fifty years later, in *Penn Central Transportation Co. v. City of New York*, the Court stated that " several factors" that have "particular significance" when it engages in the evaluation of a taking are:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. "'Taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good . . . .[135]

That a physical invasion by government can more readily be characterized as a taking than a regulation was once again established in the language of the last of the three factors. This reluctance on the part of the Court to equate regulatory taking with physical taking emphasized the "thumb on the scale" in favor of government. Moreover, the Court decided that if it could be concluded that "'the health, safety, morals or general welfare' would be promoted by prohibiting particular contemplated uses of land," then the prohibitory regulation of those property rights would be justified without compensation.[136]

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133. *Id.* at 413.

134. *See, e.g.*, Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

135. Penn Central, 438 U.S. at 124.

136. *Id.* at 125; *See also* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts are Doing About It*, 28 STETSON L. REV. 533 (1999).

Following the landmark 1992 decision of the Court in *Lucas v. South Carolina Coastal Council*, Richard Epstein, a noted takings scholar, characterized the body of Supreme Court takings case law as follows:

> Although anticipated before its arrival, last term's decision in Lucas v. South Carolina Coastal Council has been rightly regarded as anticlimactic. To be sure, the decision represents something of a high water mark in takings jurisprudence, for a six justice majority of the Court allowed that some restrictions on land use might in principle be caught by Takings Clause. But what the Court gave with one hand, it took away with the other. Justice Scalia held that the Takings Clause reached only those land use restrictions that deprived the owner of 'all economically beneficial uses' of property. The proper status of permanent but partial restrictions on land use was not explicitly addressed, but these may now be regarded as legitimate and non-compensable exercises under the state police power. Yet even with total regulatory takings, Justice Scalia stopped short of embracing Lucas' theory that the total loss of beneficial use constitutes a *per se* compensable taking. Rather he held that even for total regulatory takings a second test had to be passed as well: If the regulated activity constitutes some form of noxious use or nuisance-like activity subject to regulation at common law, then the state need not compensate the landowner for any resulting economic loss.[137]

Epstein's writings on takings have been criticized "within the legal academy as 'shallow,' a 'travesty of constitutional scholarship,' and a failure as a matter of history, logic, philosophy, or textual analysis."[138] Yet, his work has been used as a "legitimizing tool by those interested in using the Takings Clause to halt government regulation."[139] "Many of the changes to takings doctrine that Epstein proposed now have found their way into federal case law, and the judges and justices making these critical alterations to constitutional

137. Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993).

138. Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of The Progress So Far*, 25 B.C. ENVT'L. AFF. L. REV. 509, 520 (1998).

139. *Id.* at 521.

law have relied extensively upon" Epstein's writings.[140] But, most importantly, Epstein is a standard bearer for the proposition that compensation be required for "virtually any regulation that diminishes the value of property."[141] As such, Epstein may be in the best position to comment on whether there indeed is a "thumb on the scale" in favor of government when courts consider regulatory takings cases. As his commentary on the standards for finding a taking after *Lucas* suggests, the "thumb on the scale" remains and the public interest receives greater deference.

One would think that the same deference would be given on the international level. The following arbitrations will demonstrate a different state of affairs. Of the eight relevant arbitrations, six are currently pending, one was not pursued beyond the initial notice of intent to claim, and the last was settled outside of the arbitral process.[142]

A. Signa S.A. de C.V. v. Government of Canada[143]

In March of 1996, Signa, a Mexican pharmaceutical chemical manufacturer, brought notice of a claim under NAFTA with regard to Canada's Bill C-91 which extended the protection of drug patents and made it difficult for Apotex (a Winnipeg-based company) to get approval for manufacturing a generic form of an antibiotic, which Signa was to supply in their joint-venture. Apotex was in a dispute with the Canadian Government over the approvals process and Signa filed the notice of intent claiming $50 million (Canadian) for the lost opportunity due to the regulations.

However, the Canadian Government had enacted the regulations to help promote research and development in the pharmaceutical field and so to promote its citizen's public health:

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140. *Id.*

141. *Id.*

142. During research on the following arbitrations, differing monetary figures for the various claims were found in the sources available to the public. In every case the highest monetary figure cited is used.

143. *See* Appleton & Associates International Lawyers, *Financial Times of London Reports NAFTA Countries May Face Wave of Claims* (visited Aug. 26, 1999) <http://www.appletonlaw.com/articles/dat/A_0011.html>; Sierra Club, *The MAI's Environmental Protection is Inadequate* (visited Aug. 26, 1999) <http://www.sierraclub.ca/national/mai/appendix2.html>; Appleton & Associates International Lawyers, *First-ever Lawsuit Against Canadian Government Using NAFTA Investor-State Process* (visited Aug. 26, 1999) <http://www.appletonlaw.com/articles/dat/A_0010.html>.

> [T]he federal government enacted legislation (Bill C-22—1987 and Bill C-91—1993) that modified the Patent Act by first extending market exclusivity from between 7 and 10 years from the date of the first Notice of Compliance (NOC) in Bill C-22, and then by eliminating the process of compulsory licensing which required the Commissioner of Patents to issue upon request a licence to manufacture and sell generic product while a patent was still in effect (Bill C-91). In return for these concessions to lengthen the period of protection, and then to eliminate compulsory licensing, the Pharmaceutical Manufacturers Association of Canada (PMAC) entered into an agreement with the government and people of Canada to increase their Canadian investment in R&D as a percentage of product sales to 10% by 1996. That target was actually reached three years ahead of schedule in 1993.[144]

The claim, if pursued and compensated, would reward Signa at the expense of the public interest. In the end, however, the claim was not pursued beyond the initial notice.

B. Metalclad Corp. v. United Mexican States[145]

Metalclad Corp., a hazardous-waste disposal company based in Newport Beach, California, filed the first complaint alleging that Mexico unlawfully expropriated its hazardous-waste landfill located in the community of Guadalcazar. Metalclad is claiming damages which are commensurate to the fair-market value of the landfill. (Metalclad is also considering filing another claim under NAFTA's

144. Coalition for Biomedical and Health Research, *Review of the Patent Act Amendments (Bill C-91) (March 1997)* (visited Aug. 26, 1999) <http://www.cbhr.ca/patent-a/c91-web.htm>.

145. *See generally NAFTA's Investor-Protection Clause Faces Test*, SAN DIEGO UNION-TRIBUNE, July 13, 1997, at I-1 [hereinafter NAFTA San Diego]; John O'Dell, *O.C. Firm Files 1st Mexico NAFTA Claim*, L.A. TIMES, Oct. 17, 1997, at D10; *The First NAFTA Investment Case has its Judges*, PR NEWSWIRE, May 21, 1997; Kara Sissel, *Government to Expand Hazwaste Capacity*, CHEMICAL WEEK, June 25, 1997, at s39; Elisabeth Malkin, *NAFTA to the Rescue*, BUS. WK. INT'L ED., Aug. 4, 1997, at 26; Abid Aslam, *Environment-Finance: Corporations Use Trade Pact to Sue Countries*, INTER PRESS SERVICE, Sept. 2, 1998; *Metalclad Files Quarterly Results*, PR NEWSWIRE, Nov. 23, 1998; *Metalclad Announces Nasdaq Approval and Procedures on NAFTA Claim*, PR NEWSWIRE, July 15, 1999; *Metalclad Announces Withdrawal from Mexico*, MEXICO BUS. MONTHLY, May 1, 1999. *See also* Nolan & Lippoldt, *supra* note 91; sources cited *supra* note 143.

ISDM for a second landfill in Aguascalientes, Mexico.)

Metalclad alleges that, although it has been ready since 1995 to open the landfill, it has been prevented from going forward by Mexican authorities of the state government of San Luis Potosi. The tribunal selected by Metalclad and Mexico includes: Benjamin R. Civiletti, former Attorney General of the United States; José Luis Siqueiros, an international lawyer and Mexican law professor; and Elihu Lauterpacht a British law professor at Cambridge University, who is serving as president of the tribunal.

The tribunal convened July 15, 1997, and Metalclad filed its memorial Oct. 13, 1997. Though Mexico's response was due in January 1998, it filed its memorial on February 17 after requesting an extension. Metalclad had asked the tribunal to rule on this issue before determining the need for further pleadings based on Mexico's failure to file in a timely fashion. Metalclad filed a reply brief on August 21. The tribunal ruled on November 13 that Mexico had to file a rejoinder on the merits of the case no later than March 19, 1999. A final oral hearing is to begin on August 30, 1999 and end on or before September 10, 1999. The arbitral panel will be able to rule on the case after that hearing.

The facts of the case indicate that Metalclad had taken over an illegal waste disposal plant on the condition that it clean up existing problems. But local residents and environmental groups were not satisfied with the arrangement and put pressure on the authorities to stop it. State authorities declared the site part of a 600,000 acre ecological zone and refused to allow the firm to reopen the facility after an environmental impact assessment revealed that it was perched atop delicate underground streams which would risk contamination of the water supply if the facility were to be reopened. Metalclad is seeking some $150 million in damages, claiming that the zoning law constitutes an effective seizure of the company's property.

Under the rights conferred by NAFTA, the Government of Mexico could be forced to shoulder the risks and costs of Metalclad's investment should the company win its suit, even though it acted for a public purpose in protecting an ecological zone and water supply.

C. *DESONA v. United Mexican States*[146]

The complainants are the principals of Desechos Solidos de Naucalpan, or DESONA, a California-based company. DESONA bid on the management of a solid-waste landfill project in Naucalpan de Juarez, Mexico. It spent $3 million entering into a 15-year contract with the municipality; however, Naucalpan county council nullified the agreement not long after it was signed. DESONA alleges that Naucalpan breached the contract and "appropriated" the enterprise in violation of Chapter 11, and is seeking over $17 million in damages. The DESONA tribunal consists of Mr. Civiletti, Claus von Wobeser Hoepfner of Mexico, and Jan Paulsson of France, who is presiding.

The details of this arbitration and the reasons behind the nullification of the contract are still not available to the public and so make further discussion of the arbitration difficult. However, a decision is expected in August 1999.

D. *Waste Management, Inc. v. United Mexican States*[147]

As in the DESONA case, public details of this arbitration are scarce. What is known is that there is a $60 million claim by Waste Management, Inc. against the Mexican Government which was originally instituted by USA Waste Services, Inc. USA Waste Services merged with Waste Management, which is now pursuing the arbitration. The specific nature of the claim has not been made public, but the first hearing before the arbitral panel took place on July 16, 1999.

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146. *See* sources cited *supra* note 145; *See generally* Matthew Fleischer, *In re NAFTA Litigation*, AM. LAW., Dec. 1997, *available in* LEXIS, Legnew Library, Amlawr File.

147. *See U.S.-Mexico: Waste Companies Seek Damages from Mexico*, GREENWIRE, July 19, 1999; *see also* sources cited *supra* note 146

E. Sun Belt Water Inc. v. Government of Canada[148]

The complainant, Sun Belt Water, is a California-based company which entered into a joint venture with Snowcap Waters Ltd, in Canada, and in 1991 signed a $105 million contract to export water by supertanker from British Columbia in Canada to Goleta, a suburb of Santa Barbara, California. Four days after the contract was signed, the British Columbia Government imposed a moratorium on bulk-water exports which was later confirmed by legislation. Snowcap settled with the British Columbia Government for $335,000 (Canadian) but the Government did not settle with Sun Belt Water. Sun Belt Water is suing for in excess of $468 million dollars in damages, claiming that the moratorium violated NAFTA, as provinces are not allowed to halt the international free trade of goods, and that the Government showed discriminatory treatment in settling with Snowcap but not with Sun Belt Water. Essentially, they claimed that the moratorium expropriated the profits that Sun Belt Water expected to materialize from the fulfillment of the contract.

The moratorium on bulk-water exports by British Columbia represented a move to protect a natural resource that is of the utmost importance to human health; and to leave the control of that resource in the hands of the Government as opposed to private interests. Several NGOs and other organizations have commented on the danger to public health that private profit in the trade of water and the Sun Belt Water case represent:

> Nothing is more essential to public health, security and well-being than water .... It is wrong environmentally, economically and morally to engage in the large-scale trade of water .... Water is a public trust; it belongs to the people. No one has the right to profit from it at someone else's expense .... This is a

148. *See generally* Courtney Tower, *Canada, U.S. Seek Pact to Ban Water Exports*, J. COM.,.Dec. 17, 1998, at 6A; Ruth Walker, *Water Lawsuit Tests NAFTA*, CHRISTIAN SCIENCE MONITOR, Dec. 16, 1998, at 7; Valerie Lawton, *Water Export Case May Cost Millions: U.S. Company Seeks Compensation Under Free-Trade Agreement*, TORONTO STAR, Dec. 9, 1998, at D3; Robert Collier & Glen Martin, *U.S. Laws Diluted by Trade Pacts*, S.F. CHRON., July 24, 1999, at A1; Dave Cunningham, *A Flood of Claims: NAFTA Suits Challenge Sovereignty Over Water, Fuel and Even Court Bonds*, BRIT. COLUM. REPORT, Dec. 28, 1998, at 30-31; Colin Nickerson, *Canada Wants Water for Itself; A Ban on Bulk Exports of Water is an Effort to Keep the Resource from Being a NAFTA Commodity*, PORTLAND PRESS HERALD, Mar. 5, 1999, at 2A; *National Organizations Urge Chretien to Ban Bulk Water Exports Before It's Too Late*, CAN. CORP. NEWSWIRE, Feb. 9, 1999 [hereinafter *National Organizations*]; Mark Bourrie, *Environment-Canada: Moratorium on Export of Water*, INTER PRESS SERVICE, Mar. 5, 1999; *There's Plenty Water Up North: Water Policy*, ECONOMIST, Jan. 23, 1999, at 26 [hereinafter *Plenty Water*]. *See also* sources cited *supra* note 147.

> very clear issue of the public interest versus private profit .... We must protect water from being privatized and ensure that control of it remains in the public sector. That is the only way to ensure Canadians continue to have clean, affordable and sustainable supplies of fresh water .... Companies like Sun Belt see water as the oil of the next century .... Allowing water to be traded away is certain to harm the environment since it will inevitably place growing numbers of lakes and rivers beyond the reach of governments and the rule of law. Canada must act now.[149]

What is more telling in this situation is that in late 1998, when Sun Belt Water filed its notice of intent to arbitrate, both the U.S. and Canada were "determined to prevent exports of fresh water in bulk and hope to reach 'some kind of agreement' on it soon."[150] That type of recognition of a public purpose on the part of the U.S. would indicate that it would not support a state-state arbitral claim arising under this same dispute.

F. S.D. Myers, Inc. v. Government of Canada[151]

Between 1995 and early 1997, Canada banned exports of industrial waste containing carcinogenic Polychlorinated Biphenyls (PCBs). It then abandoned this policy when U.S. firms threatened a challenge under NAFTA. According to lawyers for S.D. Myers Inc., a Ohio-based firm which specializes in PCB treatment, the company intends to sue for cash damages for past losses under NAFTA's ISDM. S.D. Myers has served notice to the Canadian government of this intent. The firm argues that the ban denied it the opportunity to profit and, therefore, amounted to an expropriation of its assets outlawed by NAFTA and is claiming $20 million in damages.

149. *National Organizations*, *supra* note 148.

150. Tower, *supra* note 148.

151. *See* sources cited *supra* note 148; *See generally Canadians Questioned Legality of PCB Ban, Documents Showed,* HAZMAT TRANSPORT NEWS, Dec. 18, 1998 [hereinafter *Legality of PCB Ban*]; *Canada Lifts PCB Waste Export Ban*, HAZNEWS, Mar. 1, 1997 [hereinafter *Canada Lifts Ban*]; Philippe Guerin, *Waste Disposal Playing Field is Slanted One Way*, FIN. POST, Jan. 23, 1997, at 18; *Why the Secrecy over Investor's Rights?*, FIN. POST, Aug. 29, 1998, at 20; Paul Weinberg, *Trade-Health: Canadians Worry Over NAFTA Dispute Mechanism*, INTER PRESS SERVICE, Sept. 23, 1998; Scott Morrison & Edward Alden, *Ottawa Faces Claim Over PCB Waste Ban*, FIN. TIMES, Sept. 2, 1998, at 4; Dana S. Myers, *Waste Disposal Firms Can Still Make Profits*, FIN. POST, Jan. 17, 1997, at 10.

However, S.D. Myers can no longer import PCBs into the U.S. from Canada, as the U.S. Environmental Protection Agency in July 1997 banned all imports of PCBs. Thus, this action amounts to the pursuit of money from the Canadian Government for the few months in which the U.S. allowed PCBs to be imported and Canada's ban was in effect.

The public purpose of protecting the populace from exposure to the carcinogenic PCBs was, of course, ignored in S.D. Myers' filing of the claim. Hearings are scheduled to begin February, 2000.

G. *Methanex Corp. v. United States*[152]

The complainant, Methanex Corp., is a Vancouver-based company which is the largest producer of methanol in the world. Methanol is one of two principal raw materials necessary in the production of Methyl Tertiary Butyl Ether (MTBE) a carcinogen and, ironically, a gasoline additive used in the U.S. following the 1990 Clean Air Act instituted to combat air pollution. After the State of California ordered the removal of MTBE as a gasoline additive by 2002 under Governor Grey Davis' March 1999 executive order to protect water supplies, Methanex, which sells methanol to MTBE producers, filed a notice of intent to arbitrate on June 15, 1999, claiming $970 million in damages for the measure which Methanex claimed was tantamount to expropriation.

An EPA panel focused on a University of California study that

152. *See generally* Joe Kamalick, *Canada's Methanex Slams U.S. MTBE Policy*, CHEM. NEWS & INTELLIGENCE, July 29, 1999; Natalia Williams, *Health Canada Studies MTBE Warning*, TORONTO STAR, July 28, 1999; *Methanex Reports Improved Q2'99 Results*, CAN. NEWSWIRE, July 22, 1999; *News in Brief*, ENVT'L. COMPLIANCE & LITIG., July 1999, at 8; Michael MacDonald, *Letters to the Editor Column*, OTTAWA SUN, June 25, 1999, at 14; Phil Zahodiakin, *Methanex Files Intent to Sue California if State Bans MTBE*, PESTICIDE & TOXIC CHEM. NEWS, June 24, 1999 [hereinafter MTBE Pesticide]; Kara Sissell, *Methanex Seeks Compensation for California MTBE Ban; NAFTA*, CHEM. WK., June 23, 1999, at 11; Danielle Knight, *Environment-Finance: Lawsuits Spark Calls for Changes in NAFTA*, INTER PRESS SERVICE, June 23, 1999; Carolyn Keplinger, *Methanex Files Notice of Intent in NAFTA Arbitration Claim*, OXY-FUEL NEWS, June 21, 1999; *NAFTA Has Become Pollution Permit*, TORONTO STAR, June 21, 1999 [hereinafter *Pollution Permit*]; Robert Collier & Glen Martin, *Canadian Firm Sues California Over MTBE*, S.F. CHRON., June 18, 1999, at A1; Edward Alden, *California's Methanol Ban Prompts $1bn Suit*, FIN. TIMES, June 17, 1999, at 6; Annette Hugh & Gerry Karey, *Methanex Seeks Damages for 'Unfair' Targeting of MTBE by California*, INT'L PETROCHEM. REPORT, June 17, 1999, at 1; Eric Kronenwetter, *Hurt Methanex Asks U.S. for MTBE Damages*, OIL DAILY, June 17, 1999; Gerald Karey & Annette Hugh, *Methanex Bids To Retain Share of U.S. Methanol Market*, PLATT'S OILGRAM NEWS, June 17, 1999, at 1; Gary Taylor, *Methanex Seeks Dollars 970m Damages Thru NAFTA*, CHEM. NEWS & INTELLIGENCE, June 15, 1999; *Methanex Seeks Damages Under NAFTA for California MTBE Ban*, PR NEWSWIRE, June 15, 1999. *See also* sources cited *supra* note 151.

showed that MTBE affected at least 10,000 ground-water sites throughout California. The contamination of the drinking water supply combined with the EPA revelation that MTBE caused tumors in lab rats, and may do so in humans, is definitely a public health concern. Moreover, the EPA has recommended that MTBE usage in gasoline be "significantly reduced."[153]

But with 6% of global demand for methanol in California represented by the MTBE demand, Methanex countered the EPA panel's findings, stating that the pollution of drinking water comes from mismanagement of underground storage tanks and from outboard motors on the water. Methanex stated that the MTBE migration was due to "uncontrolled and uncorrected gasoline release to the environment."[154]

MTBE has also been banned in Alaska and in North Carolina, and several studies have suggested that it is a probable human carcinogen. However, Methanex states that "in three significant reviews of MTBE, the International Agency for Research on Cancer, set up under the World Health Organization, found that MTBE was not classifiable as a human carcinogen. The National Toxicology Program determined not to list MTBE as a carcinogen in its 9th report to Congress. Under California's Proposition 65 regulations, MTBE was not listed as a human carcinogen nor as a developmental toxic nor as a reproductive toxic."[155]

Despite Methanex's claims to the contrary, it is more probable that California was acting in the public interest in reaction to contamination of fresh water supplies and the risk of cancer from MTBE exposure. Though Methanex claims that the executive order does not aim at the true causes of MTBE contamination and that MTBE is not a carcinogen, again, it is more likely that California's actions were not the result of an ulterior trade-destructive motive.[156]

Methanex has until late September 1999 to consult and negotiate with the U.S. before it files for arbitration.

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153. Kamalick, *supra* note 152.

154. *Id.*

155. MTBE Pesticide, *supra* note 152.

156. *See Pollution Permit*, *supra* note 152 (noting that "The intent of this NAFTA provision [Chapter 11] was to prevent governments from using health and the environment as an excuse to throw up trade barriers. But such motivation hardly seems plausible in the California case. Why would it block methanol to let a California company pollute its water supply?").

H. *Ethyl Corp. v. Government of Canada*[157]

In this case, which took place prior to Methanex, a similar situation was involved. Ethyl Corporation, a Virginia-based corporation, was the manufacturer of Methylcyclopentadienyl Manganese Tricarbonyl (MMT), a gasoline additive. The possible health effects of MMT were behind the passage of Bill C-29, which banned the international and inter-provincial trade in MMT. Notice of intent to arbitrate was filed in September 1996 and a claim for arbitration was filed in April 1997.

However, in July of 1998, the Canadian Government agreed to lift its prohibition against importing and inter-provincial trading in the fuel additive. It further agreed to pay MMT maker Ethyl Corporation some $10 million and issued a public statement that the formula posed no health risk. However, there is evidence linking the manganese used in the octane enhancer to nervous-system problems, and it has been considered a possible neurotoxin for some time. So, Canada was not without a public purpose in banning MMT.

As part of the settlement, U.S.-based Ethyl agreed to drop its $250 million claim under NAFTA, alleging that Canada had expropriated its anticipated profits. The company also had claimed that its reputation had been damaged by parliamentary debate before the ban was imposed.

It is clear that governments are in danger of facing claims under the ISDM, if they adopt measures that have the effect of expropriating foreign investments, directly or indirectly. Investors have found a tool for attacking any legislation or regulation that they do not find beneficial for their investment without regard to the intended effects of the regulation or the purpose it serves.

157. *See* sources cited *supra* note 152; *see generally* Iris Winston, *Fuelling the Debate Over MMT in Gasoline*, OTTAWA CITIZEN, Dec. 19, 1997 (visited July 7, 1998) <http://www.ottawacitizen.com/wheels/971219/1475133.html>; *see also* Jesus Juanos i Timoneda, *The Legal Dynamics of the Regulation of MMT: Air Quality Standards and the Salt Lake City Airshed*, 17 J. LAND RESOURCES & ENVT'L. L. 283 (1997).

I. Evaluating the ISDM

Looking at the arbitrations above, it would seem that NAFTA is empowering private parties to force foreign governments to pay for furthering the public purpose. Interestingly enough, the majority of the investors bringing claims are based in the U.S., where typically no such compensation is granted. These parties are trying to force governments to compensate them for regulations which serve to protect public health to protect an ecological zone and water supply and to limit human exposure to carcinogens or neurotoxins. None of the regulations directly expropriated the parties' investments, except possibly in the cases of DESONA or Waste Management, Inc.[158] What the regulations served to do was create obligations and rights in the public interest, which, if complied with, indirectly "expropriated" the parties' investments. As one journalist commented:

> Metalclad wouldn't stand much of a chance in the United States, where companies can't recover the costs of complying with environmental regulations. It would have an even tougher time in a Mexican court. Under a provision in NAFTA, the odds are greatly improved, however .... Metalclad gets a fast-track trip in Washington before a three-judge tribunal that will render a binding decision. Metalclad even got to pick one of the judges.[159]

The structure of the ISDM is allowing Metalclad to bypass the courts of the U.S. and Mexico and to possibly recover its costs of complying with the regulations. And Metalclad is able to do so, even when there is suspicion that "Metalclad's environmental impact assessment [of the hazardous waste project] was full of erroneous information."[160]

Similarly, S. D. Myers is using the ISDM to get compensation for business lost during the ban on PCBs. Moreover, the firm used the threat of arbitration under the ISDM to force Canada to rescind a ban on chemical waste exports (PCBs) in the first place.[161] The use of the ISDM as an offensive measure against regulation was also seen in the Ethyl arbitration.

As the Ethyl arbitration did not run the full course and was

158. *See* Fleischer, *supra* note 146.

159. NAFTA San Diego, *supra* note 145.

160. Sissel, *supra* note 145.

161. *See* Aslam, *supra* note 145.

settled, the possibility of having to pay over $250 million no doubt factored into Canada's decision to repeal the ban on a potential neurotoxin. Rescinding the ban and paying monetary damages was a way of avoiding crushing liability. The crushing liability of monetary damages and the likelihood of an unmanageable number of claims under the ISDM are the bases for its being used as an offensive measure. Not only can governments be for all intents and purposes forced to repeal regulations, but they may be deterred from regulating in the first instance.

The interests of public health aside, the ISDM is a product of trade and investment analysis.[162] The ISDM in NAFTA was originally designed to protect investments against Mexican Government seizures of U.S. and Canadian businesses, a risk that has basis in the history of Latin America.[163] "Mexico's nationalization of the oil industry in 1938 is still part of the collective U.S. corporate memory."[164] A protection against the seizure of assets was deemed vital in the negotiation of NAFTA, but a protection against the obligations of government regulation may not necessarily have been intended. However, protection against protectionist or trade-destructive measures disguised as legislation in the public interest was surely envisaged.

A closer investigation of the arbitrations reveal that the investors may have valid claims against the various regulations. In the case of Ethyl, the ban legislated was on the interprovincial trade and importation of MMT, not on the production of MMT itself. Rather than using health legislation, Canada used trade legislation.[165] Moreover, the legislation in the end only affected Ethyl Corporation, as it is the only producer of MMT. Ethyl opposed the legislation as its sole intended target.[166] It voiced objections to the ban as it was representative of unfair trade practices. Ethyl pointed to the fact that there was no conclusive proof that MMT was a neurotoxin.[167]

In fact, Ethyl won a battle against the U.S. Environmental Protection Agency when its ban on MMT in the U.S. was finally

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162. *See* Huner, *supra* note 59.

163. *See* Nolan & Lippoldt, *supra* note 91.

164. *Id.*

165. *See* sources cited *supra* note 157.

166. *See* sources cited *supra* note 157.

167. *See, e.g.*, Ethyl Corporation, *Research Studies* (visited July 7, 1998) <http://www.ethyl.com/research.html> (giving a bibliography of studies relating to MMT, including MMT and manganese health studies).

lifted after more than twenty years.[168] The court found that, though the EPA had found neurotoxic effects in lab animals at high levels of exposure to MMT, it had not found definite proof of that danger at the levels that humans would normally encounter.[169] The ban had to be lifted, raising questions as to intent of Canada's ban on MMT and as to the presence of a legitimate public purpose.

Yet, in 1997, the Prime Minister of Canada, Jean Chretien, described MMT as "an insidious neurotoxin" with "truly horrific effects."[170] The settlement with Ethyl acknowledged that more research on the effects of MMT was needed to justify the ban.

Nevertheless environmentalists and health workers continue to raise the alarm on MMT as a toxic pollutant. Excessive amounts of manganese have been blamed for a high rate of psychosis, severe neurological disease and premature death among miners. Also, a University of Quebec in Montreal neuroscientist, Dr. Donna Mergler reports that manganese produces symptoms similar to Parkinson's disease in humans.[171]

The method and the foundation for the ban on MMT may not have been entirely sound, but it would be hard to argue that Canada's primary intent was trade-destructive and not for public health. And, the U.S. refused to initiate state-state arbitral proceedings under NAFTA on behalf of Ethyl, making the trade-destructive argument becomes that much more difficult.[172]

S. D. Myers, in its claim against Canada, stated that Canada was providing a "$150 million subsidy" to the Canadian PCB disposal industry.[173] According to S.D. Myers, "the threat of open borders" caused the prices that the Canadian PCB disposal industry was charging to drop by more than half.[174] Furthermore, the firm pointed to internal documents of the Canadian Government addressed to the Environment Minister which questioned the legality of the PCB

168. *See* sources cited *supra* note 157; *See, e.g.,* Ethyl Corp. v. Environmental Protection Agency, 51 F.3d 1053 (D.C. Cir. 1995); Ethyl Corp. v. Browner, 67 F.3d 941 (D.C. Cir. 1995).

169. *See* sources cited *supra* note 168.

170. Weinberg, *supra* note 151.

171. *Id.*; *See also* Walter Stewart, *Effect of Methylcyclopentadienyl Manganese Tricarbonyl on Human Health*, CAN. GEOGRAPHIC, May 1, 1999, at 72.

172. *See* Julie A. Soloway, *Environmental Trade Barriers Under NAFTA: The MMT Fuel Additives Controversy*, 8 MINN. J. GLOBAL TRADE 55, 75-76 (1999).

173. Myers, *supra* note 151.

174. *Id.*

ban.[175]

> A NAFTA challenge to the border closure is very likely as there is no strong environmental argument to justify closure . . . If you decide to act to close the Canadian border to PCB exports, expect strong opposition from Privy Council Office, Department of Foreign Affairs and International Trade and Industry Canada who, at a meeting with Department of Environment staff, viewed PCB export as a trade issue.[176]

One would think that such statements would rob the Canadian Government of any foundation to classify the PCB ban as in the interests of public health. That reasoning ignores the problem that regulations concerning the disposal of PCBs are less stringent in the U.S., making it less expensive to dispose of PCBs in the U.S.[177] The "race to the bottom" for environmental standards is something that NAFTA is supposed to avoid. As Environment Canada put it, "landfilling PCB wastes does not eliminate their hazardous properties: this is not an acceptable approach in Canada and so could not be considered one in the U.S. Canadian trade officials said that the national landfill ban in Canada makes the ban on PCB exports for landfill consistent with the NAFTA."[178]

In the *Sun Belt Water* case, various questions arise. Why would Canada, having such large reserves of water, not be willing to export it to areas starved for it?[179] Why were bulk-water exports considered in other parts of the country?[180] Why did British Columbia settle with the Canadian company and not with Sun Belt Water, an American company? The answer that water is one of the most essential resources for public health and so has to be controlled by the government is an important argument. However, the argument does not provide full answers to the questions which, left unsatisfied, indicate that the ban on bulk-water exports may be as destructive to trade as it is important to the public interest.

Methanex points to the reluctance of the Government to take actions which it feels would directly impact the migration of MTBE

175. *See Legality of PCB Ban*, *supra* note 151.

176. *Id.*

177. *See* Guerin, *supra* note 151.

178. *Canada Lifts Ban*, *supra* note 151.

179. *See Plenty Water*, *supra* note 148; Bourrie, *supra* note 148.

180. *See* Walker, *supra* note 148; Bourrie, *supra* note 148.

into the water supply, as opposed to banning an additive that is used to comply with the Clean Air Act to reduce air pollution. It criticizes the approach adopted since MTBE has not definitively been proven as a carcinogen. And, the following statement by Lamar Alexander lends further doubt to the public purpose of the ban: "Republican White House hopeful Lamar Alexander called for a federal ban on MTBE on June 22 and challenged his fellow presidential candidates to do the same. Urging them to 'stop giving lip service to ethanol,' Alexander pledged to make ethanol a key campaign issue. Alexander said the government should ban MTBE, an oil-based fuel additive believed to contaminate groundwater, and promote the use of corn-based ethanol—a move he said would protect the environment and boost corn prices."[181] The consideration of boosting corn prices in promoting a ban on MTBE definitely confuses the issue of the public interest. But California's ban came about because of several studies indicating that MTBE is a carcinogen and that it had contaminated fresh water supplies. As recently stated in a newspaper article:

> The company's suit would have been tossed out of any federal court because under the Constitution, government doesn't have to pay for lost business expectations when it regulates. In fact, Republicans failed to get a "regulatory takings" bill through the last Congress that would have reversed that rule; opponents pointed out that the fanatical bill would either bankrupt government or force repeal of most regulations.[182]

Though a somewhat simplified analysis of regulatory takings, essentially the "thumb on the scale" in favor of government would work in favor of the U.S. in a claim like this.

What makes the *Methanex* case more interesting is its similarity with *Ethyl*. In *Methanex*, it is now the United States whose regulation is under scrutiny because of a foreign investor. The tables are turned and, ironically, the Ethyl Corporation has come out and stated that "[t]here is a similarity. They [MMT and MTBE] are both gasoline additives, but that is where the similarity ends. The MTBE ban in California is based on health grounds . . . the MMT importation ban was not."[183] Ethyl may not be the best arbiter of what is in the

181. *MTBE: Alexander Calls for Ban on Additive*, NAT'L J.'S DAILY ENERGY BRIEFING, June 25, 1999.

182. *Constitution? Forget It! NAFTA Rules; MTBE Ban Can Be Challenged Under Trade Agreement, Where Trade Invariably Wins*, L.A. TIMES, June 24, 1999, at B9.

183. Newton Perry, *Ban of MMT Not for Health*, TORONTO STAR, June 25, 1999,

interests of public health, but its attempts at distinguishing itself from the MTBE scenario lend further credence to the public purpose of the MTBE ban.

On the other hand, the distinction made between the regulations concerning MMT and MTBE by Ethyl leads one to ask how a regulation in the public interest is to be distinguished from one that is hiding a trade-destructive intent under an ISDM? Julie Soloway, in her article entitled "Environmental Trade Barriers Under NAFTA: The MMT Fuel Additives Controversy," focuses on the *Ethyl* case in delineating "the capacity of the relevant NAFTA provisions to address protectionist environmental regulation."[184] Soloway proceeds from the assumption that the public health concern over MMT is not firmly established and so looks instead to the trade and investment issues involved. She identifies several interest groups who would favor the ban based on wealth maximization as opposed to the public interest, but are protected by the cover of the call for protection of the public from MMT. Soloway wants regulations like the ban on interprovincial and international trade in MMT, which in her view hide non-public interests, to be challenged by the ISDM under the following framework:

> As economies become more interdependent throughout the international trading system, environmental, health, and safety regulations can have a profound impact on international trade and investment. There is a general perception that firms and their governments are attempting to fill the "protectionist gap" left by falling border barriers with discriminatory application of environmental regulation .... What was the rationale behind the ban on MMT? Was Bill C-29 enacted to promote industrial rather than environmental interests? The question is illuminated by a "Baptist-Bootlegger" framework... [which] posits that industry regulation is a function of the demands of a coalition of two special-interest groups .... The first group has a public interest agenda .... The second group, often an industry, has a wealth maximization agenda and benefits from regulation that gives them some special advantage .... This group's case is not explicitly stated but is clothed in a public interest justification, thereby giving a public dimension to what "otherwise

available in LEXIS, News Library, Tstar File.

184. Soloway, *supra* note 172, at 57-58.

> would strictly be a private venture." The existence of a Baptist-Bootlegger coalition can provide evidence of a protectionist intent on the part of legislators.[185]
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> . . . .
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> This framework does not consider in-depth the intentions of the government in forming a regulation . . . . The intent of government is difficult, if not impossible, to discern with any certainty. Yet the key to defining legislation as "protectionist" is finding legislative intent. The focus on intent as an indicia [sic] of protectionism has limited value, and other indicia may be better able to identify protectionist legislation . . . . A welfare analysis may produce a more objective indicator to help determine when states are acting legitimately and when they are disguising illegitimate protectionist ends. This would entail an inquiry into whether the global welfare losses from restricting trade grossly outweigh the regulatory benefits. This would require asking whether the regulation is an effective and efficient tool for reaching its stated goal. An environmental regulation that imposes a high economic burden to yield marginal environmental results will not increase net social welfare and may indicate that it serves the interests of a small rent-seeking group . . . . The primary question here remains whether "reasonablely [sic] available" less restrictive alternatives are able to attain the same level of regulatory benefit.[186]

The existence of a Baptist-Bootlegger coalition in support of a regulation presents itself as an indicator of protectionism as does a welfare analysis which shows no more than marginal results for the regulation's stated public purpose. Soloway does not find the intent of government easily discernible nor useful in finding protectionist motivation and would rather look at the effects, like the Tribunal in *TAMS-AFFA*. Yet, as stated in *Amoco International Finance Corporation*, international law would usually give broad discretion when looking to find public purpose in the intent of a government regulation and would disregard the consideration of financial

185. *Id.* at 58-59.

186. *Id.* at 59-60.

concerns by the government.

The difference between Soloway's approach and that of customary international law can be lessened under an ISDM. If decisions of tribunals in arbitrations like those above render questions of a government's intent secondary to the cost-benefit analysis of the effects of regulation, that is exactly what will take place. Should such a rendering be the desired path? Looking at the *Ethyl* case, as per Soloway, a Baptist-Bootlegger coalition may have existed[187] and the fact that the ban was a trade measure and not a health or environment measure definitely raises questions as to whether Bill C-29 would pass a welfare analysis. But, Soloway admits herself that the "key to defining legislation as 'protectionist' is finding legislative intent," and that is how the standards for investigation should remain under ISDMs.[188] Though Soloway believes that it is nearly impossible to discern governmental intent and, practically, the welfare analysis would serve as a better test, the predominance of the welfare analysis would undermine the concept under international law of broad discretion for governments in determining what is in the public interest. As such, Soloway's preference for welfare analysis is a flawed measure. In looking at the *Ethyl* case, Bill C-29 may have effected losses at Ethyl Corporation, which could be considered expropriatory, but, again, the intent of the Canadian Government was more than likely to protect public health—to protect the public interest—and not for a protectionist agenda. So, under an ISDM, the test for trade-destructive or protectionist measures should remain primarily one of intent because a change may permit measures to be labeled protectionist when indeed they were not intended to be.

Common among the arbitrations, then, is the claim against regulation in the public interest for its effective expropriation of investment. NAFTA's ISDM does not require a direct taking of property, but does require that it be for a public purpose and that it be compensated at fair-market value. The crux of investors' claims against these environmental and public health regulations is that they are not for the public purpose and actually mask protectionist and trade-destructive actions. The problem is in ascertaining which regulations are for the public interest and which are not. The conflict arises in giving the power to raise that question being given to the investor, the one most likely to benefit if the regulations are deemed

187. Soloway claims that in addition to the "Baptist" group promoting the public interest by asking for the ban on MMT, there was a coalition with automobile manufacturers or "Bootleggers" who would maximize wealth interests from the indirect banning of the use of MMT in fuel. *Id.* at 59-60.

188. *Id.* at 60.

to be the latter.

V. THE ISDM, THE RIGHT TO HEALTH AND A SOVEREIGN'S POWER TO PROTECT PUBLIC HEALTH

In the field of public health, determining if a regulation is in the public interest may be complicated because the right to health has been left somewhat vague in the international context. Allyn Lise Taylor, in her article on the World Health Organization and a legal framework for universal access to the conditions for health, describes the background of the right to health in the Universal Declaration of Human Rights and the later Covenants created by the United Nations:

> Article 25.1 of the Universal Declaration of Human Rights proclaims that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services" .... To evidence the legal obligation necessary to advance the international right to health, the United Nations created two treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights .... The Universal Declaration provides the normative basis for the most significant United Nations instrument guaranteeing a right to health, the Covenant. Article 12.1 of the Covenant provides for "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The Covenant also provides, *inter alia*, that each nation, to the maximum extent of its available resources, "undertakes to take steps" to achieve "the highest attainable standards of physical and mental health" for all individuals, without discrimination. [189]

The various international human rights documents may espouse the concept of a right to health, but consensus as to the specific content of that right is elusive. "The meaning of the right to health seems to be impossible to develop from any first principles or even from an accumulation of examples; each country and each

189. Allyn Lise Taylor, *Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health*, 18 AM. J.L. & MED. 301, 309-310 (1992).

region has differing needs and circumstances. The very nature of the right . . . dooms any attempt to develop the right in such a fashion . . . . [H]ealth as a concept of the ideal human condition has a meaning much broader than a legal right to health can accommodate."[190]

The justiciability of the right to health may also be limited or unascertainable in comparison to what the right may encompass because of what may practically be included in regulation and legislation. Similarly, the ability of a government to regulate in the interest of public health may also be restricted. The arbitrations above demonstrate the ability of investors to challenge the idea that the regulations were instituted for a public purpose. Absent a clear delineation of the contents of the right to health, investors can potentially contest the notion that any element of public health is for a public purpose. Hence, the combination of the uncertain status of the right to health and the investor-friendly structure of the ISDM can facilitate attacks on the presumption that public health regulation is necessarily for a public purpose.

With the avenue of attack thus laid open for the investor, the ISDM can be used to oppose a wide range of public health legislation. Protection against toxic waste, pollution and other environmental health hazards could be threatened, as could the regulation of harmful substances like alcohol and tobacco. Healthcare subsidies and state-run systems may also be targets of foreign investors.

Some examples of regulation that could be affected by the threat of an ISDM include:

A. Advertising Bans on Alcohol or Tobacco

If a foreign government were suddenly and completely to restrict television advertisements of alcohol or tobacco products, a manufacturer of those products could claim constructive or effective expropriation of the profits usually attributable to placing of television advertisements, argue that the ban on advertisement serves no public purpose, and ask for compensation under the ISDM.[191]

This approach of questioning a regulation's purpose and claiming expropriation of one's investment can be applied to other

190. Jamar, *supra* note 16, at 5.

191. *See generally* Cynthia Callard, *How MAI Would Save Tobacco Firms*, TORONTO STAR, Dec. 30, 1997, at A17.

forms of legislation as well. Any restriction on the sales of tobacco or alcohol, or their packaging and labeling requirements, could be challenged.[192] Taxes may also be targeted, such as those on the consumption of alcohol and tobacco to recoup costs for healthcare benefits expended on citizens with illnesses related to their use.[193]

B. Privatization of a State-Run Healthcare System

Under the MAI, if a state monopoly enterprise is privatized, the privatization cannot be restricted to private sector firms of the host country.[194] Foreign investors must have a right to participate.[195] If the government were to restrict privatization to its nationals, foreign investors could claim expropriation of the anticipated profits of participating in the privatization. Hence, control of the healthcare system could go from the government to foreigners, which may be an objectionable development.[196]

Let us examine a hypothetical case in which Canada decides to privatize its national healthcare system and passes a bill authorizing the privatization but restricts it to Canadian private-sector firms. Let us also assume that the MAI is in force, including its ISDM. An American health maintenance organization, GreedyHealth, Inc., was informed about the possibility of a privatization of the healthcare system and salivated at the prospect of participating, only to find out that the process was closed to non-Canadians. GreedyHealth's lawyer knows of the MAI's requirement on privatization and its ISDM. He suggests that the company file a notice of intent to arbitrate based on the indirect expropriation of GreedyHealth's anticipatory profits. The sum claimed is the $1 billion expected from GreedyHealth's participation in the privatization and provision of healthcare services to the Canadian population.

The notice is filed, and later the claim for arbitration is filed, as the Government of Canada and GreedyHealth cannot come to a negotiated settlement. The parties settle on ICSID rules and select the

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192. *See id.*

193. *See id.*

194. *See* MAI, *supra* note 2; *See also* Barry Appleton, *The MAI and Canada's Health and Social Service System: A Submission to the House of Commons Standing Committee on Health,* December 4, 1997 (visited Sept. 10, 1999) <http://www.appletonlaw.com/MAI/health.html> (This example is of special importance to Canada, given its state-run healthcare system).

195. *See* MAI, *supra* note 2; Appleton, *supra* note 194.

196. *See* Appleton, *supra* note 194.

respective party-appointed arbitrators. As we are going to look at the worst-case scenario for the Canadian Government, there are no available arbitrators knowledgeable in both public health and the laws of trade and investment. The Canadian Government is forced to accept arbitrators who are not experts on public health. Moreover, the lack of a public health background for the Canadian-appointed arbitrator may put him at an disadvantage in promoting Canada's case in the negotiations amongst the tribunal to reach a majority decision. The Chairman of the panel and GreedyHealth's arbitrator, having the similar trade and investment background, may find it easier to negotiate an award based on the promotion of GreedyHealth's investment interests by its arbitrator, as opposed to the other extreme of Canada's public health interests. This is compounded by the possibility that the arbitrators would agree with both the Chairman of the MAI negotiations and Rosalyn Higgins in that regulatory takings should be or are compensable under international law.

After selection, the panel then looks at the merits of the case. Indirect expropriation is compensable under the MAI and there is no reservation clause exempting public health regulations. This, again, is different from there being no requirement for compensation for bona fide regulation as posited by Wortley, Mouri, or in *SEDCO, Inc.* In this case, the restriction on privatization, though not physically taking away property from GreedyHealth, can be seen as having the effect of taking away the benefits and return of its proposed investment in privatization, the anticipatory lost profits. Under the expropriation language in the MAI, expropriation cannot be discriminatory and must be for a public purpose. The test for these two overlap somewhat, as mentioned above. The privatization measure is necessarily discriminatory, as it does not let non-Canadian firms participate. *Amoco International Finance Corporation* stated that the precise definition of public purpose is not set under international law, however, the discriminatory effect of the regulation can reflect a lack of public purpose.[197] Moreover, if the arbitrators follow *TAMS-AFFA*, then the effect of the regulation is more important than the intent of the Canadian Government. These issues already present dents in the Canadian argument that the restricted privatization is for a public purpose. The assertion that control of a public necessity like healthcare must be under national control (like the example of water in *Sun Belt Water*) may fall on deaf ears, since the arbitrators are not schooled in public health issues. The point that external factors in

197. Amoco International Finance Corp., *supra* note 110, *reprinted in* MOURI, *supra* note 107, at 327-29.

other countries should not influence the level, quality, or access to healthcare in Canada may not be well understood even with the help of technical experts who can be consulted under the ISDM. Once again, the arbitrators may negotiate amongst themselves to get a majority and concentrate on investment issues in doing so.

If the worst-case scenario were indeed to take place, the expropriation could be labeled unlawful for the reasons that it is discriminatory and the restriction does not serve a public purpose. The question of a higher standard of compensation in unlawful versus lawful expropriations is addressed in the *Chorzów Factory Case*, *AMINOIL*, and *Amoco International Finance Corporation*. The compensation for unlawful expropriation could involve restitution, which would mean placing the investor in the position he or she would have been had the expropriation not occurred. That would include GreedyHealth's anticipatory lost profits and, in the most extreme case, would enable it to receive $1 billion without actually providing any healthcare services in Canada. The award would be binding and Canada would face litigation for enforcement should it not comply. Most importantly, the Canadian Government would be left wondering how it agreed to the terms of expropriation in the MAI when its own laws do not allow for compensation for regulatory takings, even those without a public purpose. Interestingly enough, Barry Appleton, the attorney who represented both Ethyl and S. D. Myers in their arbitrations against Canada, advised the Canadian Parliament on just this issue of the provision of health services. Appleton advised the government to seek protection of the Canadian healthcare system through reservations or exceptions to the MAI, otherwise it would have to face the prospect of the ISDM being used to dismantle it.[198]

Faced with the idea of the dismantling of its healthcare system, the various arbitrations pending against it, and the settling of the Ethyl case, Canada is keen to have the language on expropriation and investment in Chapter 11 of NAFTA revisited and reinterpreted.[199] The U.S. has not been so responsive to the Canadian

198. *See* Appleton, *supra* note 194.

199. *See generally* Peter Morton, *Damage Claims Upset NAFTA: Methanex Action May Boost Plan to Limit Damage Suits*, NAT'L POST, June 17, 1999, at C12; Evelyn Iritani, *Trade Pact Accused of Subverting U.S. Policies, Commerce: Critics Say Agreements Such as NAFTA Give Foreign Interests Legal Ammunition to Influence Economy as Well as Safety, Health and Other Issues*, L.A. TIMES, Feb. 28, 1999, at A1; Courtney Tower, *NAFTA Considers Curb on Claims from 'Green' Laws*, J. COM., Feb. 23, 1999, at 8A; Edward Alden, *Canada Seeks Tighter NAFTA Rules to Limit Compensation; Trade Pact Curb Sought on Ability of Companies to Sue Governments*, FIN. TIMES, Jan. 22, 1999, at 7; Peter Morton, *Washington Cool to Rewriting Key NAFTA Clause: Canada Urged Review: Aim is to Limit*

proposals, and reservations/exceptions to protect public health may not be sufficient—as mentioned above, Carla Hill's opinion specifically states that the health exception in NAFTA does not apply to Chapter 11 matters. But the general idea of finding alternatives to or protections from the ISDM is still valid and being pursued.[200]

VI. ALTERNATIVES TO THE ISDM

After an examination of the arbitrations in Section IV, it is apparent that investors have used the ISDM to challenge government authority over public health. The general trend in international trade and investment treaties is to include the ISDM in order to protect investor rights. But the resulting threat to, and vulnerability of, public health, labor and environmental concerns requires a look at alternative means of protecting investors and promoting trade and investment.

Various possibilities of alternative methods include: (1) A return to state-state arbitral proceedings, where the government of the investor would be able to evaluate the merits of the claim before deciding whether or not to proceed, hopefully limiting unjustified suits against health interests. The WTO Dispute Settlement Process as well as the NAFTA Binational and Trinational Panels use this formulation for trade disputes. It is specifically in the field of investment that the ISDM is favored;[201] (2) Some mechanism whereby a preliminary examination of the private actor's claim under the ISDM would be required so as to block any claims which would attack the government's right to legislate in the interests of public health;[202] (3) Provisions in the treaties making reservations or exceptions for public health concerns, be it country-specific or clear carve-outs within the text of treaties. The reservations would be specific to the country making them, whereas an exception would have to be agreed upon as a clear carve-out for public health by all countries negotiating the treaty.[203] The effectiveness and problems

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Firms' Ability to Sue Governments, NAT'L POST, Jan. 23, 1999, at D9.

200. *See* sources cited *supra* note 199.

201. *See, e.g.*, Steve Charnovitz, *Environment and Health under WTO Dispute Settlement*, 32 INT'L LAW. 901; In the Matter of Puerto Rico Regulations on the Import, Distribution, and Sale of U.H.T. Milk from Quebec, Panel No. USA-93-1807-01, U.S.-Can. Free Trade Agreement Binational Panel Review, 1993 FTAPD LEXIS 18, June 3, 1993. Several other NAFTA Binational Panel Reports are on file with author.

202. This would in effect replicate the function that an investor's government plays in state-state arbitral proceedings. However the entity enforcing a check on frivolous use of the ISDM need not be a sovereign government.

203. *See generally* Appleton, *supra* note 194 (noting that Canada sought certain country-

associated with each of the alternatives is beyond the scope of this Note, but they clearly avoid many of the problems discussed here.

VII. CONCLUSION

The ISDM may be troubling to those in public health, but it is "a dream come true for businesses . . . . This is the part of NAFTA that nobody read . . . . Governments that want to protect their own citizens have to pay for it under NAFTA."[204] Barry Appleton, who, as mentioned above, served as counsel for both Ethyl Corporation and S. D. Myers, Inc., made these statements with regard to the ISDM in NAFTA. What is more worrisome is that there is momentum to multilateralize the ISDM beyond the confines of NAFTA into a global treaty. This would make it possible to bring the threat to a sovereign's power to protect public health to the rest of the world.

The draft MAI before it was discontinued was an example of such a global treaty and a vehicle for the spread of the ISDM's use. Again, the treaty demonstrates the dominant influence of those schooled in investment analysis, as do many treaties currently being negotiated. The ISDM is a culmination of those ideas which require compensation for expropriation and an investor-state dispute process to enable an investor to be compensated. An appreciation of the intent behind negotiating an ISDM is revealed in the words of Valliantos of the Friends of the Earth (an environmental NGO): "We are really worried about what a tribunal consisting of a few trade experts will make of it . . . . There's a mindset (among trade experts) that favors liberalization over environmentalism."[205]

Actually, that mindset favors liberalization over environmentalism, support for labor, and protection of public health. And as the ISDM is engineered to do the same, alternative means of investor protection need to be considered and evaluated. The prospect of reservations or exceptions to treaties is appealing, as is a restricted form of the ISDM. One could even go so far as to recommend a return to pure state-state arbitral proceedings where only governments

specific reservations in the MAI rather than insisting on exceptions as part of the treaty itself).

204. NAFTA San Diego, *supra* note 145.

205. *Id.*

have international legal personality. In any event, the ISDM poses a challenge to a sovereign's power to protect public health, and that challenge must be addressed.

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