

**INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS AND HEALTH:**  
The Role of Transnational Corporations and International Investment Law

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A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of  
PhD in Population Health

Interdisciplinary Degree in Population Health  
University of Ottawa

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## Legend

<b>AOA</b>	Agreement on Agriculture
<b>APEC</b>	Asia-Pacific Economic Cooperation
<b>BIT</b>	Bilateral Investment Treaty
<b>CAFTA</b>	Canadian-Agri Food Trade Alliance
<b>CAFTA-DR</b>	Dominican Republic-Central America Free Trade Agreement
<b>CETA</b>	Comprehensive Economic Trade Agreement
<b>CTC</b>	Cooperative Technical Consultations
<b>DID</b>	Difference-In-Difference
<b>DSB</b>	Dispute Settlement Body
<b>EU</b>	European Union
<b>FDI</b>	Foreign Direct Investment
<b>FET</b>	Fair and Equitable Treatment
<b>GATS</b>	General Agreement on Trade in Services
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>GDP</b>	Gross Domestic Product
<b>GMO</b>	Genetically Modified Organism
<b>HHC</b>	Health-Harmful Commodity
<b>HIA</b>	Health Impact Assessment
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>IIA</b>	International Investment Agreement
<b>IPR</b>	Intellectual Property Rights
<b>ISDS</b>	Investor-State Dispute Settlement
<b>LLP</b>	Low-Level Presence
<b>MAI</b>	Multilateral Agreement on Investment
<b>MFN</b>	Most-Favoured Nation
<b>MMT</b>	Methylcyclopentadienyl manganese tricarbonyl
<b>MRL</b>	Maximum Residue Level
<b>NAFTA</b>	North American Free Trade Agreement
<b>NCD</b>	Noncommunicable Disease

<b>OIE</b>	Office International des Epizooties
<b>¶</b>	Paragraph
<b>PCA</b>	Permanent Court of Arbitration
<b>PIC</b>	Pacific Island Countries
<b>PMA</b>	Philip Morris Asia
<b>R&amp;D</b>	Research and Development
<b>RCEP</b>	Regional Comprehensive Economic Partnership
<b>ROO</b>	Rules of Origin
<b>RTA</b>	Regional Trade and Investment Agreement
<b>SPS</b>	Sanitary and Phytosanitary Standards
<b>SSCB</b>	Sugar-Sweetened Carbonated Beverage
<b>SSDS</b>	State-State Dispute Settlement
<b>TBT</b>	Technical Barriers to Trade
<b>TNC</b>	Transnational Corporation
<b>TPP</b>	Trans-Pacific Partnership Agreement
<b>TRIMS</b>	Trade-Related Investment Measures
<b>TRIPS</b>	Trade-Related Aspects of Intellectual Property Rights
<b>TTIP</b>	Trans-Atlantic Trade and Investment Partnership
<b>UHC</b>	Universal Health Care
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>US</b>	United States
<b>WHO</b>	World Health Organisation
<b>WTO</b>	World Trade Organisation

## **Abstract**

Addressing complex global health challenges, including the burden of noncommunicable diseases (NCDs), will require change in sectors outside of traditional public health. Contemporary regional trade and investment agreements (RTAs) like the Trans-Pacific Partnership (TPP) continue to move further ‘behind-the-border’ into domestic policy space introducing new challenges in the regulation of health risk factors. This dissertation aimed to clarify the pathways through which RTAs influence NCDs, and to explore points along those pathways with the intent of improving the existing evidence base and supporting policy development. This work develops a critical theoretical framework exploring the ideas, institutions, and interests behind trade and investment policy; it also develops a conceptual framework specifying how trade and investment treaty provisions influence NCD rates through the effects of trade and investment on tobacco, alcohol, and ultra-processed food and beverage products, as well as access to medicines and the social determinants of health. Using health impact assessment methodology, three analytical components were designed to examine pathways of influence from RTAs to health outcomes as mediated by the interests of transnational corporations (TNCs). The first component explored the influence of industry during the TPP negotiations and how its health-related interests were reflected in the final TPP text. The second component examined the role of trade and investment liberalisation in health-harmful commodity markets, finding a rise in TNC sales after a period of liberalisation. The third component demonstrated how investor rights and investor-state dispute can challenge the state’s right to regulate if it damages the profits of TNCs, which may threaten effective health regulation, and provides opportunities to strengthen the right to regulate. The work in this dissertation provides support for the thesis that trade and investment policies are a fundamental structural determinant of health and well-being, which are highly influenced by TNCs that guide such policies in the interest of maximising their profits and protections, often to the detriment of public policy and population health. This work identifies the need for more robust health impact assessments of RTAs before future agreements are ratified, as well as an imperative to challenge vested interests that entrench neoliberal policy preferences that have hindered sustainable and equitable development.

## **Acknowledgements**

My journey through the PhD program in Population Health has been an immensely rewarding experience for which I owe a lifetime of gratitude to the individuals whose support has made it possible. The first person I would like to acknowledge is my extraordinary thesis supervisor, Ronald Labonté. Ron, thank you for your endless support and guidance, both personal and professional, for the opportunity to learn from your years of experience, and for allowing me the freedom and flexibility to follow what I felt passionate about, while always steering me in the right direction. Thank you for always going the extra mile for me, for every door you have opened to me, for the time you have invested in me, and for believing there wasn't anything I couldn't do. For all of the other things I have inevitably forgotten to list here, thank you!

To my committee members, Anthony VanDuzer, Marie-Josée Massicotte, and Arne Ruckert, thank you for the countless hours you spent reviewing and revising drafts and talking me through the material, for all of your contributions and efforts that have made this such a positive experience for me, and for providing me with an interdisciplinary perspective that was essential to the execution of this work, your support has been invaluable and I am eternally grateful to all of you. Thank you also to my external examiner, Kelley Lee, your attention to detail, constructive feedback, and contributions to the final thesis were highly valued.

I am also thankful to the Canadian Institutes of Health Research for providing me with a doctoral scholarship that has made this experience financially possible, and for funding the health impact assessment of the Trans-Pacific Partnership that framed this work. Additionally, I would like to thank the investigators on the larger study, Ronald Labonté, Arne Ruckert, Anthony VanDuzer, Sharon Friel, David Stuckler, and Corinne Packer, as well as the expert advisory committee for the project, Jeffrey Drope, Marc-André Gagnon, Deborah Gleeson, Benn McGrady, and Anne-Marie-Thow for their guidance and feedback.

I would also like to thank my colleagues in the Globalisation and Health Equity Unit at the University of Ottawa and the students that have been involved in the research project for their support over the years; with a very special thank you to Benjamin Miller, who collected and reviewed more documents than any one person should ever be subjected to, thank you for your help and so many captivating conversations!

Throughout my PhD I have had the good fortune of being able to travel internationally and learn from leaders in the field. Specifically, I would like to thank Sharon Friel for hosting me at the Australian National University: thank you for the opportunity to collaborate with you and your team, to learn from your experience, for your contributions to the work in this dissertation, and for all of the advice and mentorship you have offered half a world away. I would also like to thank colleagues on that project, Phillip Baker, Deborah Gleeson, Anne-Marie Thow, Adrian Kay, Wendy Snowdon, and Sunil Ponnampereuma, for the benefit of their knowledge and for the influence they have had on this work.

I would also like to thank David Stuckler and his research team for hosting me at the University of Oxford. Thank you for the opportunity to work with you and your team, for mentoring me in new methodologies in this area of research, and for helping to make my PhD experience an exceptional one. Likewise, thank you to the Canadian Institutes of Health Research and the University of Ottawa for financially supporting my time abroad.

I would also like to thank two highly influential individuals leading up to my decision to pursue a PhD. Thank you to Andrew Johnson, my undergraduate and master's thesis supervisor, for being my first academic mentor, for years of support, for putting me on this path in the first place, and for inspiring in me a love of research. Also, thank you to Heather Laschinger for giving me the opportunity to gain real-world research experience that has proved invaluable, for years of mentorship, and for the support and encouragement to begin a PhD.

The journey through the PhD is equally a personal experience, and for that I would like to thank all of the individuals who have given me endless support throughout this process. First, to my husband John, my partner in everything in life. Thank you for supporting me, for having every confidence in me, and for being there for me every step of the way. Thank you also for being my 'silent advisor' for the countless hours discussing trade and investment, prepping for presentations, IT services, for letting me literally read entire chapters out loud to you, and for all of your feedback I accepted both graciously and 'not-so-graciously', you are my favourite human and I am immensely grateful that we were able to share this experience together.

I am also incredibly fortunate to have an unconditionally loving and supportive family who have never questioned my 'professional student' status. To my dad, Patrick, my mom, Robin 'Ruby', my step-dad, Ross, and my sister, Sarah, thank you for giving me the foundation to succeed, for

the security in knowing that whatever I do you will always be proud, and for always wanting me close but always allowing me to be far. Your endless love, support and belief in me are a cornerstone in my life. To all of the family I have gained along the way, including Brenda, Bob, Debbie, Mark, Marty, David, and Scarlett, and all of my extended family, thank you for all of the love and support over the years and for being a wonderful addition to my life.

Last but not least, thank you to my bestie, Jen, for knowing when I needed a break, for so many texts of encouragement, and for making all of the milestones in my life extra special, you are truly one of a kind! Thank you to my amazing PhD cohort for adding so much value and enjoyment to this experience for me, it wouldn't have been the same without you. And to the 'roomies', the *'fancy-ass dinner club'*, and all of the other remarkable people in my life I am lucky enough to call friends, thank you for everything!

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The citation for the original article is: Schram A, Labonté R, Baker P, Friel S, Reeves A, Stuckler D. The role of trade and investment liberalization in the sugar-sweetened carbonated beverages market: a natural experiment contrasting Vietnam and the Philippines. *Globalization and Health*. 2015 Oct 12; 11(1):1. The article has been modified and edited for the purposes of this dissertation.

# CHAPTER 1

## INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS AND HEALTH: AN INTRODUCTION

“THE FEW OWN THE MANY BECAUSE THEY POSSESS THE MEANS OF LIVELIHOOD OF ALL...THE COUNTRY IS GOVERNED FOR THE RICHEST, FOR THE CORPORATIONS, THE BANKERS, THE LAND SPECULATORS, AND FOR THE EXPLOITERS OF LABOR. THE MAJORITY OF MANKIND ARE WORKING PEOPLE. SO LONG AS THEIR FAIR DEMANDS - THE OWNERSHIP AND CONTROL OF THEIR LIVELIHOODS - ARE SET AT NAUGHT, WE CAN HAVE NEITHER MEN'S RIGHTS NOR WOMEN'S RIGHTS. THE MAJORITY OF MANKIND IS GROUND DOWN BY INDUSTRIAL OPPRESSION IN ORDER THAT THE SMALL REMNANT MAY LIVE IN EASE.”

– Helen Keller

## 1.1 Introduction

In 2007, the Director-General of the World Health Organisation (WHO) stated that “[t]he boundaries of public health have become blurred, extending into other sectors that influence health opportunities and health outcomes. The importance of economic, social, environmental, and political determinants of health has grown” [1]. To further elaborate on this remark, consider the following scenarios:

Twenty years after signing the North American Free Trade Agreement (NAFTA) Mexico’s poverty rate is almost identical to what it was in 1994 (52.3%), which alongside population growth means an additional 14.3 million people live below the poverty line. During the NAFTA years Mexico achieved per capita gross domestic product (GDP) growth approximately half of that achieved by the rest of Latin America [2].

In 1988, after intense pressure from the United States (US) government, South Korea liberalised its tobacco market. Transnational tobacco corporations had captured 41.7% of market share by 2009, up from 2.9% in 1988. These corporations invested heavily in market research, identifying females aged 18-24 as a target group for market growth. Cigarette characteristics were altered to appeal to women, including flavour additives, sizing, and packaging, along with magazine campaigns and increased accessibility through vending machines to avoid the stigma of women purchasing cigarettes. Within the first ten years of liberalisation female smoking rates rose from 1.6% to 13% [3,4].

Following NAFTA, US foreign direct investment (FDI) into Mexico accelerated. Four years after the agreement was put in place, US FDI into food processing rose to US\$5.3 billion, over double the amount in the year before NAFTA. Sales exceeded US\$12 billion that year, well over the US\$2.8 billion generated in food exports from the US [5]. Mexicans now consume the most soft drinks per person globally and the country is ranked as the world’s fattest populous nation [6].

Philip Morris Asia sued Australia for an undisclosed amount for the introduction of tobacco control legislation in 2012 requiring plain packaging for cigarettes. The company, which only acquired shares in the Australian subsidiary ten months after the

government had announced it would implement plain packaging [7], used a bilateral investment promotion and protection agreement between Australia and Hong Kong from 1993 to challenge this health legislation through the investor-state dispute settlement (ISDS) system. Although the tribunal eventually dismissed the dispute due to a lack of jurisdiction to hear the case, Australia's costs for defending against the litigation are estimated to have reached AU\$50 million [8].

Pharmaceutical giant Eli Lilly is currently suing Canada for half a billion dollars for revoking two of the company's patents under Canada's promise doctrine [9]. Eli Lilly, which was ruled by the highest Canadian court to have failed to meet Canadian patent standards at the time of filing, is invoking the ISDS mechanism within NAFTA, alleging that the Canadian government has violated its investor rights.

The situations described above demonstrate that trade and investment policies have the potential to shape the determinants of health, including the economic and labour environment, as well as consumption of tobacco and ultra-processed food and beverage products<sup>1</sup>. Furthermore, the international investment regime provides opportunities to challenge legitimate domestic health regulations which may threaten the efficacy of future health regulatory policy while creating a financial burden on states. Transnational corporations<sup>2</sup> (TNCs) are central actors in the trade and investment policy space, both as participants in the negotiation of new agreements, and as users of provisions that facilitate the spread of health-harmful commodities (HHCs)<sup>3</sup> and challenge domestic measures that seek to regulate such commodities.

The primary health outcome of interest in this dissertation is noncommunicable disease (NCD) morbidity and mortality, one of the largest threats to social and economic development in the 21st century [12]. Presently, NCDs are responsible for 38 million deaths annually, 42% of which occur prematurely (before age 70). Furthermore, three quarters of all NCD deaths occur in low- and

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<sup>1</sup> Food processing can be categorised according to four levels: (1) unprocessed or minimally processed (*e.g.* fresh fruit, meat, milk); (2) processed culinary ingredients (*e.g.* sugars, fats, oils); (3) processed foods (*e.g.* canned foods, bread, cheese); and (4) ultra-processed foods (*e.g.* confectionary, soft drinks, breakfast cereals). Ultra-processed foods have been defined as "...formulations of several ingredients which, besides salt, sugar, oils, and fats, include food substances not used in culinary preparations, in particular, flavors, colors, sweeteners, emulsifiers and other additives used to imitate sensorial qualities of unprocessed or minimally processed foods and their culinary preparations or to disguise undesirable qualities of the final product" [10] (p.2). Ultra-processed food products make excellent global commodities given their transportability, long shelf lives, high profit margins, and suitability to marketing and advertising.

<sup>2</sup> "Transnational corporations (TNCs) are incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates. A parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake." [11]

<sup>3</sup> In this dissertation health-harmful commodities (HHCs) refer to tobacco products, alcohol products, and ultra-processed food products.

middle-income countries, as do 82% of all of the premature deaths. Cardiovascular diseases, cancers, respiratory diseases, and diabetes account for the vast majority of NCD mortality. The leading causes of these NCDs are the presence of metabolic risk factors such as hyperlipidemia (high levels of fat in the blood), hyperglycemia (high levels of sugar in the blood), hypertension (high blood pressure), and being overweight or obese. These metabolic risk factors for NCDs are highly correlated with behavioural risk factors, the most significant of which are tobacco use, alcohol misuse, unhealthy diet, and physical inactivity [13]. This dissertation intends to move outside of the traditional terrain for thinking about and addressing these risk factors, that is, beyond individual interventions for ‘lifestyle’ change or exploration of immediate environmental influences, and begin moving towards those blurred boundaries. It does so by engaging with a driver of NCDs that lies farther upstream at the intersection of economics, law, and political science: international trade and investment policy. More specifically, it adopts a critical viewpoint that international trade and investment agreements deliver enhanced rights to corporations that facilitate the spread of NCD risk factors, while entrenching current regulatory regimes through judicial processes thus threatening future health regulatory policies to address these challenges.

### **1.1.1 Population Health Approach**

Examining behavioural risk factors for NCDs, tobacco use, alcohol misuse, diet and physical activity, involves exploring drivers of physiological changes in an attempt to alter such behaviours to reduce the likelihood of NCD incidence. Focusing on behavioural modification in order to enhance the health of the population, however, can be individualising, that is to say, it risks placing a disproportionate burden for health improvement on individuals and their ‘lifestyle choices’ [14]. To help combat this, the *Commission on the Social Determinants of Health* developed a model for an expanded system of drivers of the health and well-being of a population [15] (see Figure 1). Central to the current work is the introduction of the role of macroeconomic policies<sup>4</sup> in this model as a structural driver of health outcomes. A population health approach moves continually further upstream in this model and explores the ‘causes of the causes’, considering what determines the social determinants of health. Recognising the significance of the socioeconomic and political

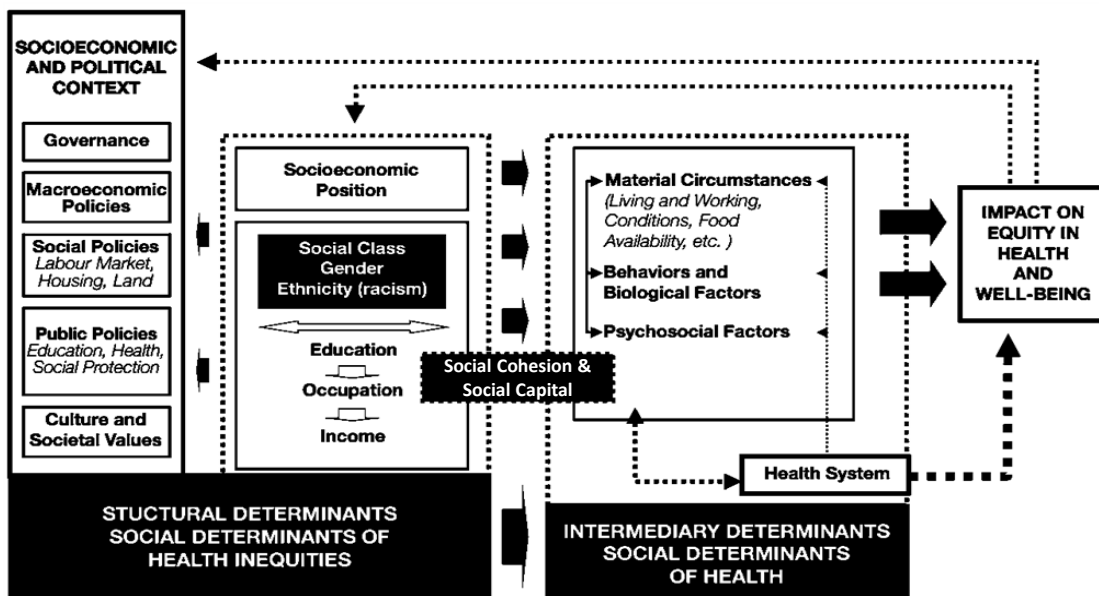
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<sup>4</sup> The study of economics has two perspectives: macroeconomics, the study of the overall economy, including employment, gross domestic product, and inflation; and microeconomics the study of individual markets including how supply and demand interact for goods and services. Macroeconomics often includes the study of international policies, as domestic markets are connected to foreign markets through trade, investment, and capital flows; but microeconomics has an international component as well given the high-level of global integration of markets [16]. Consequently the divide between the two may be artificial at times, and areas of macroeconomic policy, like trade and investment policy, will have important impacts on microeconomic environments.

context and the public policies that govern equitable access to a healthy lifestyle reflects an important shift towards embracing complexity [14]. As noted by Dunn and Hayes [17]:

“population health refers to the health of a population as measured by health status indicators and as influenced by social, economic, and physical environments, personal health practices, individual capacity and coping skills, human biology, early childhood development, and health services. As an approach, population health focuses on interrelated conditions and factors that influence the health of populations over the life course, identifies systematic variations in their patterns of occurrence, and applies the resulting knowledge to develop and implement policies and actions to improve the health and well being of those populations.” (p.57)

Figure 1 Conceptual framework for action on the social determinants of health (Solar and Irwin, 2010)



It has been suggested that most of the progress in preventing premature deaths from NCDs will require changes in public policies outside of traditional health sectors [12], which can be likened to an increased need for the population health approach. With this in mind, this dissertation was developed to gain an understanding of what those policy changes might be within an area of macroeconomic policy, specifically, trade and investment policy. Before engaging in an exploration of the theoretical and conceptual relationships between trade and investment and health, and the new contributions made by this work, some of the fundamental components of the international trade and investment system must be established. The following section will overview key principles and significant developments within the global trade and investment system, including the World Trade Organisation (WTO), and the expansion of regional and

bilateral trade and investment agreements, before turning to an outline of the structure of the current dissertation.

## **1.2 International Trade and Investment System**

### **1.2.1 A Brief History of Modern Trade and Investment Relations**

As the Second World War (1939-1945) drew to a close, leaders of the US, the United Kingdom, and other allied countries began negotiations to establish the rules for the postwar international economy. A series of events between the two World Wars considered reactions to the Great Depression in the 1930s, including the introduction of high tariffs, competitive currency devaluations, and discriminatory trading blocs, were faulted as destabilising the international political and economic environment. This view steered these leaders to the conclusion that free trade and economic cooperation and integration were the only path to international peace and prosperity. These negotiations concluded in July 1944 in Bretton Woods, New Hampshire with the establishment of the International Monetary Fund and the World Bank [18].

An international agreement on trade proved more challenging to facilitate. It was not until 1947 that 23 nations agreed to the first postwar round of tariff reductions to be implemented by the General Agreement on Tariffs and Trade (GATT). The GATT also codified the rules of the trading system until an International Trade Organisation could be created. A charter for an International Trade Organisation was drafted and signed by 53 countries; however, opposition from the US prevented the organisation from coming to fruition. Consequently, the GATT, an interim agreement, governed international trade relations for almost 50 years. Under the guidance of the GATT (1947) eight rounds of tariff reductions occurred before it was succeeded by the WTO on January 1, 1995 [18].

### **1.2.2 World Trade Organisation**

The Uruguay Round of negotiations establishing the WTO began in Punta del Este, Uruguay in 1986 and concluded in Marrakesh, Morocco in 1994 with 123 countries signing the Marrakesh Agreement [19]. The Marrakesh Agreement established that the role of the WTO in the area of trade and economics should be one of "...raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's

resources in accordance with the objective of sustainable development...” [20]. The intention of creating the WTO was to develop a binding set of rules on governments for the conduct of international commerce that would help business while protecting legitimate social and environmental objectives of states. The WTO was also intended to serve as a forum for settling disputes regarding these rules and the negotiation of new trade and investment agreements [21].

Two fundamental principles of the WTO are trade without discrimination and progressive liberalisation of trade through additional negotiations. Non-discriminatory trade is enforced through the right to most-favoured nation (MFN) and national treatment. MFN prevents discriminatory treatment among one country and its trading partners, that is, the most favourable conditions provided to one trading partner must be provided to all trading partners. There are select exceptions to this obligation such as the formation of a free trade bloc and special access for developing countries. National treatment prevents discrimination between domestic and foreign producers, such that imported goods and services should be treated no less favourably than domestic goods and services. These rights are enshrined within the WTO agreements [22]. The Uruguay Round produced over 60 different agreements, annexes, decisions, and understandings, and developed an overall structure that was divided into six main parts: (1) the agreement establishing the WTO; (2) agreements on goods; (3) agreements on services; (4) agreements on intellectual property; (5) dispute settlement; and (6) trade policy reviews [23].

Important for the purposes of this dissertation are the agreements on goods, services, and intellectual property, and the procedures for dispute settlement. The multilateral agreements on trade in goods are composed of the original GATT 1947 as well as the GATT 1994, an updated version. Other significant agreements on trade in goods include: the Agreement on Agriculture (AOA), an agreement dedicated to the agricultural sector which is intended to remove trade distorting features of the international agricultural system, including import quotas and export subsidies [24]; the Agreement on Sanitary and Phytosanitary Measures (SPS), an agreement on food safety and animal and plant health standards [25]; the Agreement on Technical Barriers to Trade (TBT), an agreement which tries to ensure that regulations, standards, testing, and certification procedures do not create unnecessary obstacles to trade [25]; and the Agreement on Trade-Related Investment Measures (TRIMS), an agreement which seeks to eliminate trade distortive investment measures such as local content requirements or restrictions on the volume or

value of imports enterprises may purchase [26]. The GATT, SPS, and TBT agreements are explored in further detail in Chapter 4.

The General Agreement on Trade in Services (GATS) attempts to liberalise domestic service sectors through four modes of services provision: cross-border supply of services, consumption abroad of services, commercial presence of services, and presence of natural persons providing services [27]. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) introduces rules on intellectual property rights (IPRs) into the multilateral trading system, including rules on copyright, trademarks, geographical indications, industrial design, patents, and trade secrets [28]. The GATS and TRIPS agreements are explored in further detail in Chapter 4.

Finally, the WTO offers a dispute settlement system that provides Members a process by which they can seek compliance with the terms of the Agreements. Disputes arise when one WTO member adopts a policy or takes an action that another member considers to violate its WTO commitments. Third parties are able to join the dispute if they have a declared interest in the case. Timelines for disputes established by the WTO ensure that they should not exceed one year, although they may last up to 15 months if the initial ruling of a dispute panel is appealed to the Appellate Body. The Dispute Settlement Body (DSB) consists of all WTO members and is the sole authority for establishing the dispute panel and accepting or rejecting the rulings of either the dispute panel or the Appellate Body. The role of the dispute panel is to make recommendations to the DSB, however, their ruling can only be rejected by consensus. Appeals are based on points of legal interpretation of the law and do not examine existing evidence or new issues. In the case of an appeal the DSB again either accepts the ruling of the Appellate Body or may reject it by consensus. The goal of the dispute process is to ensure that the respondent brings its policies into line with its obligations. If it fails to do so the member must enter into negotiations on acceptable compensation, such as tariff reductions in the interest of the complaining member [29]. If compensation cannot be agreed on, the member bringing the complaint may be permitted to retaliate against the recalcitrant member by removing trade concessions in relation to the goods or services of that member. The WTO dispute settlement procedures can only be initiated by states against states, which makes it a state-state dispute settlement (SSDS) system.

### *1.2.2.1 World Trade Organisation and Health*

After the establishment of the WTO it became apparent that the ‘rules of the game’ for international trade and investment had changed dramatically. The comprehensive suite of agreements introduced novel interactions between trade and investment and health. As a component of global economic integration such agreements have been argued to be indispensable for achieving improved economic growth, health, and general welfare [30]. These agreements, however, have also increasingly come under scrutiny for their adverse health impacts [31–33]. In 2002, the WHO in partnership with the WTO, released a report on the relationship between the WTO Agreements and public health. The report examined the implications for infectious disease control, food safety, tobacco use, the environment, access to medicines, health services, food security and nutrition, and emerging issues, including biotechnology [34].

The SDDS system is a particularly important area given its capacity to result in either a reversal of public health measures ruled to contravene trade obligations, or, in the absence of a policy reversal, to impose temporary sanctions on the offending state until the regime is brought into compliance. It has been argued that the WTO is a relatively encouraging forum in which to address tensions between health and trade and investment objectives, “...given that WTO agreements acknowledge public health protection as a legitimate goal, incorporate significant flexibilities to accommodate this, and...do not allow corporations to directly pursue legal action against states” (p.276) [35]. Nevertheless, the efficacy of general exceptions in the GATT, including those for public health, have been called into question based on the finding that only one out of 44 attempts to use such exceptions have succeeded [36].

While the WTO continues to be a central institution for global trade, negotiation of new agreements has occurred simultaneously outside of this forum resulting in an ever-expanding and increasingly complex web of regional and bilateral trade and investment agreements [37–39]. These agreements are surveyed in the next section.

### **1.2.3 Regional and Bilateral Trade and Investment Agreements**

Although the WTO has elements of investment within its agreements, specifically the TRIMS agreement and one of the modes of services provision in GATS is delivery through a commercial presence, a form of investment, the WTO is principally an institution supporting global trade. The Organisation for Economic Cooperation and Development (OECD) attempted to develop a

Multilateral Agreement on Investment (MAI) in 1995 to provide a level of investment protection and a forum for investment disputes not offered by the WTO. Numerous sources of opposition blocked the signing of the MAI and a multilateral agreement on investment has yet to materialise [40]. Instead, a network of international investment agreements (IIAs) has sprung up around the WTO. IIAs are largely comprised of Bilateral Investment Treaties (BITs), agreements on the promotion and protection of investments between two countries, of which there are 2,278 currently in force. Other forms of IIAs exist, including broad economic treaties, treaties with limited investment-related provisions, and treaties with only a framework on investment. There are 285 of these other IIAs currently in force [41].

Government efforts have increased regarding the negotiation of one particular category of IIAs: comprehensive regional trade and investment agreements (RTAs). RTAs include two or more countries defined by some geographical boundary with 'BIT-like' terms incorporated within a specific chapter on investment. This trend was pioneered by NAFTA, but has gained increased prominence in contemporary negotiations, including the Trans-Pacific Partnership (TPP) among 12 Pacific-Rim countries, the Comprehensive Economic Trade Agreement (CETA) between Canada and the European Union (EU), the Trans-Atlantic Trade and Investment Partnership (TTIP) between the US and the EU, and the Regional Comprehensive Economic Partnership (RCEP) among 16 Asian countries.

In accordance with the principle of progressive liberalisation, RTAs negotiated post-WTO are by design WTO+. That is, while RTAs contain analogous content to the WTO, such as market access for goods, SPS, TBT, services, and IPRs, they have the critical distinction that their obligations are additive to the WTO (see Appendix A for the chapter structure of the TPP and the corresponding agreements within the WTO). For example, through RTAs and BITs countries may further reduce tariffs, commit new service subsectors or remove restrictions on existing commitments, and provide new protections for IPRs, relative to the WTO and other existing agreements. Arguably, the most significant difference between the WTO Agreements and many RTAs is the inclusion of an investment chapter, often similar in structure and content to a BIT, providing an expansive set of foreign investor rights and direct access to dispute settlement for foreign investors. Throughout this dissertation the term contemporary RTAs will be used as a shorthand for agreements like the TPP, CETA, TTIP, and RCEP, which contain WTO+ provisions on trade and an investment chapter.

Investment chapters are comprised of substantive content, including a set of foreign investor rights, and associated procedural and arbitral rules in the case of a dispute [42], both of which have come under extreme criticism [43,44]. Substantive content in these chapters defines who is an investor and what an investment is, that is, which investors have access to the agreements and for what types of claims in order for a tribunal to have jurisdiction to rule on a dispute. Definitions of an investment have generally been very broad, including ‘every kind of asset.’ The definition of an investor can be very expansive requiring only incorporation in a state party to the treaty; or it can be more restrictive requiring some threshold of economic activity in the host state [45]. More expansive definitions of an investor may permit ‘shell companies’ access to the rights of a treaty; a phenomenon referred to as ‘treaty-shopping’ wherein foreign investors acquire nationalities based on treaties with the most favourable set of rights for their interests [46]. Investment chapters also include a typical set of rights for foreign investors, including the right to fair and equitable treatment; to compensation in the case of direct or indirect expropriation; to treatment no less favourable than that given to domestic investors or investors from third countries; to freedom from performance requirements such as technology transfer or local procurement; to the free transfer of capital, including the right to set up and maintain the investment, to withdraw capital from the host state, or repatriate the income of the investment; to have all legal or contractual obligations guaranteed by the host state respected; and to bring arbitration claims against host governments through the ISDS mechanism [40]. This set of substantive rights privileges foreign investors over domestic investors and is generally more favourable than what they would receive from domestic laws [42,47]. Foreign investor rights and ISDS will be explored in greater detail in Chapter 7.

The ISDS mechanism, which permits foreign investors to directly initiate litigation in the event that they perceive their rights have been violated, was developed to provide increased legal protection for foreign investors from developed countries when investing in developing economies that lacked independent and reputable courts. The developing economy countries adopted these terms as part of a strategy to attract foreign investment into their country. It is suggested that it was originally intended to be a de-politicised and neutral forum that would be quicker, cheaper, and more flexible than other dispute settlement mechanisms [48].

When an ISDS mechanism is included in a treaty it will cover issues such as consent to arbitration and which arbitral forums are available. The arbitral rules most frequently provided for are the arbitration rules of the International Centre for Settlement of Investment Dispute (ICSID) and the

United Nations Commission on International Trade Law (UNCITRAL). The rules are usually selected by the claimant as states have already given consent to the rules listed in the treaty by nature of having ratified it. The ICSID Convention, institutionalised within the World Bank, was created in 1965 and is currently in force in 149 countries. When only one party to a treaty is also a party to the ICSID Convention, the ICSID Additional Facility Rules can be used in place of the arbitral rules provided by the Convention. ICSID is not a judicial body, rather it is an arbitration system where three arbitrators (usually lawyers) are appointed to a tribunal: one by the state, one by the claimant, and a third arbitrator that is either agreed to by both parties to the dispute or appointed by the institution administering the dispute. ICSID has a public registry where all cases are disclosed, as well as the names of the appointed arbitrators and counsel. Third parties may attend the hearings if neither party objects; and either party to the dispute is able to make the final award public. ICSID arbitrators are paid US\$3,000 per day. The claimant must also pay to ICSID US\$25,000 to launch a dispute and US\$32,000 in annual maintenance fees. The award from a tribunal established under the ICSID Convention is subject to a special annulment procedure<sup>5</sup>, but is not permitted to be set aside by domestic courts. Conversely, awards under the Additional Facility Rules are not subject to the annulment procedures, but can be challenged in domestic courts [48].

The UNCITRAL rules are similar on many accounts, however, UNCITRAL does not provide institutional support and cases must be heard in third party forums, such as the Permanent Court of Arbitration or by the ICSID Secretariat. Historically, UNCITRAL had been considerably less transparent than ICSID, such that the existence of disputes could be kept undisclosed, hearings were closed unless both parties agreed, and the final award was published only if both parties consented. This changed in April 2014 when UNCITRAL introduced new rules on transparency that addressed many of these issues [50]. While UNCITRAL does not set arbitrator fees, it does propose that they should be ‘reasonable,’ however, these fees usually end up being higher than those with ICSID [48].

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<sup>5</sup> Under the ICSID Convention awards rendered are binding and not subject to appeal. The Convention provides disputing parties the option to challenge an award through an annulment proceeding but is limited to five grounds: (1) that the tribunal was not properly constituted; (2) that the tribunal has manifestly exceeded its powers; (3) that there was corruption on the part of a member of the tribunal; (4) that there has been a serious departure from a fundamental rule of procedure; or (5) that the award has failed to state the reasons on which it is based [49].

Evidence for the relationship between investment protection and actual FDI inflows is unclear. Some research suggests these agreements have been successful in attracting FDI [51] while others conclude that it is not any one agreement but a number of agreements that is correlated with increased investment [52]. A third group of studies have found that the relationship is nuanced and the larger economic policy changes must be considered [53]. A final group of studies found that investment treaty protection and ISDS have no demonstrable effect on FDI [54–56]. Moreover, the necessity of investment chapters between developed countries has been questioned [47]. Developed countries are perceived to have effective and reputable national courts where foreign investors can expect to receive unprejudiced rulings in the event of a disagreement with the state. Arguing the need for allegedly neutral international arbitration panels to provide judicial objectivity in disputes between investors and the state in these countries to promote and protect foreign investment is problematic. The concerns listed above make it difficult to understand the value of this system for states, particularly in light of the associated costs and risks to public policy discussed in the next section.

#### *1.2.3.1 Regional Trade and Investment Agreements and Health*

Not only has trade and investment liberalisation outside of the WTO again created novel points of interaction between trade and investment and public health, it is also accused of prioritising corporate interests over public interests [57–59]. The intensified engagement by governments in RTA negotiations has heightened public health interest in how to address these new challenges [32,60,61], including efforts by TNCs during negotiations to achieve internationalisation of regulation to facilitate the flow of HHCs across borders alongside expansive investor protections [62,63]. The ISDS system has increasingly been used to challenge domestic public policy measures that allegedly infringe upon investor rights [48]. These include challenges to measures that directly and indirectly impact health, such as:

measures imposing and attempting to collect taxes; measures changing domestic fiscal policy;...government bans on harmful chemicals; bans on mining; environmental restrictions on the manner in which mining can take place; requirements for environmental impact assessments; regulations regarding transport and disposal of hazardous waste; regulations governing health insurance; measures aiming to reduce smoking; measures affecting the price and delivery of water; regulations aiming to improve the economic situation of minority populations; and measures aiming to increase revenues gained from production and export of natural resources (p.7) [40].

Several health-related regulations have been successfully challenged through the ISDS system, including the 2008 *Achmea v. Slovakia I* case in which an insurance company, Achmea, was awarded US\$28.8 million in compensation for violation of their right to fair and equitable treatment (FET) and their right to transfer of funds after a reversal of the previous liberalisation of the Slovak health insurance market [41]. Additionally, in 1997 chemical manufacturer Ethyl Corporation initiated an ISDS challenge under NAFTA for CA\$350 million for damages and lost income after the Canadian government passed a law restricting the import and interprovincial transport of the gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT), a suspected neurotoxin. The Canadian government repealed the law and settled with Ethyl before a tribunal could make a ruling. Canada paid Ethyl CA\$19.5 million in compensation, a value which exceeded Environment Canada's budget for enforcement and compliance programmes that year, and agreed to issue a statement that MMT is neither an environmental nor a health risk [64].

The perception of a possible investor-state dispute, or a threat of one, may be factored into domestic policy decision-making processes. This may result in new policy being compromised for the purposes of avoiding the risk of a claim being brought, being delayed until related arbitration is concluded, or abandoned altogether, a set of responses referred to as regulatory chill. This has occurred several times around tobacco plain packaging policy which was abandoned by the Canadian government in the nineties after a threat of dispute [65–67] and delayed by the New Zealand government while Australia underwent an investor-state dispute over tobacco plain packaging from 2011 to 2015 [8,68]. The possibility of regulatory chill has been exacerbated by inconsistent interpretations of the broad treaty standards by tribunals, which creates uncertainty about what the standards require for regulators. The role of ISDS and expansive investor rights in the policy decision-making environment and regulatory chill responses is explored in depth in Chapter 7.

In addition to the risks of a direct challenge to health regulatory policies and the possibility of regulatory chill, ISDS also has opportunity costs associated with the system itself, where revenue that could have funded programmes or policies designed to improve population health is diverted to protect the investments of an elite subsector of society. A recent study found that in known ISDS cases with publicly disclosed awards, extra-large companies (over US\$10 billion in annual revenue), have profited over US\$6.5 billion from this system, or US\$136 million per adjudicated case. Super wealthy individuals (over US\$100 million in net worth) and large companies (over

US\$1 billion but less than US\$10 billion in annual revenue) have profited US\$984 million and US\$628 million, or US\$45 million and US\$17 million, per case, respectively. These groups have received 94.5% of all compensation awarded in these cases. The ISDS legal industry has also benefited substantially at over US\$1.7 billion in total or US\$8 million per case. Extra-large companies have also been disproportionately successful having won 70.8% of cases (combined jurisdictional and merits stage decisions<sup>6</sup>), relative to other claimants which have won 42.2% of the time. This pattern is replicated when examining the merits stage only, where extra-large companies win 82.9% of the time, relative to 57.9% of the time for all other claimants [70].

In total, states, and consequently tax-payers, have been ordered to pay over US\$10 billion in legal fees and financial compensation, approximately US\$47 million per adjudicated case [70]. This value excludes three recent cases against Russia by Yukos oil companies which were awarded US\$50 billion cumulatively<sup>7</sup>. The opportunity costs of this system for health are enormous. For example, childhood vaccinations are considered one of the most cost-effective uses of limited health resources. In Sub-Saharan Africa and South Asia the cost of national childhood vaccination programmes translated to an estimated cost per death averted of under US\$275 [72]. Accordingly, that US\$10 billion could have been used to avert over 36 million deaths through childhood vaccination programs [70,72]. The most recent award for Yukos could amount to over 180 million deaths averted alone [70,72].

The lack of legitimacy of an ISDS system in countries with independent courts, the uncertain association with increased FDI, and the one-sided nature of those profiting from the system, calls into question the value and necessity of the persistent inclusion of an ISDS mechanism in contemporary RTAs. As noted earlier, concerns regarding these agreements also include the role for TNCs during negotiations, prioritisation of a shift towards internationalisation of regulation, and the increased flow of HHCs across borders, all trends introduced by previous trade and investment liberalisation but with amplified consequences due to enhanced investor protections.

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<sup>6</sup> Jurisdiction can be defined as “...the court’s raw, baseline power and legitimate authority to hear and resolve the legal and factual issues in a class of cases” (p.215); whereas “[m]erits, by contrast, are defined by who can sue whom, what real-world conduct can provide basis for a suit, and the legal consequences of a defendant’s failure to conform that conduct to its legal duties...jurisdictional issues are not subject to waiver by parties; the court bears an independent obligation to investigate and raise jurisdictional problems; and the court resolves any factual issues on which jurisdiction turns. On the other hand, merits issues should be resolved at trial, typically with a jury serving as finder of any contested facts” (p.215-16) [69]. In ISDS the jurisdiction stage determines the tribunal’s authority to hear and resolve the dispute, while the merits stage rules on the facts of the case based on the substantive law. The jurisdiction and merits stages can be completed separately or together.

<sup>7</sup> In April 2016 this award was overturned by a Dutch district court on the grounds that the international arbitral panel lacked jurisdiction to rule in the case. The decision by the district court can be appealed to higher Dutch courts [71].

Increased emphasis by governments on these types of negotiations, as exemplified by the TPP, CETA, TTIP, and RCEP, create an urgent need for the public health sector to increase engagement with this highly influential policy sector. The final section of this chapter introduces the central arguments, aims, and objectives of the current dissertation.

### **1.3 Dissertation Outline**

This dissertation seeks to clarify the pathways through which international trade and investment agreements influence human health and to explore points along those pathways with the intent of improving the existing evidence base and policy development. The central thesis of this work is comprised of three main arguments:

- (1) macroeconomic policies, specifically trade and investment policies, are a fundamental structural determinant of the socioeconomic and political context within which the social determinants of health inequalities (*e.g.* education, employment, income) and the social determinants of health (*e.g.* material circumstances, individual behaviours, health systems) are conditioned and constrained, which ultimately determine one's health and well-being;
- (2) TNCs are highly influential actors within the trade and investment policy space and they execute that influence to guide provisions that are in their interest through engagement in the negotiation of new international trade and investment agreements; and
- (3) Trade and investment agreement provisions in the interest of TNCs are manifested through two primary channels:
  - i. provisions that contribute to TNC profitability by facilitating trade and investment in goods and services across borders, including HHCs; and
  - ii. provisions that provide protection from domestic regulation of HHCs, specifically, the entrenchment of current regulatory regimes enforced through processes of the highly problematic ISDS arbitral system

This dissertation has two primary aims, the first of which is to make an empirical contribution to the academic literature on international trade and investment agreements and health. This aim is pursued through the development of a conceptual framework on trade and investment and health pathways (Chapter 4), and through the application of novel investigative techniques, including the

use of health impact assessment (HIA) as a guiding methodological approach (Chapter 3), and natural experiment design as a quantitative method to analyse the impacts of trade and investment agreements on HHCs (Chapter 6). The second aim is to make a theoretical contribution by advancing a critical investigation of the role of TNCs in the design and implementation of international trade and investment agreements. This aim is pursued through the development of a critical theoretical framework on contemporary trade and investment agreements (Chapter 2); as well as three analytical explorations of TNC interactions with trade and investment agreements: TNC involvement in treaty negotiation (Chapter 5), the spread of HHCs (Chapter 6), and expansive investor rights enforced through the ISDS system (Chapter 7). The following section highlights the focal areas used to narrow these investigations.

### **1.3.1 Trade and Investment and Health Focal Areas**

The comprehensive nature of the dissertation topic, international trade and investment agreements and NCDs, required at times a narrower scope of focus to make in-depth investigations feasible. Firstly, there were points at which the use of a specific trade and investment agreement was required. The intention of this work is to emphasise contemporary RTAs, more specifically, to explore the TPP agreement. The TPP began as a strategic economic partnership between Singapore, New Zealand, and Chile in 2003, which expanded to include Brunei in 2006 with the signing of the P-4 agreement [73]. In 2008 this new partnership entered into negotiations with the US, Australia, Peru, and Vietnam, joined by Malaysia in 2010, Canada and Mexico in 2012, and finally Japan in 2013. The twelve members together account for 40% of global GDP and 26% of global trade [74]. The TPP was lauded as a ‘21st century agreement that addresses new and cross-cutting issues presented by an increasingly globalized economy’ [73]. At the time the dissertation was proposed (July 2014), Canada was engaged in negotiations on the TPP and it was believed that a deal would be concluded imminently. In the end, TPP negotiations did not conclude until the 5<sup>th</sup> of October 2015, and another month passed before the signed text was released<sup>8</sup>.

The TPP is used throughout to contextualise the findings for contemporary RTAs. It is more explicitly investigated in Chapter 5, which explores the role of the food industry in TPP

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<sup>8</sup> Signatory countries are currently undergoing domestic processes that will enable them to ratify the deal, but the TPP cannot come into force unless all original signatories complete their domestic processes within 2 years of signing, or at least six countries complete their domestic processes and account for at least 85% of the combined GDP of the original signatories. As the US accounts for 60% of the combined GDP of the original signatories, the TPP cannot come into force without the US. With uncertainty regarding whether US President Obama will be able to acquire Congressional approval, and all frontrunner candidates in the upcoming US federal election publicly opposed to the TPP in its current form, it is possible the deal will never be ratified or will return to the negotiation stage.

negotiations. The recency of TPP negotiations made this a suitable agreement for analysis, and the release of the text in late 2015 permitted a supplemental analysis of the extent to which industry requests were reflected in the negotiated text. Several investigations required evidence of the impacts of international trade and investment agreement on health which necessitated exploration of agreements already in force. For example, Chapter 4 emphasises contemporary RTAs in the structure of the framework itself, but explores evidence from existing RTAs to support the framework with a considerable focus on NAFTA. In order to capitalise on available evidence, Chapter 4 also addresses all forms of trade and investment liberalisation, including unilateral liberalisation through domestic policies and multilateral liberalisation through the WTO. The quantitative analysis developed in Chapter 6 explores the impacts of bilateral trade and investment relations with the US along with WTO accession to capture the health effects of global economic integration in Vietnam (a TPP member country) and the Philippines. Finally, Chapter 7 required an exploration of not only agreements already in force, but ones with adjudicated ISDS cases. Accordingly, this chapter was open to an examination of all IIAs with an ISDS mechanism, although there was a disproportionate focus on BITs and NAFTA.

A common factor among the agreements given the most attention throughout this work, the TPP and NAFTA, is the dominant role of the US in the agreements. A focus on US agreements was selected on the basis of the US's association with TNCs and its involvement in the international investment regime. The US is home to 598 of the top 2,000 largest companies in the world, and 34 of the top 100 companies which have aggregate annual sales of over US\$4 trillion [75]. The US, again, often acting as the voice of large corporations, is also an ardent supporter of the ISDS system. As a respondent the US has been very successful in defending against ISDS cases, having been successful in 100% of its cases to date compared to Canada's 62% success rate as a respondent. US investors have also had much success in the system with a success rate of 44%, relative to a 14% success rate for Canadian investors; and have accounted for approximately 20% of all known cases, almost twice as many as the next highest country [41].

In addition to narrowing the scope of international trade and investment agreements, there were times at which it was useful to narrow the scope of NCD risk factors (tobacco use, alcohol misuse, and diet) under investigation. The implications of trade and investment agreements for the global diet has increasingly received attention [5,76–79]. For some in public health the food industry is seen as the new tobacco [80], and health gains made through extensive tobacco education

programmes and regulation are being undermined by rising rates of diabetes and obesity [81]. The food industry is also a significant economic sector: it accounts for approximately 10% of the global economy and is valued at US\$7 trillion, greater than even the energy sector [82]. Furthermore, six of the ten largest food companies are headquartered in the US, more than any other country in the world [82]. Due in part to the reasons listed above, the food system and dietary outcomes were selected as the focal NCD risk factor and used throughout the dissertation when such specification was appropriate for the analysis, including: the use of food systems to exemplify theoretical constructs developed in Chapter 2; the use of food systems and dietary outcomes to demonstrate available evidence for the causal pathways developed in Chapter 4; the use of the food industry to explore one subsector of TNC requests during TPP negotiations in Chapter 5; and the use of sugar-sweetened beverages, a product of transnational food and beverage companies, when examining the relationship between trade and investment agreements and the spread of HHCs in Chapter 6. The following content describes these individual analyses in greater detail.

### **1.3.2 Aims and Objectives**

Aim 1: make an empirical contribution to the academic literature on international trade and investment agreements and health

*Objective 1a: apply novel investigative techniques in the assessment of relationships between international trade and investment agreements and health*

The study of international trade and investment agreements and health is an emerging field, and as such, appropriate methodological approaches are still being explored. This work utilises HIA as a guiding methodological approach. HIA is proposed as a potentially valuable tool to direct the production of evidence for the relationships between trade and investment and health. An introduction to HIA is provided in Chapter 3 which overviews the major stages of the HIA process (screening, scoping, appraisal, and reporting) and how it has been adapted to the trade and investment policy context. HIA provides a guiding structure for the overall dissertation. As well, novel methodological techniques are introduced in Chapter 6, which tested the utility of a natural experiment design as a quantitative method to analyse the impacts of trade and investment agreements on HHCs.

*Objective 1b: develop a conceptual framework for understanding the relationships between trade and investment agreements and health*

A comprehensive framework of causal pathways between international trade and investment agreements and health is lacking in the existing literature. In order to advance this area of research a framework is needed that can guide future studies, and be refined based on the results, in order to develop consistency in, and guide adequate coverage of, empirical investigations of potential pathways. The conceptual framework developed in this dissertation proposes that trade and investment agreements impact NCD morbidity and mortality rates through changes to domestic policy environments, which in turn influence: the availability, affordability, accessibility, and acceptability of HHCs (e.g. tobacco, alcohol, ultra-processed food and beverages); access to medicine; domestic regulatory policy space and governance; as well as employment and working conditions, health and social services, and income. Chapter 4 details the development of the conceptual framework, including a realist review (a type of systematic review), which was conducted to help develop and validate the pathways in the framework. The framework is premised on the first argument that trade and investment policies are a fundamental structural determinant of the socioeconomic and political context within which the social determinants of health and health inequalities are conditioned and constrained, which ultimately determine one's health and well-being. In an attempt to create maximum generalisability of the framework, actors, including TNCs, are not explicitly incorporated, although they are implicitly one of the driving forces behind the changes in the business and consumer environment as a result of enabling trade and investment agreement provisions. The framework establishes the logic behind the causal pathways in HHCs and health policy space investigated in Chapters 6 and 7, and could serve as a screening tool for future HIAs in this area.

Aim 2: make a theoretical contribution by advancing a critical investigation of the role of transnational corporations in the design and implementation of international trade and investment agreements

*Objective 2a: develop a theoretical framework for understanding provisions within contemporary regional trade and investment agreements*

The development of a theoretical framework for understanding the provisions found in contemporary RTAs was determined to be essential for contextualising the results of all subsequent chapters. The premise of this framework is that many of the contentious provisions within these agreements, such as the internationalisation of regulation, enhanced IPRs, and expansive investor

rights paired with ISDS, are the result of a set of neoliberal ideas that have been institutionalised through the expansion of international trade and investment agreements in the interest of a transnational capitalist class comprised of elite political, economic, and judicial actors. Of these contentious provisions, this dissertation will indirectly explore the internationalisation of regulation through TPP negotiations in Chapter 5 and directly explore expansive investor rights and ISDS in Chapter 7. IPRs, although relevant within both the theoretical and conceptual framework and a potential source for dispute in ISDS, are not explored in depth at any point in this dissertation. Establishing these theoretical constructs is indispensable to understanding the motivations for contemporary RTAs, including who stands to benefit most and why states continue to pursue such agreements in spite of the compromises to state sovereignty and public policy.

The theoretical framework, presented in Chapter 2, explores the neoliberal ideas behind the development of trade and investment agreements, and the rules and practices shaped by this set of ideas. The theory of new constitutionalism [83] is used to explore contemporary trade and investment agreements as tools to entrench a set of policy preferences at a transnational level that are binding on national governments in combination with the theory of the transnational capitalist class [84,85] to explore the actors and interests behind the institutionalisation of neoliberal ideas. The theoretical framework helps to ground two of the core arguments of this thesis: (1) that TNCs are highly influential actors with preferential access to trade and investment agreement negotiations; and (2) that TNC's use this preferential access to maximise the benefits of such agreements for their own profit and protection.

*Objective 2b: explore the role of transnational corporations in contemporary regional trade and investment agreement negotiations*

Contemporary trade and investment agreements have been accused of being a corporate charter of rights, allegations bolstered by reports of the US granting access to over 600 corporate advisors during the TPP negotiations [86]. The premise of this investigation was that the text of the TPP agreement would be highly influenced by the requests of TNCs. A thematic analysis of TPP submissions by food industry to their representative governments in the US, Canada, Australia, and New Zealand was completed and published [63]. The Canadian results of this study are presented in Chapter 5, along with a comparison to the results in the US. A supplementary analysis of the released TPP text is included to demonstrate the extent to which food industry requests are

reflected in the final content of the negotiated treaty, along with the implications for health. This objective was designed to support the assertion that TNCs are central actors in trade and investment agreement negotiations, an essential point of access for influencing the content of the provisions. This study was also the first of three analytical components, forming the appraisal stage of the HIA, investigating the points of interaction between TNCs and trade and investment agreements, specifically that they are designed in no small part for TNC interests, for TNC profits, and for TNC protection. The latter two claims are addressed by the following two objectives.

*Objective 2c: explore the role of trade and investment agreements in facilitating the spread of health-harmful commodities by transnational companies*

Trade and investment agreements may facilitate the spread of HHCs by TNCs, including sugar-sweetened carbonated beverages (SSCBs), products associated with increased risk factors for obesity, type II diabetes, and cardiovascular diseases [87]. Apart from a limited set of comparative cross-national studies, the majority of analyses linking trade and investment liberalisation and the food environment have drawn on case studies and descriptive accounts. The premise of this investigation was that trade and investment agreements would be associated with an increased level of such commodities driven by foreign participation in the market, particularly by TNCs. The published analysis presented in Chapter 6 used a natural experimental design to test whether Vietnam's accession to the WTO in 2007 along with a BIT with the US increased sales of SSCBs compared with a matched country, the Philippines, which acceded to the WTO in 1995. This chapter addresses both aims of the dissertation. It applies a novel methodology in the study of trade and investment and health, and investigates the pathways between trade and investment agreements and FDI into and imports of HHCs in the conceptual framework proposed in Chapter 4. Also, it is the second of three analytical components, addressing one of the critical theoretical assertions that trade and investment provisions are designed to enhance TNC profits.

*Objective 2d: explore the implications of expansive investor rights for transnational companies enforced through investor-state dispute settlement for health policy*

Expansive investor rights and ISDS are arguably one of the most important trade and investment drivers of the health regulatory policy environment, and simultaneously, one of the topics that has received the least amount of engagement from the health field, relative to areas such as access to medicines and health services, or food safety, for example. The premise of this investigation is that

expansive investor rights, in combination with ISDS, subjugate domestic policy-making to principles of international investment; consequently, threatening effective policy measures, introducing potential regulatory chill, and creating opportunity costs that undermine health development. Chapter 7 presents a health policy analysis of 41 ISDS awards based on merits, which explores tribunal interpretations of key investor rights that may threaten health policy space, and opportunities to strengthen the right to regulate within IIAs. The analysis highlights what TNCs stand to benefit and what states stand to lose from expansive investor rights, while exploring in more detail the domestic policy space and governance pathway from the conceptual framework proposed in Chapter 4. It also addresses one of the tensions between the international investment regime and public health, specifically, when new regulation is introduced that impacts the investment of a foreign investor. This scenario is particularly relevant to markets with a high concentration of foreign investment in HHCs, such as the SSCB market in developing economies presented in Chapter 6. This analysis is the third of the analytical components addressing the assertion that these agreements are for the protection of TNCs, and explores in depth one of the contentious provisions of contemporary RTAs, investor rights and ISDS, addressed in the theoretical framework.

### **1.3.3 Candidate Contributions**

This dissertation had the distinct advantage of being associated with two international research projects. The first was a project entitled *A health impact assessment of the Trans-Pacific Partnership agreement* funded by the Canadian Institutes for Health Research (CIHR) and administered at the University of Ottawa. Colleagues on this grant included Drs. Ronald Labonté, Arne Ruckert, Sharon Friel, David Stuckler, and Corinne Packer, and Professor Anthony VanDuzer. The second was a project entitled *Trade policy: maximising benefits for nutrition, food security, human health, and the economy* funded by the Australian Research Council (ARC) and administered at the Australian National University. Colleagues on this grant included Drs. Sharon Friel, Ronald Labonté, Adrian Kay, Deborah Gleeson, Gabriele Bammer, Anne Marie Thow, Wendy Snowdon, and David Stuckler. The work of this dissertation benefitted greatly from the expertise of these individuals and the resources of these project grants.

The association with these project grants, however, necessitates a brief review of the relative contributions of the candidate and project team members. First, in regards to the CIHR grant, this

dissertation formed, in large part, the work of this grant and was consequently led by the candidate. The candidate received guidance and feedback on the use of the HIA methodology discussed in Chapter 3, the development of the conceptual framework in Chapter 4, and the legal analysis in Chapter 7 from CIHR project members. All work was conducted by the candidate with two exceptions: first, a research assistant on the project assisted with reducing the articles in the realist review and assisted with approximately 50% of the coding of the articles; second, two research assistants on the project assisted with the first round of coding of the 41 arbitral awards analysed in Chapter 7. The development of the conceptual framework was steered by the candidate with feedback from the research project team and an expert advisory committee, and all analytical work in Chapters 4 and 7 was conducted by the candidate.

Second, Chapters 5 and 6 were associated with the work of the ARC project grant. Chapter 5 is based on an international comparative analysis of food industry lobbying of the US, Australian, New Zealand, and Canadian governments during the TPP negotiations conducted by the ARC team. The Canadian analysis presented in Chapter 5 was conducted solely by the candidate. The ARC team selected the methodology. Analysis of the US submissions, conducted principally by other members of the ARC team with contributions from the candidate, was utilised for comparison to the Canadian data in Chapter 5. The comparative analysis to the final TPP text was developed and conducted by the candidate for this dissertation. ARC project team members also contributed to the conceptualisation and selected methodology in Chapter 6, and work was completed under the direct supervision of one of the project members. All data collection and analysis was completed by the candidate. This dissertation was written in its entirety by the candidate with feedback from the thesis committee and project team members.

The following chapters in this dissertation will address the aims and objectives outlined earlier, demonstrating that 21<sup>st</sup> century health challenges, such as NCDs, require increased engagement with 21<sup>st</sup> century trade and investment policies as structural drivers of health. This chapter opened with the words of the Director-General of the WHO in 2007 that the boundaries of public health have become blurred, it is perhaps fitting then to close this chapter with a portion of a speech given by that same Director-General, Margaret Chan, five years later, addressing the very nature and necessity of the following work:

The globalization of unhealthy lifestyles is by no means just a technical issue for public health. It is a political issue. It is a trade issue... Efforts to prevent noncommunicable

diseases go against the business interests of powerful economic operators. In my view, this is one of the biggest challenges facing health promotion... it is not just Big Tobacco anymore. Public health must also contend with Big Food, Big Soda, and Big Alcohol. All of these industries fear regulation, and protect themselves by using the same tactics... Let me remind you. Not one single country has managed to turn around its obesity epidemic in all age groups. This is not a failure of individual will-power. This is a failure of political will to take on big business. I am deeply concerned by two recent trends. The first relates to trade agreements. Governments introducing measures to protect the health of their citizens are being taken to court, and challenged in litigation. This is dangerous. The second is efforts by industry to shape the public health policies and strategies that affect their products. When industry is involved in policy-making, rest assured that the most effective control measures will be downplayed or left out entirely [88].

## CHAPTER 2

NEOLIBERALISM, NEW CONSTITUTIONALISM, AND THE TRANSNATIONAL  
CAPITALIST CLASS: DEVELOPMENT OF A THEORETICAL FRAMEWORK FOR  
CONTEMPORARY TRADE AND INVESTMENT AGREEMENTS

“...THE 20TH CENTURY HAS BEEN CHARACTERIZED BY THREE DEVELOPMENTS OF GREAT POLITICAL IMPORTANCE: THE GROWTH OF DEMOCRACY, THE GROWTH OF CORPORATE POWER, AND THE GROWTH OF CORPORATE PROPAGANDA AS A MEANS OF PROTECTING CORPORATE POWER AGAINST DEMOCRACY.”

– Alex Carey

“THE KEY TO UNDERSTANDING THE RISE IN INEQUALITY ISN’T TECHNOLOGY OR GLOBALIZATION. IT’S THE POWER OF THE MONEYED INTERESTS TO SHAPE THE UNDERLYING RULES OF THE MARKET.”

– Robert Reich

## 2.1 Introduction

Contemporary trade and investment agreements include contentious provisions, distinct from traditional trade measures regarding tariff reductions, that are argued to go further ‘behind-the-border’ and present greater threats to domestic sovereignty and human health [32,33,89]. Examples of these provisions were introduced in Chapter 1, including internationalisation of regulation, enhanced intellectual property rights (IPRs), and expansive investor rights alongside investor-state dispute settlement mechanisms (ISDS). Determining how trade and investment rules affect health outcomes is complex, and the subject of later chapters. What is of importance at this stage is a theoretical understanding of the development of such contentious provisions within contemporary trade and investment agreements, and why they are being pursued by governments around the world.

The literature on trade and investment from the public health discipline is young and underdeveloped. Consequently, the availability of employable theoretical approaches is limited. This chapter will borrow heavily from political studies, including the *3-i* framework which guides an investigation of the ideas, institutions, and interests that influence public policy development [90–92]. The theories included in the proposed framework originate from a philosophical tradition attributable to Karl Marx and neo-Marxist scholar Antonio Gramsci; however, the theoretical approach taken in this dissertation is neo-Gramscian, based on the modernisation of Gramsci’s work to a discourse on international political economy and globalisation processes by scholars such as Robert Cox, Stephen Gill and William Robinson [83,84,93,94].

This chapter begins with an exploration of neoliberal ideas behind the development of trade and investment agreements, including various conceptualisations of neoliberalism within the academic discourse. It then turns to an examination of institutions, the rules and practices shaped by this set of neoliberal ideas. This section will introduce Gill’s new constitutionalism which describes contemporary trade and investment agreements as tools to entrench a set of policy preferences at a transnational level that are binding on national governments. This is followed by a look at the actors and interests behind the institutionalisation of neoliberal ideas, exploring the role of Robinson’s transnational capitalist class, including elite economic, political, and judicial actors involved in the processes of institutionalisation. Figure 2 provides a visual overview of the theoretical framework that will be elaborated in the following sections.

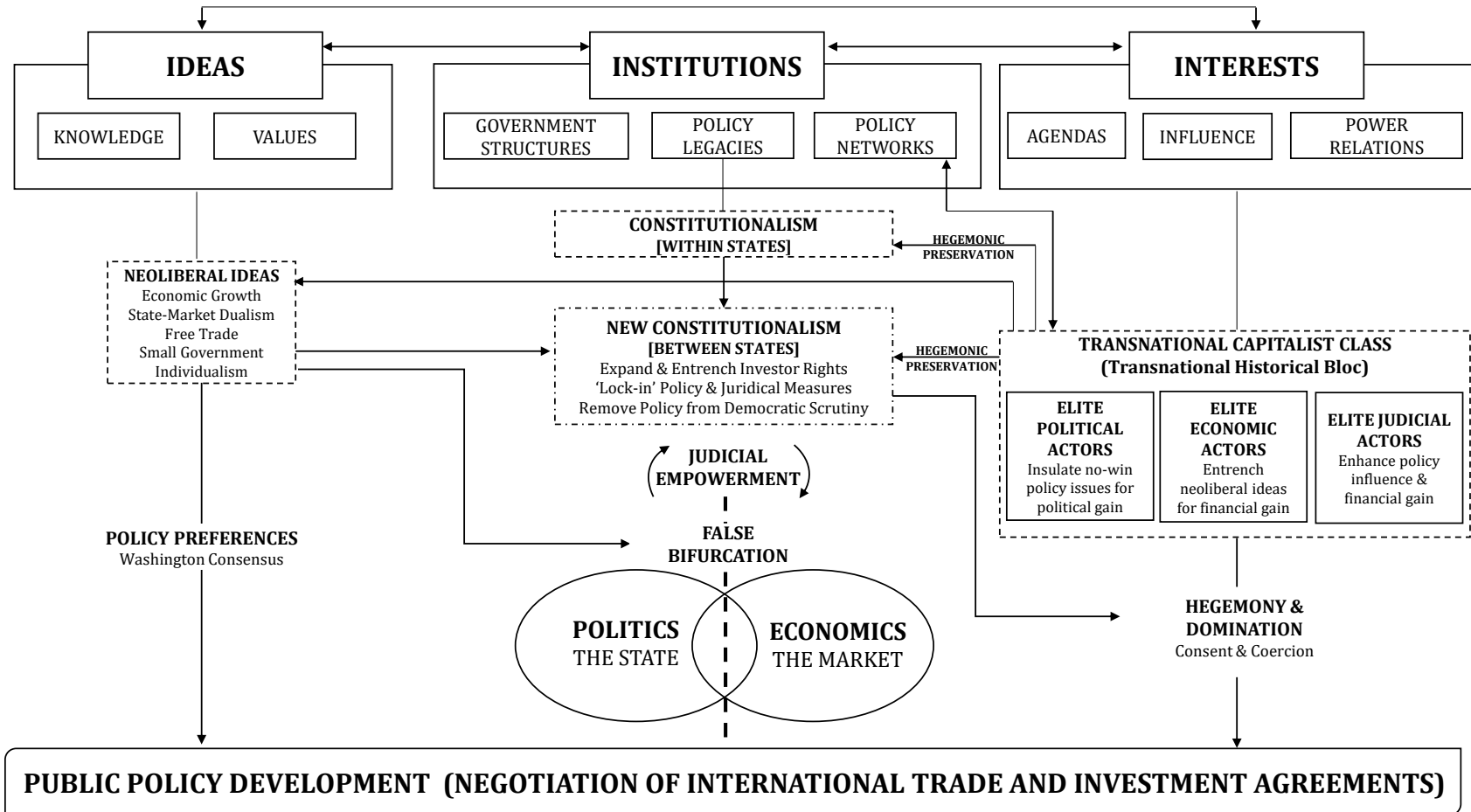
In the final section the theoretical constructs will be explored within the agri-food sector. As indicated in Chapter 1, food systems will be explored throughout the dissertation as an entry-point for a more detailed analysis of the relationships between trade and investment agreements and health. Here, the connection between the theoretical framework and food systems will be reviewed to serve as a foundation for the exploration of the dominant food system in subsequent chapters.

## **2.2 Ideas: Neoliberalism**

The first line of inquiry in the *3-i* framework involves exploring how ideas influence public policy development. Ideas are inclusive of knowledge and beliefs about what is and values about what should be [92]. Ideas translate into what gets problematised and how by relevant actors; drive the range of policy options given consideration; and determine how efficacy, feasibility, and acceptability will be assessed [90]. The knowledge behind policy development can be based on evidence, expert opinion, or experience [90]. Moreover, groups that enjoy direct influence on government and possess a shared system of values and thinking that promote certain policy options for certain goals allow the dominant ideas of such groups to influence policy decisions [91,95].

The following material begins with a brief overview of the many ways in which neoliberalism has been framed within the literature, paying particular attention to the ‘dominant ideology’ view, before turning to neoliberalism as it will be utilised here: as a set of ideas and corresponding policy preferences that are influencing contentious provisions within contemporary trade and investment agreements. The groups mentioned above will be explored further in the section on interests.

Figure 2 Ideas, institutions, and interests of international trade and investment agreements



### 2.2.1 Neoliberalism in Academic Discourse

Neoliberalism is a term that is “...oft-invoked but ill-defined...” [96] which led to the development of a taxonomy of the six ways in which neoliberalism has been employed [97]. First, neoliberalism has been used as an ‘all-purpose denunciatory category’. This framing has been conceptualised by Boas and Gans-Morse [98] who note that “...neoliberalism has come to signify a radical form of market fundamentalism with which no one wants to be associated” (p.138). It is a “...conceptual trash heap capable of accommodating multiple distasteful phenomena without much argument as to whether one or the other component really belongs” (p.156) [98]. A second practise is to use neoliberalism to convey ‘the way things are’. This is largely expressed through statements of politicians in addressing their policy agendas and shifts away from previously dominant economic theories, notably Keynesian economics.<sup>9</sup> It is “...now so deeply embedded in the reflexes of the world’s ruling elites and line managers that they have difficulty conceiving the world in any other way” (p.694) [100]. These usages of neoliberalism provide no substantive understanding of the construct [97].

The third framing of neoliberalism is as a ‘policy doctrine of the English-speaking world’ [97]. This provides a more nuanced view that while neoliberal ideas have taken hold in a substantial portion of the English-speaking world, it is not a global phenomenon; hence, neoliberalism cannot be equated with capital accumulation<sup>10</sup> but rather represents one form of capitalist organisation [102]. A fourth usage has been ‘neoliberalism as hegemony’, classifying neoliberalism not as an ongoing process but as a *fait accompli*, “...part of what makes neoliberalism ‘neo’ is that it depicts free markets, free trade, and entrepreneurial rationality as achieved and normative, as promulgated through law and through social and economic policy” (p.694) [103]. However these views have received relatively little attention in contrast to a fifth representation of neoliberalism as the ‘dominant ideology’ of global capitalism.

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<sup>9</sup> An economic ideology attributed to John Maynard Keynes which challenged prevailing economic thought that free-markets could be relied upon to provide full employment, and instead asserted that household spending and government purchases were equally important components of the economy to business spending and net exports. During times of recession when household expenditures and investment spending by business may languish, government intervention, including fiscal stimulus packages, is justifiable to address market failures [99].

<sup>10</sup> Capital accumulation can be obtained through five channels: (1) financial capital (a system of ownership or control of physical capital); (2) natural capital (ecosystem and natural resources); (3) produced capital (physical assets generated through human productivity, goods or services); (4) human capital (individual capacities acquired through education and training); and (5) social capital (trust, understanding, shared values and socially held knowledge). This dissertation deals exclusively with financial capital and produced capital. [101].

For proponents of this ‘dominant ideology’ view, the Keynesian economic model championed after the social, political, and economic devastation of World War II was displaced following a series of debt crises in the 1970s<sup>11</sup> which created opportunistic conditions for a branch of neoclassical economics<sup>12</sup> to take root [106]. “Neoliberalism was birthed in these conditions of macroeconomic instability and institutional crisis, its central narrative of market deference representing both an accommodation to and a rationalization of a new set of economic ‘realities’” (p.30) [107]. From this perspective on neoliberalism, a key moment in its historical evolution was the election of Margaret Thatcher in the United Kingdom in 1979 and Ronald Reagan in the United States in 1980, as a result of which conservative politicians sympathetic to neoliberal ideas gained power in two of the world’s most dominant market economies [107]. The 1990s also saw the systematic spread of a set of neoliberal policies (referred to as the *Washington Consensus*, explored in the following section) throughout the developing world as conditionalities for loan and debt relief provided by the International Monetary Fund (IMF) and the World Bank [108]. Neoliberalism thus emerged as a convincing discourse from a select group of actors with specific interests and objectives, supported by a specific context at a specific point in time; essentially, formed through a correlation of forces. These localised ideas, described earlier as the ‘policy doctrine of the English-speaking world’, were globalised through entrenchment within supranational institutions, including the IMF and the World Bank, and then adopted by other national actors and institutions and once again localised, to become an increasingly dominant ideology [109].

One of the leading critical scholars of neoliberalism, David Harvey, defined the concept as:

...a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defence, police and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets. Furthermore, if markets do not exist (in areas such as land, water,

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<sup>11</sup> See *Chapter 11 Foreign Debt and Financial Crisis* in [104] for a review

<sup>12</sup> Neoclassical economics is a school of economic thought that grew out of classical economics which suggests that markets, when free from government intervention, lead to economic growth and full employment. Neoclassical economics added the role of the scientific method and mathematical models to the study of economics and argued that economic actors are rational, such that consumers will maximise utility and corporations will maximise profits [105].

education, health care, social security, or environmental pollution) then they must be created, by state action if necessary. But beyond these tasks the state should not venture. State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly possess enough information to second-guess market signals (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit (p.2) [110].

Harvey's [110] account of neoliberalism envisions the resurgence of an elite group capturing institutions and propagating its ideologies, wielding influence over corporations, the media, and civil society, and ultimately gaining state power through political parties. This dissertation is built on Harvey's characterisation of neoliberalism, but not his positioning of these characterisations as a complete theory in and of itself. Rather, it applies Flew's [97] contention that the most persuasive account of neoliberalism is as a set of ideas about socio-economic order. This provides for greater flexibility in identifying which ideas (or variants thereof) associated with neoliberalism have underscored specific policy developments, and by which actors and institutions; that is, Flew's account allows for a less hegemonic understanding of neoliberalism in practice. Here neoliberalism will be regarded as purely the set of ideas that have underscored specific policy developments, separate from the actors and institutions that have advocated and entrenched neoliberal ideas.

### **2.2.2 Neoliberal Ideas and Policy Preferences**

Neoliberal ideas are at their core "...a belief in the free market and minimum barriers to the flow of goods, services and capital" [111]. One of the premises on which neoliberal ideas are formed is the belief that economic growth is paramount and economic actors need to be free from government interference or regulation to pursue economic advantages [111]. The dynamic between politics and economics is integral to the current theoretical framework. Neoliberalism has emphasised a false bifurcation between the political and the economic, that is, between the state and its actors and the market and its actors. Such conceptualisations may frame the state as "...a form of human association distinguished from other social groups by its purpose, the establishment of order and security; its methods, the laws and their enforcement; its territory, the area of jurisdiction or geographic boundaries; and finally by its sovereignty" [112], that is, its authority over the decision-making processes in its territory [113].

This concept of the state can be derived from the Roman *res publica*, which was a legal system that secured the rights and determined the responsibilities of all Roman citizens. This view of the state is consistent with John Locke's view that the state is a social contract wherein "...individuals agree not to infringe on each other's 'natural rights' to life, liberty, and property, in exchange for which each man secures his own 'sphere of liberty'" [112]. More critical perspectives, such as that offered by Marx, depict the state as an "...'apparatus of oppression' determined by a ruling class whose object was always to maintain itself in economic supremacy [112]. Thus, from a Marxist perspective the political and the economic are not separate spheres, but rather mutually reinforcing sources of power and oppression. Shifting from Marx's view of the state, Gramsci developed a society-centred view of the state, such that the state reflects the spread of power relations in society, and is even conditioned by and subordinate to movements in society. Gramsci's conceptualisation permits a correlation of forces to create opportunities for any class or social group to attain power [114]. For Gramsci "the state is the entire complex of practical and theoretical activities with which the ruling class not only justifies and maintains its dominance but manages to win the active consent of those over whom it rules" (p.244) [115].

Throughout this dissertation where more conventional views of trade and investment policy development is scrutinised, for example conventional views on constitutionalism explored in the next section, these theories can generally be perceived as rooted in Locke's view of the state as the guarantor of life, liberty, and property. Conversely, the more critical examination of the state in trade and investment policy development taken here is rooted in Gramsci's view, such that the state reflects the spread of power relations in society where a ruling class obtains active consent over those whom it rules, but is still subject to movements in society. Gramsci's conceptualisation of the state is not one of an objective enforcer of the social contract but rather a subjective entity intertwined with ruling class values to maintain dominance, which would suggest that any notion that the state and the market are distinct and can be free from interference of each other is fundamentally flawed. As noted by Harvey [110], the role of the state is to guarantee and enforce the underlying structures the market depends upon for its own existence: the quality and integrity of money, the legal structures to secure private property rights, and the creation of markets where they do not yet exist. Dugger [116] illustrates this point:

False dualisms, such as public versus private and state versus economy, distort the way we understand reality so that we compartmentalize aspects of the life process that should not be compartmentalized...The state and the market are inherently interconnected. They are not now nor have they been in the past, separate social realms. But pretending that they are separate, or pretending that they were separate in some golden age of the past, serves a purpose. Doing so makes the market appear to be the only source of productivity and economic growth. The myth of the state versus market makes state action look like interference in a self-regulating system of free markets (pp.245-246).

The remaining principles on which neoliberal ideas are predicated are that free trade is universally beneficial for nations based on comparative advantage, that government spending should be reduced wherever possible to reduce inefficiency and waste, and that individualism and not collectivism should drive the distribution of economic goods [111]. The relative merits of these propositions will not be addressed here as they are not essential to the theoretical framework being developed in this chapter and involve engaging with subject matter well outside the scope of dissertation as a whole.

Neoliberal ideas have been associated with a set of policy preferences referred to as the *Washington Consensus*,<sup>13</sup> including: (1) increased fiscal discipline to limit budget deficits; (2) reduced public expenditure, moving away from subsidies and administration towards fields with high economic returns; (3) tax reform, broadening the tax base and moderate marginal tax rates; (4) financial liberalisation, allowing interest rates to be market-determined; (5) competitive exchange rates, either undervalued or correctly valued; (6) trade liberalisation; (7) increased foreign direct investment (FDI) through reduced barriers; (8) privatisation of state enterprises; (9) deregulation, the abolition of regulations that impede the entry and exit of goods, services and capital, not in the areas of safety, environment, and finance; and (10) secure IPRs [117].

The last five policies are crucial for the purposes of this work. Through contemporary trade and investment agreements states can entrench the policy preferences of a ruling elite such as trade liberalisation; the reduction of barriers to FDI; privatisation of state-owned enterprises and public services; internationalisation of regulation to prevent restrictions on the flow of goods, services, and capital across border; and the expansion of IPRs. These neoliberal ideas manifested as a set of

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<sup>13</sup> The term *Washington Consensus* was coined by John Williamson in 1989 to describe the set of ideas on economic development established by the Organisation for Economic Cooperation and Development. According to Williamson, "I made a list of ten policies that I thought more or less everyone in Washington would agree were needed more or less everywhere in Latin America, and labeled this the 'Washington Consensus'" [117].

policy preferences are reflected in public policy development, specifically in the contentious provisions within contemporary trade and investment agreements mentioned earlier. Trade liberalisation, the reduction of barriers to FDI, and the internationalisation of regulation are explored in Chapters 5 and 6, including the interests behind these policy preferences and their institutionalisation. The next section turns to the institutionalisation of neoliberal ideas as enforceable trade and investment policies through a process of constitutionalism.

## **2.3 Institutions: Constitutionalism**

The second line of inquiry from the 3-*i* framework is that of institutions, “...the formal and informal rules, norms, precedents, and organizational factors that structure political behaviour,” (p.709) [91,92,118] including government structures, policy networks, and policy legacies [92,119,120]. Government structures consist of a state’s political arrangement, the formal and informal systems in place that govern policy-making, and includes processes for implementing legislation and determining which political actors retain veto power over legislative decisions [121]. A policy network includes private and non-profit actors, with varying levels of diversity or consistency in agendas that are outside of formal government agencies but which wield influence over policy processes [122,123]. Policy networks will be considered in the later section on interests.

Policy legacies include countries’ constitutions and previous policies that shape or constrain future policy development, such that once a government “...has started down a track, the costs of reversal are very high” (p.28) [124] because doing so would challenge stakeholders’ interests [90]. The process of constitutionalism within states paved the way for constitutionalism between states (*i.e.* what Gill and other theorists call the new constitutionalism [83,93]), which includes international trade and investment agreements. Contemporary trade and investment agreements reflect past policy legacies in that they have developed from previous agreements including those constituting the WTO, but they also become policy legacies in their own right, conditioning and constraining future policy development. Policy legacies are the focus of the remainder of this section.

### **2.3.1 Constitutionalism**

In Thomas Paine’s *Rights of Man* he declared that “[a] constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is a power

without right” (pp.302-303). Although Paine’s assertion that a government lacks legitimacy, or indeed a defensible existence, until the time at which a constitution establishes that government is far from universally accepted, the spread of constitutionalism has been accelerating across the globe for numerous decades [125]. Constitutional supremacy and legislative supremacy are regarded as opposite and incompatible choices [126]. A constitutional supremacy holds the constitution and a bill of rights as the law of the land while legislative supremacy holds acts of parliament as the law of the land. A constitutional supremacy entrenches the constitution which cannot be amended by any ordinary legislation, thereby binding successive governments to its laws, while a legislative supremacy permits parliament to amend and repeal legislation through an ordinary majority, giving each new parliament equal sovereignty as the last. Constitutional supremacy empowers the judiciary to enforce the constitution and set aside any legislation that comes into conflict with it, while legislative supremacy protect acts of parliament from judicial oversight [127].

The development of courts is fundamental to ensuring that elected officials do not exceed or abuse their powers within a constitutional supremacy. When a state establishes a constitution it consents to exercise its executive and legislative power in accordance with such limitations. Consequently, the state requires a neutral and autonomous institution to determine when it has exceeded its powers. This role can only effectively be fulfilled by an apolitical body of independent arbiters of the law. In such a system the state remains the highest authority of the social course of the nation, but is subject to the constraints imposed by the constitution and its traditions, as interpreted by the courts [128].

The United States (US) has established the constitutionalism model for the rest of the world. As stressed by Gardbaum [127]:

The obvious and catastrophic failure of the legislative supremacy model of constitutionalism to prevent totalitarian takeovers, and the sheer scale of human rights violations before and during World War II, meant that, almost without exception, when the occasion arose for a country to make a fresh start and enact a new constitution, the essentials of the polar opposite American model were adopted. In order effectively both to protect, and express their commitment to, fundamental human rights and liberties, country after country abandoned legislative supremacy and switched to an entrenched, supreme law bill of rights that was judicially (or quasi-judicially) enforced (pp. 714-715).

### **2.3.2 Theories on Constitutional Transformation**

Hirschl [129] explored several conventional theories that have been put forward in the literature to explain transitions to constitutional supremacy around the globe. The first is democratic proliferation, which states that expanding juridical power is just the outcome of a state transitioning to democracy, a process which requires a semi-autonomous, apolitical body to equally enforce the rules of the game for all political actors. Second are evolutionist theories which hold that empowering judiciaries is an inevitable process but particularly so in the wake of the human rights violations of World War II [130]. These theories assert that individual rights and freedoms are better protected in a constitutional supremacy than under the majority rule of a parliamentary sovereignty by way of legal protections for minority groups within the constitution that no elected government can change [131]. Third are functionalist explanations which suggest that the expansion of juridical power may occur when there is a perception of dysfunction within the political system [132]. The source of this dysfunction may stem from political polarisation or distrust among politicians and decision makers. As with evolutionist theories, it sees constitutionalism as an organic progression for political systems in crisis [133].

The theories above lack the ability to explain variations in when juridical power is established and the extent of such powers in new and developed democracies. For example, they cannot explain why Canada adopted its Charter of Rights and Freedoms in 1982 or New Zealand's Bill of Rights Act in 1990: constitutional reforms that were not associated with any major changes in political regimes or shifts in democracy [134,135]. Moreover, the assumed progressive origins underlying constitutionalisation remain largely untested [129]. The work of Di Muzio [136] has suggested that a critical historical investigation of US constitutionalism reveals that this model secured a particular type of liberty and property rights for a particular class of people and entrenched the dynamics of master over slave, capital over labour, and colonist over native. He concludes that the US constitution safeguarded the right to accumulate wealth beyond one's needs, regardless of whether those means of accumulation included indentured servitude or genocide, and cemented those rights against future challenges from the increasingly radicalised and politically inspired majority [136]. Indeed, the transition to constitutionalism has been argued as a way to protect states against the tyranny of majority rule and to insulate policy-making from democratic, majoritarian politics shielded behind beliefs of an impartial judiciary [130].

The final set of conventional theories included in Hirschl's review are the institutional economics models. These theories claim that economic development requires predictable laws for the marketplace, protection of property rights and capital accumulation, and legal recourse through independent courts if these laws and protections are violated [137,138]. According to these theories constitutionalism can enshrine these rights and protect them against future regime changes that may result in a less-friendly investment climate, which would negatively impact economic development. It is this final set of conventional theories that is most evocative of neoliberalism's ideology of the necessity of economic growth supported by predictable and secure marketplaces protected against state interference through the apolitical courts. This institutional economics model can also be applied as a conventional explanation of the transition to the new constitutionalism subsequent to a period of profound restructuring that resulted in the expansion of capitalism around the world [84,139]. That is, protections for property rights and capital accumulation and legal recourse for enforcement entrenched at the international level to protect globally integrated marketplaces, is an ideologically consistent response to constitutionalism at the national level to protect national marketplaces.

### **2.3.3 The New Constitutionalism**

The 'new' in new constitutionalism indicates the shift from constitutionalism within states to constitutionalism between states. The rights of individuals and private property once enshrined solely at the national level through constitutions were transformed to the protection of investor rights and intellectual property at the transnational level through a series of international trade and investment agreements [83]. Those critical of constitutionalism have labelled new constitutionalism a neoliberal project that seeks to transform macroeconomic and microeconomic policy in order to: (1) expand and entrench private property rights as well as the privatisation of public assets, including land and water, and public services; (2) safeguard private property from state measures that may directly or indirectly expropriate such property, including 'locking-in' the above reforms with financial penalties for any violations; and (3) shelter such policy formation from democratic scrutiny and contestation from the masses, for example, presenting trade and investment agreements as purely economic matters to dissuade the general public from developing interest, alongside high levels of secrecy around negotiations [83].

The new constitutionalism has entrenched a type of transnational neoliberalism built on privatisation and liberalisation as structures for economic development, claiming that national policies that inspire investor confidence and support capital accumulation will result in economic growth and wealth creation for all members of society [83]. The new constitutionalism is constructed on the same neoliberal ideas that fabricate a division between the state and the market. The international trade and investment system, however, depends on the existence of states to constitute and enforce measures within the agreements. Consequently, the intention is arguably not to remove the state, but rather to reshape it. This has been accomplished in part by reframing national public policy issues as global economic issues. As an example, domestic regulations on cigarette package labelling are transformed from a public health issue to an issue of trade-restrictive measures that violate IPRs, which then expropriates investor profits and erodes investor confidence in the market [140].

One of the significant changes brought about by constitutionalism is the increased role of the judiciary in policy-making, a concept referred to as judicial empowerment [129,141]. While constitutionalism within states empowers national judiciaries to protect individual rights against violations from the state, the new constitutionalism empowers international arbitrators to protect foreign investor rights against actions of the state. The international system of arbitration designed to adjudicate investment disputes between private investors and host states will be explored in depth in Chapter 7. What has been absent from the discussion to this point is who benefits from the policy preferences developed from neoliberal ideas and who guides their institutionalisation. The next section turns to the exploration of interests, the final component of the theoretical framework, which engages with transnational corporations (TNCs) as elite economic actors that pursue the expansion and entrenchment of neoliberal policy preferences for financial gain.

#### **2.4 Interests: The Transnational Capitalist Class and Elite Actors**

The final line of inquiry from the *3-i* framework includes interests: the “...agendas of societal groups, elected officials, civil servants, researchers, and policy entrepreneurs” (p.709) [92]. While conventional theories of constitutional transformation have almost ubiquitously ignored the role of human agency and self-interested agendas [129]; critical scholarship has challenged the dominant narrative that constitutionalism is an impartial framework enabling universal material

progress and human freedom [136]. Examining interests acknowledges that both the real and perceived agendas of stakeholders shape public policy, which can be augmented by the desire of stakeholders themselves to influence policy to achieve their own aims, and moderated by the power relations between government and stakeholders [95]. This section will address some of the remaining enquiries concerning actors with direct influence in the political processes that frame public policy development, in this case focused on TNCs and their influence over trade and investment policy.

#### **2.4.1 Hegemony and Domination: Consent and Coercion**

A hegemon is formed by the dominant groups in society, which necessarily includes the ruling class, although not exclusively [142]. Gramsci's work challenges the view that hegemony is determined by state economic and military strength alone. He suggested instead that a union of social forces, or a historical bloc, achieves hegemony principally through consent, dispersing the norms and values of the ruling class through legitimised institutional processes [115]; which partly explains the focus on constitutionalism in the neo-Gramscian tradition [143]. In fact, "...constitutionalism is thought of as a mechanism that can instantly bestow legitimacy on a political system" (p.48) [144]. Consent is actively manufactured within civil society through "...extremely complex mediums, diverse institutions, and constantly changing processes" (p.7) [145], but consent, and hence hegemony, is never total.

The attempt to universalise one set of norms and values comes at the cost of the marginalisation of competing sets of norms and values, thus hegemony will always be contested [146]. Neoliberal hegemony has been supported through an ongoing process of incorporating contestations into the prevailing hegemonic framework through "...ever more refined but basically unchanged versions' of neoliberal governance" (p.12) [147]. Even when the consent of the dominant groups in society is gained, resistance may exist along the peripheries of society where hegemonic actors will exert domination or coercive force, such as the military or police force, and compulsion through administrative bodies [148]. For example, it has been suggested that the spread of neoliberal policies through the structural adjustment programmes of the World Bank and IMF represents coercive force [149].

For neo-Gramscians the possibility of contesting and displacing historical blocs lies not in a ‘war of manoeuvre’ physically overwhelming coercive apparatuses; but a ‘war of position’ or resistance to cultural domination [115], a process which “...slowly builds up the strength of the social foundations of a new state” by “...creating alternative institutions and alternative intellectual resources within existing society” (p.165) [143]. Removing a historical bloc from power requires more than physical force; it requires the dismantling of carefully constructed consent that has shaped how people see their world and, more importantly, “...their ability to imagine how it might be changed, and whether they see such changes as feasible or desirable” (p.71) [150].

It has been proposed that a ‘US historical bloc’, established on the set of neoliberal ideas and reflecting the hegemony of the US capitalist class<sup>14</sup>, expanded externally to create a global hegemony [84]. The same increased capital mobility and integration of national economies mentioned earlier meant that the development of the capitalist class became progressively less confined to national borders [84]. This led to a ‘transnational historical bloc’ [143,152]; composed of the transnational capitalist class [84,153,154]. The transnational capitalist class is defined as a global ruling class “...of the transnational corporations and financial institutions, the elites that manage the supranational economic planning agencies, major forces in the dominant political parties, media conglomerates, and technocratic elites” (p.11) [84]. The influence of the transnational capitalist class in global decision-making is extensive and can be seen in countries in all stages of economic development and with a variety of political arrangements [84].

#### **2.4.2 Hegemonic Preservation of Elite Actors**

In order to explore the role of the transnational capitalist class in the new constitutionalism it is necessary to drill down to key actors within this historical bloc that are involved in constitutional transformation. The judicial empowerment created by the new constitutionalism necessitates a voluntary transfer of authority from political actors to judicial actors. Hirschl [129] has hypothesised that such judicial empowerment may occur when hegemonic elites hope to entrench policy preferences against a growing influence of disenfranchised or underrepresented groups in majoritarian decision-making arenas. He calls this his ‘hegemonic preservation thesis.’

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<sup>14</sup> “...the class of modern capitalists, owners of the means of social production and employers of wage labour” [151]. The capitalist class includes persons whose remuneration may come nominally in the form of a salary, but which is in fact due to their position in the capitalist class (e.g., the directors of large companies). It also includes persons who are not employers but who serve the capitalist class in high administrative positions.

The hegemonic preservation thesis discusses a collaboration among three elite groups: (1) political elites seeking to insulate policy-making from the unpredictability of democratic politics to preserve political power; (2) economic elites seeking to entrench the neoliberal set of ideas for financial gain; and (3) judicial elites seeking enhanced policy influence and financial gain [129]. The motivation for economic elites to pursue constitutionalism within states is easily transposed to motivations for the new constitutionalism: financial gain. New constitutionalism entrenches neoliberal policy preferences such as privatisation and liberalisation that contribute to the financial success of elite economic actors. Of the three elite groups the main focus in this dissertation will be on elite economic actors, specifically TNCs.

For Hirschl [129] the motivation of elite judicial actors within constitutionalism lies in the pursuit of greater influence. He suggests that the US Supreme Court is in fact not an apolitical body administering unadulterated values of justice and democracy, rather it is comprised of human actors making strategic political choices. The motivation of elite judicial actors within the new constitutionalism is manifestly clearer. The ISDS system provided for in international trade and investment agreements, while generating considerable expenses for governments and tax-payers, has been a windfall for the legal industry. As noted in Chapter 1, the ISDS industry has been the second largest beneficiary of the system, over US\$1.7 billion to date or US\$8 million per case [70]. An elite group of judicial actors have built and secured a multimillion-dollar industry that they have promoted as necessary to attracting FDI, about which they have controlled the academic discourse and lobbied against reforms, and within which they have acted as negotiator, litigator, and arbitrator [155].

The most problematic motivation to ascertain within these elite groups is that of political actors for the reason that the shift to judicial empowerment requires the voluntary forfeit of political decision-making power. Hirschl [129] suggests that this group gains the ability to protect their political power by shifting ‘no-win’ political issues, such as abortion in the US, to a body publicly perceived to be both professional and apolitical so as not to be associated with unfavourable decisions. Elite political actors are perceived as the key catalyst and constitutionalisation as an outcome of “...hegemonic yet threatened political elites (in association with economic and judicial elites sharing compatible interest) who found strategic drawbacks in adhering to democratic decision-making processes” [129].

Transposing Hirschl's arguments to the transnational level it is possible that elite political actors may be aware of the negative externalities of their adherence to neoliberal globalisation policies like privatisation and liberalisation, including job losses in varying employment sectors and increased competition for domestic industries. In order to ensure continued support for trade and investment agreements they may reinforce neoliberal ideas that such policies are essential to economic growth, which will then trickle down benefits to everyone in the economy, a part of building consensus for the social order envisioned by the transnational historical bloc [156]. Elite political actors may then be able to shift politically contentious issues, like the interaction between trade and investment commitments and the environment, labour, and health regulation, to supranational forums, consequently allowing the government to be perceived as less accountable for any undesirable effects of globalisation.

The motivation of elite political actors within the new constitutionalism is almost certainly more complex than the argument Hirschl presents for this group at the national level. The reasons political actors engage in international trade and investment agreements are likely to be multifaceted and variable. First, it is possible that some elite political actors are 'true believers' in the neoliberal ideology and see it as the path to economic prosperity for their country. This possibility draws upon the discussion of neoliberalism earlier as 'the way things are'. As noted this conceptualisation of neoliberalism has largely been expressed by politicians and it has been suggested that it is "...now so deeply embedded in the reflexes of the world's ruling elites and line managers that they have difficulty conceiving the world in any other way" (p.694) [100]. This may also be supported by the period of neoliberalism following the election of Thatcher and Reagan [107]. Second, it is possible that some elite political actors recognise that in a globally integrated economy if they do not facilitate the flow of goods, services, and capital across their border and provide a set of expansive rights for investors that they may lose economic growth and employment opportunities to other countries that are willing to. This is an extension of the 'race-to-the-bottom' theory that suggests that countries competitively undercut each other, particularly in labour and environment standards, to attract investment from TNCs [157–159]. Third, it is possible that, consistent with the theories of both Marx and Gramsci, there are blurred boundaries between elite political actors and elite economic actors. This possibility draws upon evidence of the 'revolving-door' between government and the private sector and the provision of political contributions that may fund special

interests over public welfare [160,161]. For example, during an important vote in the US on the Trans-Pacific Partnership (TPP) the US Business Coalition for the TPP contributed US\$1,148,971 to political campaigns with an average contribution of US\$19,673 to Republican candidates and US\$9,689 to Democratic candidates [162]. Elite political actors may subscribe to one or more of these motivations. Moreover, reflective of Gramsci's society-centred view of the state, it is also possible that there is contestation within this group and that some elite political actors will oppose parts, or all, of international trade and investment agreement as evident in the ongoing domestic processes to ratify the TPP [163].

The theoretical framework outlined above covers the ideas, institutions, and interests behind the development of public policy, specifically trade and investment agreements. The dominant food system will be explored throughout the dissertation as a focal point for more detailed analyses of the relationships between trade and investment agreements and health. Accordingly, it is valuable to finish this chapter with a brief consideration of how the theories and concepts introduced here, such as neoliberalism, hegemony, and the transnational capitalist class, may apply to the larger themes of historical capitalist accumulation arrangements through trade and investment in food.

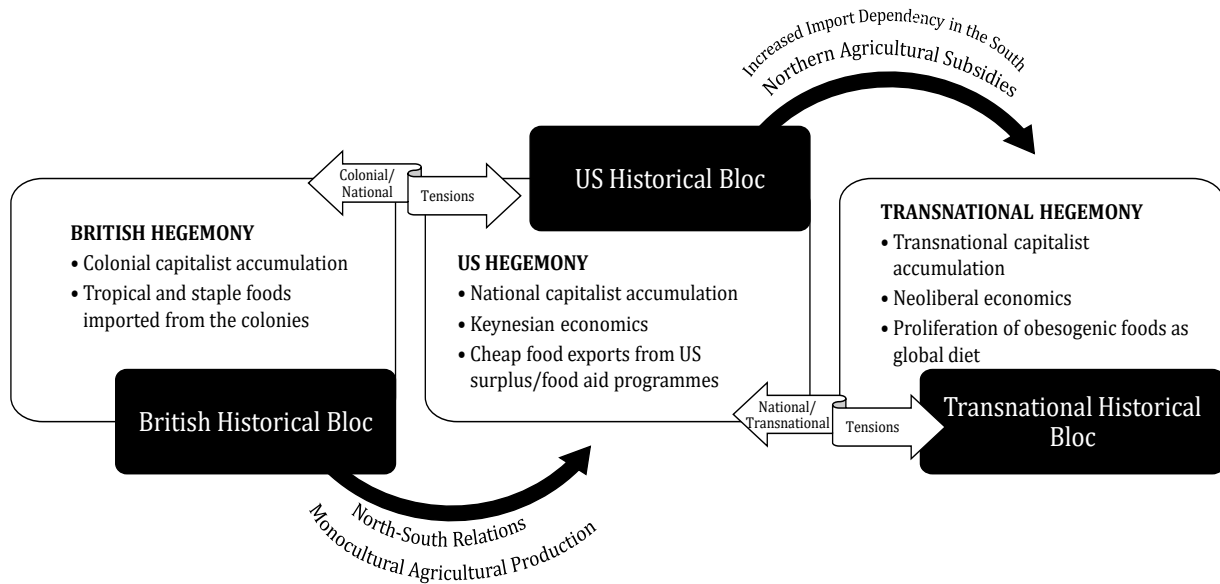
## **2.5 An Application of the Theoretical Framework to Globalising Food Systems**

A well-developed paradigm from the critical political economy of food systems is food regime analysis [164,165]. Food regime analysis is ideologically consistent with the framework advanced in this chapter, having also developed out of the Marxist tradition [165]; the language around similar concepts, however, often varies. For example, Friedmann and McMichael use the term 'regime,' which has been defined as an informal yet stable group, composed of elite actors from the public and private sector, with access to institutional resources, and that wields power over a system of governance [166,167]. This concept is analogous to Gramsci's historical bloc. Food regime analysis is structured around regimes, or historical blocs, which are associated with a set of ideas regarding the political-economy and methods of capital accumulation, reflecting the interest of the current hegemonic power and consequently producing and reproducing global food relations and capitalism itself [168] (see Figure 3).

The first food regime, the British historical bloc, occurred under a British hegemony between the 1870s and the 1930s, and was defined by tropical imports into Europe from extraction colonies

(wherein the purpose was largely to extract labour and resources), as well as imports of grains and livestock from occupation colonies (wherein the purpose was largely to settle and develop land) [165]. One of the policy legacies from this time was the transformation of colonised territories for monoculture production for the benefit of European citizens, usually at the cost of food security and ecological sustainability within the colony, particularly so among extraction colonies. The reduced agricultural workload for the European people freed labour for newly industrialising sectors, creating a model for twentieth-century notions of development [165].

Figure 3 Food regimes



The second food regime, which occurred as a part of the US historical bloc, materialised around the 1950s and lasted until the 1970s, and was reflective of the post-World War II international order and US hegemony. In contrast to food flows during the previous regime, the second regime was based on managed overproduction achieved through domestic supports and increased flows of surplus agricultural goods from the US to its informal empire of postcolonial states [165]. Food aid became a tool of geo-political power, with the US creating a strategic perimeter around the Soviet Union territory during the Cold War to protect against the spread of communism, and resulted in rising levels of food dependency amongst developing countries.

The 1980s ushered in a third food regime, the transnational historical bloc, built on neoliberal ideas and the rise of transnational food and beverage corporations (see Chapter Five for an introduction

to ‘Big Food’). This bloc has taken advantage of key policy legacies from the US historical bloc including agricultural subsidies in the West, which were designed in part to support global food aid programmes. Transnational food and beverage companies have been associated with the production and distribution of food products made from agricultural crops that have long been recipients of agricultural subsidies, including corn, wheat, and soy [169,170].

Important to the food regime analysis are the periods of transition between blocs. The transition from British hegemony to US hegemony, and ultimately to transnational hegemony, were the result of complex changes in international dynamics. Moreover, they were not the outcome of what Gramsci had defined as a ‘war of manoeuvre’, but rather one of changing position (a ‘war of position’), including shifts in institutions and resources reflective of fluctuations in the dominant capitalist classes. While shifts from British hegemony to US hegemony can be connected to such outcomes of World War II as the rise of US military and economic power globally [171], the shift from US to transnational hegemony developed out of the emergence of neoliberal ideas and a period of globalisation discussed above [84]. This globalisation period allowed US capitalist class interests to search out the most favourable conditions within the new ‘workshop of the world’: the cheapest labour, the most profitable regulatory conditions, and the most lenient environmental and labour laws [165]. The move from a US to a transnational hegemony reflected a shift from the interests of US national economic elites to the interests of transnational economic elites, from Keynesian economic policy to a neoliberal ideology, and from the post-war constitutionalism movement to a period of the new constitutionalism and rapid expansion of international trade and investment through the World Trade Organisation (WTO) and a series of bilateral and regional agreements. To demonstrate the impacts of these periods of hegemony on food systems, the next section turns to an example of these three food regimes in the Pacific Island Countries (PICs). The PICs were selected based on their historical use as an example of food regimes [172], that they have some of the highest rates of obesity in the world which has been attributed in part to substantial dietary change [173], and because trade has been demonstrated as a structural driver of NCDs in the PICs through unhealthy food consumption [174].

### **2.5.1 Impacts of Food Regimes in the Pacific Island Countries**

Indigenous peoples around the world have paid a heavy price for the neoliberal model of economic growth, including environmental degradation, dispossession of their lands, and the dissolution of

traditional indigenous food systems [175]. The effects of globalisation on traditional food systems have perhaps been felt most keenly in the PICs [176]. In the period of the British historical bloc, pioneering individuals and colonial-linked private companies occupied lands that had been settled by hunter and gatherers from Indonesia and Southeast Asia [177,178]. Crops including sugar, tobacco, rubber, coffee, vanilla, cocoa, and above all, copra, were highly sought after by the European colonists, and indentured labourers from Japan, China, Portugal, Korea and the Philippines were brought to the islands to harvest these crops [179,180]. This food regime made several irreversible changes to the PICs, including labour migration, the intensification of agricultural production, and new trade and land tenure policies which shifted islanders from subsistence agriculture to export-oriented monocultures.

By the time World War II was over and the US historical bloc had become the new global hegemon, PIC contact with the Western world had already expanded, bringing with it new technology, economic development, improved communications, and a shift to a cash economy [177]. The food aid programmes characteristic of the US historical bloc reinforced food dependency in the PICs amplifying threats such as: (1) a rising quantity of food imports and negative trade balances supported by overseas aid, further increasing their level of foreign dependency; (2) nutritional problems associated with food imports; and (3) increased urbanisation and reduced indigenous food production [181].

During the transition from an US historical bloc to a transnational historical bloc, the PICs were advised by aid donors, international financial institutions, banks, and investors that to fix the residual problems created by the previous regime they should open their markets in order to create economic growth, which resulted in additional land previously used for domestic production reallocated for export agriculture [180]. An increased focus on exports drove the need for more food imports and exposed citizens within these states to market volatility in sudden swings of demand and prices. This raised their balance of payment deficits and increased their reliance on low value-added products, which continually worsened their terms of trade [180]. The transnational historical bloc has perhaps had some of the most disastrous impacts on the PICs through the dumping of high-fat animal products, including ‘mutton flaps’, ‘turkey tails’, chicken backs, and canned meats, which are exported from consumer markets that deem these products undesirable [182,183]. Explorations of the benefits accruing to TNCs have been largely absent in

the literature despite evidence of increasing rates of imported ultra-processed foods in the region, suggesting that someone is profiting from this trend [176,184,185]. Heart and circulatory diseases are now the leading cause of death, and obesity rates are among the highest in the world such that 75% of adults in seven of the PICs are overweight or obese [177]. Negative impacts of the global food regime system on food security and dietary health are not isolated to the PICs; similar impacts have been demonstrated in parts of Latin America [186,187]. The relationship between trade and investment agreements and changes in the food environment and subsequent health outcomes in the PICs and Latin America are further explored in Chapter 4.

## 2.6 Contestations: The Emergence of a Fourth Food Regime?

It is conceivable that we have reached another point of transition in the food regime system [188]. Contestation of the transnational historical bloc, including its accompanying agri-food relations, has been challenged by advocates for food sovereignty [189] including movements like the *Via Campesina*<sup>15</sup>. Meanwhile, rising concerns from sectors of society regarding the ethics and ecological sustainability of transnational food and beverage corporations are appropriated by a discourse on corporate social responsibility. For example, Mondelez International has been exposed for its poor practices on climate change, water use, workers' rights, and land rights [191]. The company attempts to improve its image through corporate social responsibility programs, such as sending bicycles to cocoa-growing regions of Ghana [192], rather than addressing fundamental criticisms of its business practices, which would be contrary to neoliberal patterns of capital accumulation. This is the embodiment of what has been referred to as ever more refined but basically unchanged versions of neoliberal governance [147].

Transnational food and beverage corporations are also increasingly coming under fire from public health [193–195]. The growing burden of diet-related noncommunicable diseases (NCDs) [196] has placed a greater emphasis on research and policy directed at changing the food environment within which people make their dietary choices [14]. Countries around the globe have been pursuing regulatory initiatives to address this problem, including: interpretive food labelling;

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<sup>15</sup> Via Campesina is an international network which brings together millions of peasants, small and medium-size farmers, landless people, women farmers, indigenous peoples, migrants and agricultural workers who are part of various, mostly state-wide, organisations from 88 countries around the world. It defends small-scale sustainable agriculture and food sovereignty as a way to promote social justice and dignity. It strongly opposes corporate driven agriculture and transnational companies that are viewed as destroying people and nature [190]

taxation of unhealthy food products; mandatory reformulations to reduce content of specific ingredients like trans fats, sodium and sugar; restrictions on marketing and advertising; food standards in schools and hospitals; and planning restrictions on locations of new food outlets [197]. Consequently, these hegemonic but threatened actors may be seeking preservation by shifting public health policy, customarily decided by national politics, to less democratic and less transparent decision-making processes at the international level. More specifically, through a system of trade and investment treaties that promote and enforce consistent policy approaches, highly reflective of US models, but which frequently fail to recognise necessary variations in policy requirements based on national, cultural, ecological, and economic needs.

Conceptualising transnational food and beverage corporations through this theoretical framework is important because it connects these elite economic actors to the transnational capitalist class that is seeking hegemonic preservation through the new constitutionalism based on neoliberal ideas. Food regime analysis historicises the different periods of economic thought and capitalist relations behind the dominant food system which, in turn, have contributed to the design of capitalist relations. Policy legacies of previous British and US hegemonies have contributed to the development of the current transnational hegemony, including monoculture in food production, North-South relations, import dependencies, and agricultural subsidies. This section is intended to provide theoretical and historical insights into the actions of the dominant neoliberal food regime, where it is used as a point of entry for exploration of trade and investment and health relationships throughout the remainder of this dissertation.

## **2.7 Discussion**

This chapter presents a neo-Gramscian inspired critical political economy analysis of international trade and investment policy development. Specifically, the *3-i* framework was employed to structure the investigation of neoliberal ideas influenced by the powerful interests of a transnational capitalist class and the institutionalisation of those ideas through the new constitutionalism. It has been suggested that new constitutionalism has emerged as “...a de facto governance structure for the global political economy, one that is premised upon both domestic and constitutional transformation as well as ‘progressive liberalisation’ of the global political economy” [83]. The neo-Gramscian analytical approach identified a collection of global social

forces, or transnational historical bloc, which produces and re-produces the hegemonic interests of the ruling transnational capitalist class through consensus and coercion of the general public. It is proposed here that the transnational capitalist class is using the new constitutionalism to preserve their hegemonic bloc by entrenching neoliberal policy preferences that support their class interests and contribute to consent through the legitimacy of constitutionalism. Transnational food and beverage corporations, as actors in this bloc, may be seeking potential protection against domestic regulatory changes that challenge their profitability through trade and investment agreements. From a Neo-Gramscian perspective it took a correlation of forces to allow the neoliberal ideas of a specific group of actors to become a dominant ideology behind a new historical bloc. Arguably, contestation of this current bloc is growing; however, it still appears to reflect marginalised interests, while broader concerns are often appropriated into increasingly refined neoliberal values and consent-building strategies like corporate social responsibility. The agenda of the transnational capitalist class, although largely united, particularly in relation to larger civil society, is not entirely homogeneous; and points of conflict may produce openings for contestation and a slow and complex ‘war of position’ or resistance to cultural domination [115] to move into a new historical bloc.

This chapter aimed to contribute a critical investigation of the role of TNCs in the design and implementation of international trade and investment agreements and is intended to frame the discussion of the three investigations into points of connection between TNCs and trade and investment agreements, including TNC involvement in treaty negotiation in Chapter 5, the spread of unhealthy food products in Chapter 6, and the set of expansive investor rights enforced through the ISDS system in Chapter 7. Before turning to these investigations, Chapter 3 presents the guiding methodology for the remaining work, while Chapter 4 develops the conceptual relationships between international trade and investment agreements and health underlying the investigations in Chapters 5 through 7.

## CHAPTER 3

HEALTH IMPACT ASSESSMENT: APPLICATION OF THE METHODOLOGY TO THE  
EXAMINATION OF INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS

"IT IS MY ASPIRATION THAT HEALTH FINALLY WILL BE SEEN NOT AS A BLESSING  
TO BE WISHED FOR, BUT AS A HUMAN RIGHT TO BE FOUGHT FOR."

– *Kofi Annan*

### **3.1 Introduction to Health Impact Assessment**

The two primary aims of this dissertation are to make an empirical and a theoretical contribution to the international trade and investment and health literature. Whereas Chapter 2 introduced the theoretical framework for the investigations in Chapters 5 through 7, this chapter will present the methodological approach guiding the empirical work. Increased awareness of the interconnection between international trade and investment agreements and health, alongside a movement for a ‘health-in-all-policies’ approach, has led to numerous calls for health impact assessments (HIAs) of international trade and investment agreements [198–200]. Although HIAs are increasingly used to evaluate the health effects of a diverse range of domestic policies, their application within foreign policy is relatively new [199].

At the time that HIA was selected as the methodology for this dissertation it was, to the best of our knowledge, the first attempt to conduct an HIA on trade and investment policy. Over the course of this work two HIAs of regional trade and investment agreements (RTAs) were published [60,61]. Although this is no longer the first of its kind, this dissertation will still make an empirical contribution to the use of HIA within the foreign policy context. Chapter 4 develops a conceptual framework to advance the use of HIA in trade and investment policy in future studies, and its utility as a methodology is reflected on in Chapter 8.

We elected to follow the HIA process developed by the *European Centre for Health Policy* given its comprehensive suite of tools and guides. They define HIAs as “a combination of procedures, methods and tools by which a policy, program or project may be judged as to its potential effects on the health of a population, and the distribution of those effects within the population” (p.4) [201]. See Figure 4 for a model of the HIA process explored below.

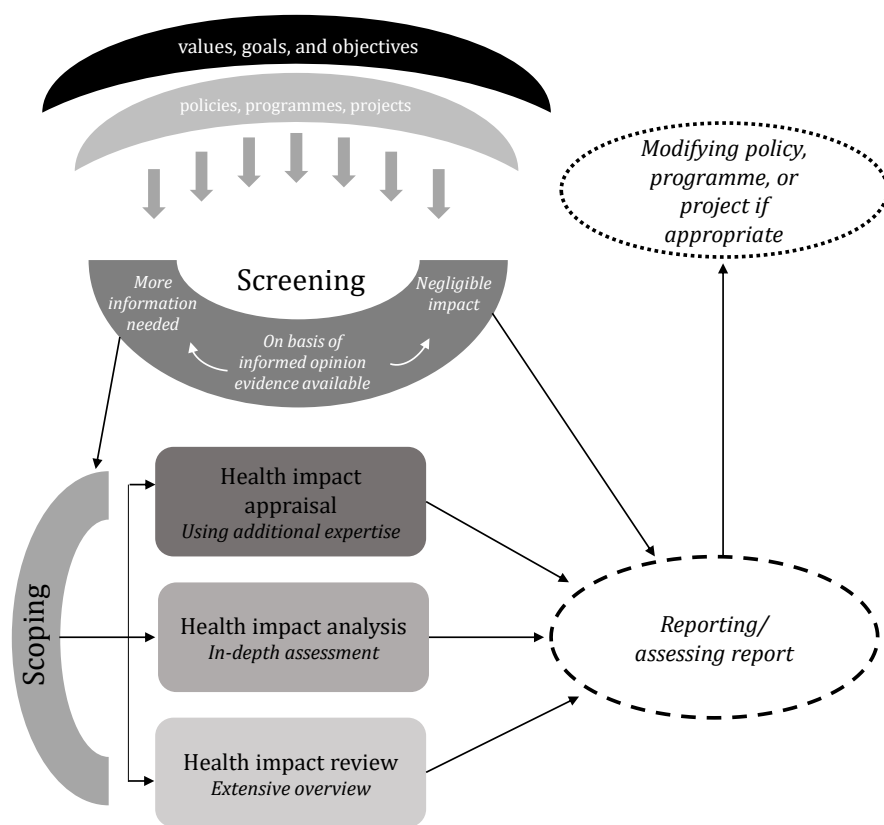
### **3.2 Stages of Conducting a Health Impact Assessment**

#### **3.2.1 First Preliminary Step for HIA: Values, Goals, and Objectives**

The first step in any HIA is to recognise the values, goals, and objectives of the policy process in order to ensure applicability within a given policy environment. In addition, the HIA process also brings with it its own set of values, first and foremost of which is to maximise the health of the population. HIA also intends to promote: (1) the democratic process, participation in the policies

that impact people’s lives; (2) equity, that policies must be viewed as more than their aggregate effects, distributional impacts in terms of gender, age, ethnicity, and socioeconomic status are valued; (3) sustainable development, the need to consider short and long term impacts equally, as well as direct and indirect impacts; and (4) ethical use of evidence, that a variety of rigorous quantitative and qualitative evidence from multiple disciplines and methodologies is required for any comprehensive assessment [201].

Figure 4 Health impact assessment model (Lehto and Ritsatakis, 1999)



### 3.2.2 Second Preliminary Step for HIA: Policies, Programmes, and Projects

The next step in the HIA process is to identify the policy, programme, or project (hereafter restricted to policy for the purposes of this HIA) for evaluation. The HIA process can be launched when there is a proposal to maintain, modify, or introduce an existing or new policy. The stage of the policy defines the available evidence for collection and analysis. While HIAs would ideally occur when recommendations could viably be implemented, retrospective analyses are valuable

sources of information for future HIAs and the development of evidence-based positions that existing policies require amendments [201].

### **3.2.3 First Stage of HIA: Screening**

In the HIA process, screening identifies potential links between the policy and the impacts it may have on health based on informed opinion and available evidence. If informed opinion and available evidence suggest that the policy will have a negligible impact on health, whether positive or negative, the process moves directly to the reporting stage where this conclusion is made available to decision-makers. Alternatively, if there is reason to believe that health impacts are possible but more information is needed to determine their nature, then the HIA proceeds to the scoping stage [201].

### **3.2.4 Second Stage of HIA: Scoping**

The scoping stage of an HIA determines which health impacts to investigate, in which populations, and by which methods. Additionally, it requires selecting one of three investigative approaches: (1) a health impact appraisal; (2) a health impact analysis; or (3) a health impact review [201]. Health impact appraisal is a rapid systematic assessment of the policy by experts and stakeholders, including existing data and some new qualitative data collection [201,202]. Health impact analysis is a comprehensive assessment of the policy including a review of the available evidence, stakeholder opinions and expectations, as well as collecting and analysing new data using multiple methods and sources [201,202]. Finally, health impact reviews analyse policies that are so broad that in-depth analysis is not feasible. The goal of this approach is to create a “...summary estimation of the most significant impacts on health of the policy or cluster of programmes and projects, without necessarily trying to disentangle the precise impact of the various parts of the policy or cluster on specific aspects of health...to give a broad-brush view of the impact” (p.7) [201]. Health impact reviews are suggested during the early policy development stage and include collecting and analysing existing and accessible data [202].

### **3.2.5 Third Stage of HIA: Appraisal**

The third stage of the HIA involves conducting the assessment outlined in the scoping stage. HIAs include a wide variety of data collection techniques, and include analyses of both existing and new data. However, new data collection is generally restricted to qualitative approaches with policy

stakeholders. Analyses within the assessment can be iterative and can occur concurrently. Systematic reviews of evidence are recommended when available [202].

### **3.2.6 Fourth Stage of HIA: Reporting**

The work of the assessment should be made available to those with legitimate interests in the findings. The report may be appraised and subsequently improved based on such appraisals [201].

### **3.2.7 Fifth Stage of HIA: Modification of Policy, Programme, or Project**

The final stage of the HIA involves decision-makers considering the recommendations of the report, weighing the interests, and modifying the policy where applicable in order to maximise potential positive health impacts and minimise potential negative health impacts [201].

### **3.2.8 Postliminary Step for HIA: Monitoring and Evaluation**

Two further types of work can occur after the HIA is complete. First, that HIA reporting is made available in order to inform future HIAs in similar areas, and second, that actual impacts are monitored against the anticipated impacts in order to continually develop and refine the HIA process [201].

## **3.3 Application of Health Impact Assessment to International Trade and Investment Policy**

### **3.3.1 First Preliminary Step for HIA: Values, Goals, and Objectives**

The application of HIA to international trade and investment policy is still relatively new and underexplored territory. The global trade and investment system seeks to reduce barriers to international trade and investment and ensure equal access for all actors in order to contribute to growth and development [203]. Trade and health share development as a goal which can be used to find opportunities for policy coherence and mutual benefit. Additionally, member states of the World Trade Organisation (WTO) have agreed to provide greater flexibilities and privileges for developing countries and protection for health and the environment [204]; these too are areas for potential coherence with the values of equity and sustainable development within health. Equally important, however, are the areas of incoherence such as the investment in and lowering of tariffs on health-harmful commodities (HHCs), consistent with the goals of the global trade and investment system but with negative externalities for health. Acknowledging at the outset that

there are areas for cooperation can enable objectivity and balance in the HIA, while identifying barriers in the values, goals, and objectives of the two fields through policy analysis contributes to a critical examination.

### **3.3.2 Second Preliminary Step for HIA: Policies, Programmes, and Projects**

The current HIA was designed to develop better understanding of the health impacts of international trade and investment agreements in general, with an emphasis on contemporary RTAs which have increased in relevance with the slow pace of negotiations under the multilateral WTO system. As mentioned in Chapter 1, this dissertation uses the Trans-Pacific Partnership (TPP) as a focal agreement, where possible, for in-depth exploration and context, but is supplemented with other bilateral, regional, and multilateral agreements when required. That the TPP was signed during the HIA process may increase the difficulty of making modifications to the treaty text, but it does not preclude the possibility of revisions. Moreover, the evidence generated has the ability to inform debates on the TPP as it undergoes domestic processes for ratification within the signatory countries.

### **3.3.3 First Stage of HIA: Screening**

Screening for potential pathways between trade and investment policy and health is complex given the comprehensive nature of such policies. On the basis of informed opinion and available evidence it was decided that trade and investment policy does have potential positive and negative impacts for health [34], and more specifically for noncommunicable diseases (NCDs) [205], and that calls for HIAs of international trade and investment agreements [198–200] demonstrate a need for additional information. Consequently, the current HIA proceeded to the scoping stage.

### **3.3.4 Second Stage of HIA: Scoping**

In the scoping stage we selected the health impact analysis approach as the dissertation format would permit a comprehensive assessment of components of the policy including a review of the available evidence, as well as collecting and analysing new data using multiple methods and sources [201,202]. The scope of work was designed around the central theses and objectives of this dissertation outlined in Chapter 1, including the application of novel investigative techniques, and the development of a conceptual framework as empirical contributions to the literature. These contributions also address the central argument that trade and investment policies are a structural

determinant that conditions and constrains health and well-being through its effects on the socioeconomic and political context and the social determinants of health. Additionally, a theoretical contribution is undertaken through the development of a theoretical framework, along with the exploration of three points of interaction between transnational corporations (TNCs) and international trade and investment agreements, including during negotiation, in the spread of HHCs, and in expansive investor rights and the investor-state dispute settlement (ISDS) system. These investigations address the arguments that TNCs are highly influential actors within the trade and investment policy space and that through their preferential access to the negotiation of these agreements they can influence the provisions that impact their profits and protections.

### **3.3.5 Third Stage of HIA: Appraisal**

The appraisal stage of the HIA is inclusive of the work in Chapters 4 through 7. Chapter 4 develops the conceptual framework and includes a form of systematic review, referred to as realist review, to outline the state of the evidence on the causal pathways between international trade and investment agreements and health [206]. Chapter 5 is an examination of the role of industry in the trade and investment policy-making process. Specifically, we conducted a qualitative analysis of food industry stakeholder submissions during the TPP negotiations to ascertain what the food industry wanted to gain from the agreement. We accompanied this analysis with a review of the signed TPP text to assess the extent to which industry interests were incorporated in the agreement and the potential implications for health. Chapter 6 includes a natural experiment using quantitative methods to assess the impacts of international trade and investment agreements on the spread of HHCs primarily through foreign direct investment (FDI) from transnational food and beverage companies. We explore the impact of bilateral trade and investment relations with the United States (US) and accession to the WTO on the market of one specific HHC, sugar-sweetened carbonated beverages (SSCBs), contrasting the situation in Vietnam and the Philippines with difference-in-difference (DID) models. Finally, Chapter 7 explores the health policy implications of expansive investor rights and the inclusion of ISDS mechanisms, with a focus on the role of ISDS in the policy decision-making environment and potential regulatory chill responses. This chapter uses a type of qualitative legal analysis, and explores all publicly available awards decided on merits of investor-state disputes over the past five years for lessons on the interactions between investor protections and health policy. The analysis is followed by policy recommendations for

revisions to the TPP's investment chapter to strengthen the right to regulate and reduce the likelihood of regulatory chill responses.

### **3.3.6 Fourth Stage of HIA: Reporting**

The primary source of reporting of this HIA is through the production of this dissertation. In order to expand the reach of the results Chapters 2 through 7 are in varying stages of being translated into peer-reviewed journal articles. Findings from this HIA have also been reported through newspaper commentaries, blogs, conference presentations, workshops, and lectures (see Appendix B for a list of these outputs).

### **3.3.7 Fifth Stage of HIA: Modification of Policy, Programme, or Project**

The results of this HIA are in the process of being disseminated through diverse channels, noted above, in an attempt to provide information on how maximise the potential positive health impacts and minimise the potential negative health impacts of international trade and investment agreements. These results may inform public discourse and policy-maker opinion during TPP ratification processes.

### **3.3.8 Postliminary Step for HIA: Monitoring and Evaluation**

The work conducted in this HIA can inform future HIAs in the area of trade and investment policy and health, most notably the development of a conceptual framework to serve as a screening tool for future HIAs, as well as a review of the literature to guide where evidence is most needed going forward. The development of this framework and an overview of the state of the evidence are presented in the next chapter.

## CHAPTER 4

PATHWAYS BETWEEN INTERNATIONAL TRADE AND INVESTMENT  
AGREEMENTS AND HEALTH: DEVELOPMENT OF A CONCEPTUAL FRAMEWORK  
AND A REALIST REVIEW OF EXISTING EVIDENCE

“WHEN ONE TUGS AT A SINGLE THING IN NATURE, HE FINDS IT ATTACHED TO  
THE REST OF THE WORLD.”  
– John Muir

## 4.1 Introduction

Although the public health community has been actively engaging with trade and investment policy for more than a decade now [34], the literature still lacks a comprehensive framework of the pathways between international trade and investment agreements and health. In an attempt to address this gap, the current chapter details the development of a conceptual framework of these relationships, grounded in the current body of literature on these topics. The primary health outcome of this dissertation, and accordingly this framework, is noncommunicable disease (NCD) morbidity and mortality. Specifically, this chapter focuses on how trade and investment policy affects environmental influences on behavioural risk factors, the most significant of which are tobacco use, alcohol misuse, and unhealthy diet, all of which contribute to the metabolic risk factors for NCDs [12]. The framework has a secondary focus on access to medicines, which plays an essential role in mediating NCD mortality once metabolic risk factors are present.

The objective of this framework is to map the causal pathways through which international trade and investment agreements influence the environment within which individuals carry out health behaviours, in order to highlight the role of structural factors in these health behaviours. Consumption of tobacco, alcohol, and ultra-processed food products, collectively referred to as health-harmful commodities (HHCs) throughout this dissertation, are the focal products of concern. Physical activity, low levels of which are another risk factor for NCDs, is excluded from the framework as it is not a tradeable commodity and is less directly influenced by trade and investment provisions. The population health approach taken in this dissertation, introduced in Chapter 1, considers the social determinants of health. Consequently, income and social status, employment and working conditions, and health and social services are incorporated within the conceptual framework given their immediately recognisable connections with trade and investment provisions. Although other social determinants of health, such as gender, ethnicity, or biological factors may be affected by trade and investment agreements, these relationships are not included in this framework given the already expansive scope of the undertaking. The value of exploring these social determinants is not being dismissed, rather consideration of such factors should be given increased attention and subsequently incorporated into this framework in the future.

This chapter is intended to be complementary to Chapter 2, balancing the theoretical development of the ideas, institutions, and interests behind trade and investment agreement, with the development of causal pathways to explore empirical relationships between trade and investment agreements and health. This conceptual framework was developed with the aim of guiding and encouraging future academic and policy endeavours in the area of trade and investment and health, particularly, as a screening tool for future health impact assessments (HIAs) of agreements. While the role of transnational corporations (TNCs) is not made explicit within this framework, TNCs are a driving force of both the provisions included in trade and investment agreements, explored in Chapter 5, as well as in the utilisation of the provisions in these agreements that modify the international business environment to their advantage, and consequently influence population health behaviours. Finally, the causal pathways developed between international trade and investment agreements and health in this chapter provide the guiding rationale for the exploration of imports of and foreign direct investment (FDI) into HHCs in Chapter 6, and the role of investor rights and investor-state dispute settlement (ISDS) in domestic policy processes in Chapter 7, which in turn explore how TNCs use trade and investment provisions to maximise their profits and protections, respectively.

## **4.2 Methods**

### **4.2.1 Conceptual Framework Development**

The initial draft of the conceptual framework was developed as a composite of existing conceptual frameworks depicting relationships between trade and health through a more selective set of pathways (see Table 1). The initial draft borrowed heavily from the agricultural and food systems literature which developed frameworks to map the complex relationships between trade and diet. The draft framework was expanded to incorporate additional HHCs (tobacco and alcohol), access to medical treatment, and select social determinants of health (employment and working conditions, health and social services, and income and social status). The terminology and content of the conceptual framework is designed reflect the structure of contemporary regional trade and investment agreements (RTAs). While many chapters within contemporary agreements have prototypes within the World Trade Organisation (WTO) upon which they build (with these new chapters often referred to as WTO+), others have no pre-existing WTO structure and are highly

reflective of shifting priorities in global trade and investment (see Appendix A for an overview of the chapter structure of the Trans-Pacific Partnership (TPP), the focal agreement of this dissertation, and its relationship to the seminal agreements of the WTO).

*Table 1 Key guiding frameworks for the development of the conceptual framework*

ARTICLE	FRAMEWORK
Friel, S., Hattersley, L., Snowdon, W., Thow, A-M., Lobstein, T....Walker, C. (2013). Monitoring the impacts of trade agreements on food environments. <i>Obesity Reviews</i> , 14 (S1), 120-134.	Figures 1 & 2, Tables 2 & 4
Friel, S., Gleeson, D., Thow, A-M., Labonté, R., Stuckler, D., Kay, A., Snowdon, W. (2013). A new generation of trade policy: potential risks to diet-related health from the trans pacific partnership agreement. <i>Globalization and Health</i> , 9, 46.	Figure 1
Labonté, R. (2004). Globalization, health and the free trade regime: assessing the links. <i>Perspectives on Global Development and Technology</i> , 3 (1-2), 47-72.	Figure 1
Legge, D., Gleeson, D., Snowdon, W., & Thow, A-M. (2013). Trade and non-communicable diseases in the Pacific Islands.	pp. 5-7
Thow, A-M. (2009). Trade liberalization and the nutrition transition: mapping the pathways for public health nutritionists. <i>Public Health Nutrition</i> , 12 (11), 2150-2158.	Figure 1

The draft conceptual framework was generated by a core development team. It was then distributed for feedback to a larger research project team and subsequently revised. The revised conceptual framework was then circulated to an expert advisory panel. Two iterations of this process were completed before the conceptual framework was finalised. Members of the development and project teams and expert advisory panel possess expertise in health policy, trade and investment policy, trade and investment law, and political science from academia and civil society (see Table 2 for overview of members).

*Table 2 Members of the conceptual framework development team*

MEMBER	AFFILIATION	ROLE
Jeffrey Drope	Vice President, Economic and Health Policy Research, American Cancer Society	Expert Advisory Panel Member
Sharon Friel	Director, Regulatory Institutions Network and Professor of Health Equity, Australian National University	Research Project Member
Marc-Andre Gagnon	Assistant Professor, School of Public Policy and Administration, Carleton University.	Expert Advisory Panel Member

Deborah Gleeson	Lecturer, School of Psychology and Public Health, La Trobe University	Expert Advisory Panel Member
Ronald Labonté	Professor and Canada Research Chair, School of Epidemiology, Public Health and Preventive Medicine, University of Ottawa	Core Developer
Benn McGrady	Technical Officer (Legal), Prevention of Noncommunicable Diseases (PND), World Health Organisation	Expert Advisory Panel Member
Corinne Packer	Researcher, School of Epidemiology, Public Health and Preventive Medicine, University of Ottawa	Research Project Member
Arne Ruckert	Senior Research Associate, School of Epidemiology, Public Health and Preventive Medicine, University of Ottawa	Core Developer
Ashley Schram	PhD Candidate, Population Health, School of Epidemiology, Public Health and Preventive Medicine, University of Ottawa	Core Developer
David Stuckler	Professor of Political Economy and Sociology, University of Oxford	Research Project Member
Anne-Marie Thow	Lecturer, Menzies Centre for Health Policy, School of Public Health, University of Sydney	Expert Advisory Panel Member
Anthony VanDuzer	Professor, Faculty of Law, University of Ottawa	Research Project Member

#### 4.2.2 Realist Review

A realist review was employed to assist in developing and validating the pathways in the framework. Within a realist review the first step is to develop a set of relationships based on underlying assumptions of the expected impacts of an intervention or policy, as set out in the conceptual framework above. The second step is then to populate that framework with empirical evidence where it exists, looking for evidence to support or contradict those assumptions and modifying as evidence is reviewed [206]. The realist review methodology is relatively new and endeavours to combine theoretical understanding and empirical evidence to explain the underlying mechanisms connecting two events and the context within which that connection occurs. This approach is particularly well-suited to a review of complex systems [206], such as one connecting trade and investment agreements to health outcomes. Realist reviews take an expansive approach, reviewing both qualitative and quantitative research studies [207]. They begin with a search strategy, but not a clearly defined protocol, in order to allow for an iterative search process as the review progresses. This flexibility allowed us to refine the framework as the review was

conducted, and to refine the review as the framework was developed. Realist reviews do not employ structured assessments of quality as a part of inclusion criteria; rather, quality is assessed in an unstructured manner during the review process [208]. Finally, although realist reviews are a subset of systematic reviews, they are neither standardised nor replicable [206,208].

Although we undertook a comprehensive development approach for the framework in order to garner broad interest from trade and investment and health researchers, there is a concentration on food systems and dietary health in the realist review, consistent with the rest of this dissertation. Additionally, evidence was targeted from RTAs that have been in force long enough to produce evidence and have been well-studied within the literature, including the North American Free Trade Agreement (NAFTA) between Canada, Mexico, and the United States (US) which entered into force January 1994 as well as the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) between the US and five Central American states which entered into force primarily in 2006. In order to capitalise on available evidence, the review also includes all forms of trade and investment liberalisation, including unilateral liberalisation through domestic policies and multilateral liberalisation through the WTO.

The search strategy included multiple combinations of search term sets using the Web of Knowledge, Proquest and Scopus multidisciplinary databases, between January 2000 and June 2014 (see Table 3).

*Table 3 Realist review search terms*

CONCEPT	TERMS
Trade	trade, investment, liberali*, globali*
trade and health policy issues	marketing, label*, tax*, ban*, packag*, warn*, additive*, flav*, advertis*, licens*, dispute*
economic issues	FDI, welfare, economic growth, employment, unemployment, labo*, poverty, neolib*, income, wage*
food supply	fast food, processed food, prepared food, snack food, obesogenic food, soda, soft drink, packaged food, convenience food, sugar sweetened beverage, grocery, food retail, food market*, food advertis*
Tobacco	tobacco, smoking, nicotine
Alcohol	alcohol, liquor, wine, spirits, beer

access to medicine	medicine, patent, data exclusivity
Policy	regulat*, policy space, policy capacity, FCTC, codex alimentarius, domestic
Health	nutrition*, diet*, overweight, obes*, malnutrition, non-communicable disease

The initial search results returned 24,343 articles. A round of eliminations by title reduced the results to 6,493 articles. These abstracts were then reviewed for relevancy of the content to development and validation of the framework pathways. A total of 191 articles were retained, all of which were reviewed and coded by two team members using NVivo 10 software. Coding began deductively using a line-by-line coding technique based on the hypothesised pathways from the initial conceptual framework. Inductive coding was also incorporated when new relationships within the conceptual framework became evident from the reviewed articles. After the initial phase of coding was completed, a search within the Google Scholar database was performed to explore evidence for pathways that had emerged during the iterative development of the conceptual framework, and for pathways where no evidence had turned up from the initial search strategy. This targeted search resulted in 46 new sources which were reviewed and incorporated into the evidence base.

Identified articles were read for evidence connecting specific trade and investment agreements (or chapters or provisions within an agreement) to changes in the availability, accessibility, affordability, acceptability, and quality of HHCs, as well as changes in policy space for regulation of HHCs. Articles were also examined for evidence of impacts of trade and investment agreements on economic growth, economic distribution and equity, employment quality and quantity, taxation and revenue generation, and social spending. Relationships between trade and investment agreements and access to medicines were also explored, as well as any health impacts attributed to changes in the HHC environment, economy, employment, and social services. Available evidence was assigned to dyadic relationships in the pathway, for example, evidence of an increase in imports after an agreement with tariff reductions entered into force was assigned to *tariff reduction – import volume*. Additional themes emerged during the review related to general commentary on the multilateral, regional, and bilateral systems of trade and investment; power relations and inequity; trade diversion; policy coherence and policy recommendations; and the role of industry in negotiations, HHC supply, and policy-making. The extensive volume of material

produced from the review cannot be fully captured in this chapter, however it has been retained for future analysis and publication.

The realist review was designed to focus on developing evidence for the relationships between trade and investment provisions and transformations of domestic environments related to HHCs, access to medicines, and the selected social determinants of health. The relationship between such environmental changes and health behaviours, and the relationship between health behaviours and health outcomes, is the subject of multiple bodies of existing literature. Consequently, they will receive comparatively minimal attention in the subsequent sections. The unique contribution of this piece is to identify a comprehensive set of connections between trade and investment agreements and NCDs. Given the relatively new addition of trade and investment policy to the health discourse, this chapter places a greater emphasis on establishing the trade-related processes of these connections.

## **4.3 Results**

This section begins by outlining the structure and key principles of the final conceptual framework, followed by an assessment of the quality of reviewed evidence. It will then move into an overview of the environmental transformations resulting from the facilitation of: (1) trade in goods; (2) services and investment; and (3) changes to domestic policy space and governance. Domestic policy space is defined here as, "...the freedom, scope, and mechanisms that governments have to choose, design, and implement public policies to fulfill their aims" [209]. The results conclude with a brief review of the subsequent health transformations as an aggregate result of these three key pathways.

### **4.3.1 Framework Structure**

#### *4.3.1.1 Trade and Investment Chapters and Provisions*

The first column on the left of the conceptual framework (see Figure 5) identifies key provisions with relevance for health outcomes within a trade and investment agreement that should be examined for specific content in future HIAs. It is divided into three sections: (1) facilitation of trade in goods; (2) facilitation of services and investment; and (3) domestic policy space and

governance. The structure of this section was informed by NAFTA, proposed chapters of the TPP, and existing frameworks within the literature.

#### *4.3.1.2 1st and 2nd Level Environmental Transformations*

The second and third columns from the left identify the theorised proximal (first-level) and theorised distal (second-level) changes, respectively, to the environment from the identified provisions. Generally speaking, for the trade in goods, services, and investment pathways, the first-level environmental transformations are those that pertain to the business environment, that is, changes relevant to industry and investors. Second-level environmental transformations are those that pertain to the consumer environment, that is, changes relevant to individual consumers. These impacts are divided into the direct health impacts on HHCs and access to medicines, as well as the indirect health impacts through the identified social determinants of health.

#### *4.3.1.3 1st and 2<sup>nd</sup> Level Health Transformations*

The fourth column from the left identifies the theorised proximal (first-level) changes to population health from the identified provisions. These impacts are again divided into the direct health impacts on HHCs and access to medicines, and indirect health impacts through the identified social determinants of health. First level health transformations largely concern changes to individual health behaviours, such as consumption of HHCs and adherence to medical treatment, as well as to the individual experiences of employment and working conditions, health and social services, and income and social status. The final column on the right identifies the theorised distal (second-level) changes to population health from the identified provisions, including the metabolic risk factors associated with changing health behaviours and our key health outcome of interest, NCD morbidity and mortality.

#### *4.3.1.4 External Factors, Neutrality, Nonlinearity, and Dynamic Interactions*

The influence of the first four columns on NCD morbidity and mortality can be mediated by systemic inequity both within and between countries, a country's health system's capacity to respond to these challenges, as well as economic and social policies enacted at national and international levels (e.g. tax systems, structural adjustment programmes). The conceptual framework also acknowledges the influence of the national and global political economy context and global governance structures on the constructs and pathways addressed in the framework.

These processes will not be explored here given the extensive nature of the material to be covered, however, future reviews of these processes would be valuable.

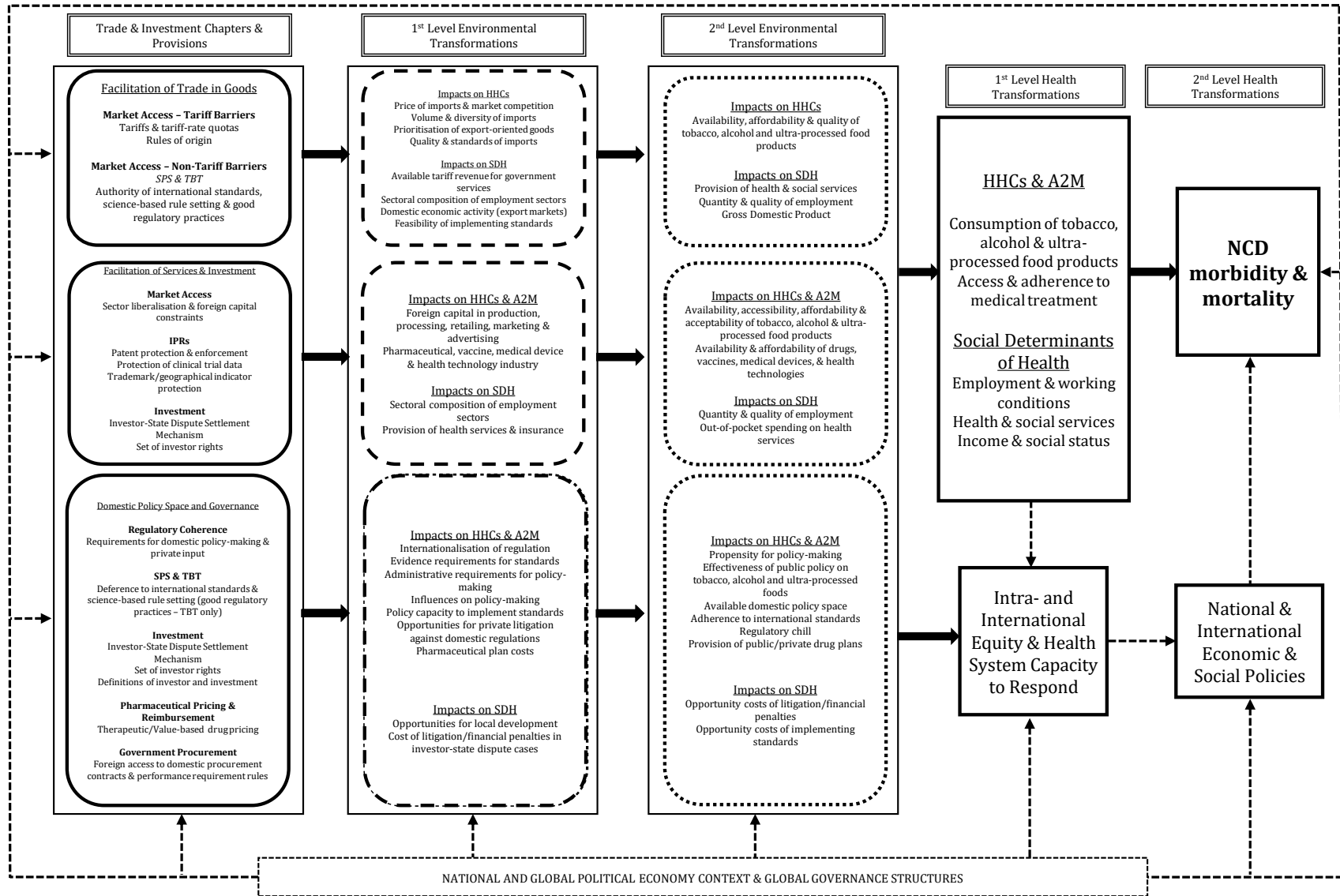
The framework has intentionally been designed with neutral language to permit flexibility in the effects depending on local context (*e.g.* avoiding terms like increases/decreases or improves/declines). Whether or not changes in the environmental level transformations have positive or negative health transformations will be evaluated by contextualised HIAs. Finally, while the framework has been constructed in a linear fashion to facilitate its usage and subsequent adoption, it recognises that the processes and outcomes of each stage have the potential to feedback into earlier processes (*e.g.* outcomes of dispute settlement cases can feedback into the development of new investor rights) creating loops throughout the framework. Likewise, the framework has encased each column to demonstrate that these effects may have dynamic interactions (*e.g.* reductions in tariffs on trade in goods may have more or less salience depending on the level of service sector liberalisation). Nuancing the feedback loops and dynamic interactions could be done within individual HIAs; however, for the purpose of generating a comprehensive conceptual framework with the greatest potential for generalisability and ease of use such details have not been incorporated.

#### **4.3.2 Assessment of Reviewed Evidence**

Gathering quality evidence for the pathways from international trade and investment provisions to NCD morbidity and mortality became increasingly difficult as the number of transformations required increased. Connecting trade and investment provisions with 1<sup>st</sup> level environmental transformations produced the strongest evidence but moving through 2<sup>nd</sup> level environmental transformations, into health transformations became progressively more convoluted as the number of intervening factors and the time to realise such effects increased.

Likewise, as the provisions moved further away from traditional tariff rules to ‘behind-the-border’ measures, the volume and strength of evidence also began to decline. That is to say, tracking changes through the facilitation of trade in goods pathway involves monitoring data on domestic tariff rates and the movement of goods across borders, data which is, relatively speaking, readily accessible and possible to analyse. Operationalising and acquiring relevant data to monitor the facilitation of services and investment and domestic policy space and governance is considerably

Figure 5 Conceptual framework of international trade and investment agreements and noncommunicable disease



more challenging. The strength of available evidence thus weakened as the analysis moved from left to right and from top to bottom within the conceptual framework.

Although the intent of the review was to explore the impacts of trade and investment liberalisation, a considerable portion of the reviewed evidence was from studies of liberalisation in general, not demonstrably undertaken as a result of trade and investment commitments. Often referred to as unilateral liberalisation, these actions open domestic markets and ease the entry of investment through national policies rather than international agreements. Given the relative paucity of empirical research on trade and investment liberalisation, we chose to retain information on unilateral liberalisation as indirect evidence of likely or possible effects of trade and investment agreement required liberalisation. Where evidence is attributed to trade and investment liberalisation, the specific agreement is noted.

In some cases it is challenging to distinguish between unilateral and agreement-related liberalisation, as is the case in Mexico which began dramatically reforming its domestic economic policies just prior to joining NAFTA [210]. Moreover, the evidence reviewed demonstrates effects after trade and investment agreements come into force but is unable to demonstrably link such effects to treaty commitments. Further to this point, trade and investment commitments may reflect commitments requiring real domestic policy changes, that is actual trade and investment liberalisation, or they may simply reflect commitments to existing domestic policies, or even commitments to a level of liberalisation less than what currently exists. In the event that commitments are equal to or less than what already exists effects are still likely to occur, originating from investor confidence in the irreversibility of the liberalisation commitments alongside access to international dispute settlement, although the magnitude of such effects is likely to be reduced. These nuances were rarely explored in the reviewed literature, although reference to these complexities as well as possible feedback loops and dynamic interactions have been made during the detailed discussion of the pathways in later sections of this chapter. As a result of these limitations of the reviewed data, causal relationships are theoretically developed, often alongside empirical evidence, however they are not unequivocally demonstrated, consistent with a realist review approach.

One notable omission in this framework is the role of actors, that is, states, corporations, civil society, and consumers, which necessarily implies a failure to address many of the complexities

within which these structural relationships play out when combined with various actor interests and power relations. For example, the pathway developed for the facilitation of services and investment fails to adequately capture intra-firm trade and the ways in which TNC global production chains are developed and sustained (although the pathway leading from Facilitation of Services and Investment could be used for this purpose). Nor does it capture inequalities in decision-making power within consumer environments. The feasibility of incorporating actor interests and power relations within this framework should be assessed in the future.

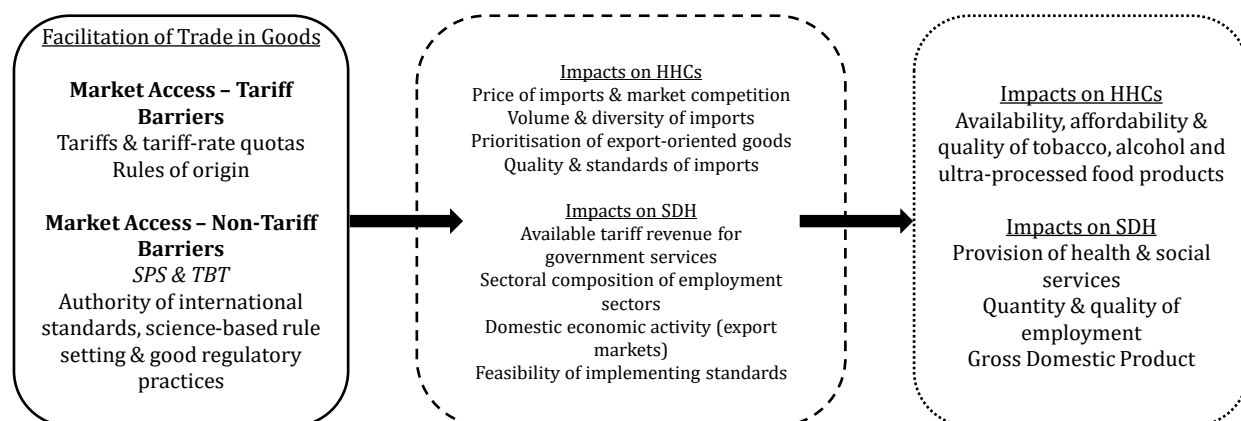
Finally, the evidence in our realist review does not reflect the entire body of available evidence. The reviewed evidence was heavily weighted towards the negative externalities of trade and investment agreements rather than the positive externalities. This may reflect either a researcher bias in conducting or reviewing the literature, including the selected search terms, or the limited benefits accruing from these agreements to populations outside of elite actors discussed in Chapter 2. Considerable evidence originated from studies of NAFTA and CAFTA-DR, and relatedly, much of the evidence of changes to the food environment and dietary outcomes from trade and investment liberalisation was restricted to Latin America and the Pacific Island Countries (PICs). Additional efforts to continue compiling evidence for the following pathways and refining the conceptual framework itself as new evidence emerges will support future work in this area. The next section will review the first of three pathways: facilitation of trade in goods.

### **4.3.3 Facilitation of Trade in Goods Pathway**

#### *4.3.3.1 Trade and Investment Chapters and Provisions*

This section of the framework conceptualises the pathways between trade in goods and NCD morbidity and mortality (see Figure 6). Trade in goods is facilitated by the reduction or elimination of both tariff and non-tariff barriers.

Figure 6 Facilitation of trade in goods pathway



#### 4.3.3.1.1 Market Access – Tariff Barriers

Market access chapters in trade and investment treaties, an evolution of the WTO General Agreement on Tariffs and Trade (GATT), list the maximum tariffs (import or border taxes) and tariff-rate quotas (a two-tiered tariff that provides a starting tariff rate and then an increased tariff rate when import volumes exceed a specified quota) that a state may charge for categories of goods. Tariff schedules cover all goods, for example in the TPP there are over 11,000 tariff lines. Consequently, to enhance feasibility HIAs should be restricted to key products relevant to the type of assessment being conducted. Examining impacts on NCD prevalence could include tariff lines related to tobacco products, alcohol products, agricultural products (particularly ultra-processed food products and key agricultural inputs such as corn, sugar, and soy), as well as tariffs on pharmaceuticals, vaccines, medical devices and health technologies. In-depth explorations could also consider analysing rules of origin (ROO) chapters which establish the criteria needed to decide the nationality of a product, which determines how preferential tariff and tariff-rate quotas are applied to applicable goods under particular trade and investment treaties.

#### 4.3.3.1.2 Market Access – Non-Tariff Barriers

Trade in goods is also influenced by non-tariff barriers, including chapters on sanitary and phytosanitary standards (SPS) and technical barriers to trade (TBT), evolutions of the Agreements on SPS and TBT in the WTO. SPS indicate how governments can apply food safety standards and animal and plant health measures. Key provisions include references to international standards

(including the *Codex Alimentarius*) and the rules regarding the role of ‘science’ and ‘evidence’ needed to justify standards perceived as more stringent than current international standards. TBT commitments aim to ensure that domestic technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade. Within a TBT chapter it is important to examine the wording around the protection of domestic policy space, formation of standards, opportunities for private actor involvement in policy-making, and any new hindrances to the policy-making process. SPS and TBT commitments, while highly relevant to trade in goods, influence health outcomes primarily through restrictions on domestic policy space and governance, that is, they dictate quality standards and regulatory matters related to goods. Thus, further exploration of these chapters is included in the final pathway: domestic policy space and governance.

#### *4.3.3.2 Direct Health Impacts on Health-Harmful Commodities*

##### *4.3.3.2.1 1st Level Environmental Transformations*

Market access, SPS, and TBT provisions individually, and cumulatively, can generate changes to import and export flows. Reduced tariff rates, alongside the harmonisation of product standards, may result in changes to the volume and diversity of imports, the price of imports and market competition, prioritisation of export-oriented goods, and the quality of traded goods.

##### *4.3.3.2.1.1 Price of imports and market competition*

Tariff reductions often mean a reduction in the cost of imported goods [187,211,212]. At the end of the WTO negotiations the average tariff on industrial products was around 4%. Agricultural tariffs on the other hand were still estimated around 40% on average [213], suggesting there was still considerable room for change at that time in agricultural goods in future RTAs. Lower priced goods can be beneficial for consumers, specifically, lower priced, healthful food imports [214]; however, imports can also have negative effects when the price of HHCs is driven down. Market competition between transnational tobacco companies and domestic tobacco companies in South Korea, after it liberalised its tobacco markets in 1988, led to increased cigarette sales, due in part to increased consumption among existing smokers and new female smokers, a group targeted by transnational companies [3,4]. Market competition may create a situation where cheaper but less healthy imported products replace traditional domestic goods, such as processed and hydrogenated

oils replacing locally produced coconut oils in Samoa after trade liberalisation. Prior to liberalisation in the 1980s palm oil was not imported into the country; as of 2003 it comprised a third of all available oil in the country [215].

#### *4.3.3.2.1.2 Volume and diversity of imports*

The reduced costs of imported goods after tariff reductions is associated with increased volumes and diversity of imported products. After the introduction of NAFTA, which removed virtually all tariffs over a ten year period, the three member countries (Canada, the US, and Mexico) increased trade among this regional bloc relative to their trade with the rest of the world, notably in red meat and grains [216]. In the first ten years of the agreement, US agricultural exports to Mexico almost doubled to \$8.5 billion, and exports to Canada grew more than four-fold to \$10 billion [217]. While Mexico shipped seasonal fruits and vegetables North, staple commodity crops and livestock flowed into the South. Corn and soybean imports into Mexico from the US post-NAFTA rose nearly four-fold and three-fold, respectively, displacing as much as 40% of corn production and almost all soybean production in Mexico [186]. Similarly, lower tariffs on processed cheese after CAFTA-DR were associated with higher volumes of imported cheese into Central America from the US; Honduras, which cut its tariffs on poultry by 50% and loosened its zoosanitary requirements, increased its US poultry imports 20% annually after the agreement [187].

These increased flows of imports often include HHCs like tobacco, alcohol, and ultra-processed food. In addition to corn and soy, the US began exporting sugar and snack foods into Mexico at increasing rates after NAFTA [186]. Similar effects have been seen in India which began importing large amounts of vegetable oils, including palm and soybean, from Brazil, Argentina, and the US after removing the state monopoly on imports [5]. The demand from fast food restaurants and a growing tourism industry in Costa Rica increased imports of frozen french fries, which were sourced principally from Canada due to the tariff reductions in the Canada-Costa Rica trade agreement [187]. Imports of US chocolate, candy, cookies, pastries, popcorn, chips, and confectionary grew across Central America after CAFTA-DR [187]. Reduction of import tariffs on processed foods in Samoa and Fiji during periods of unilateral liberalisation resulted in increased import of processed and packaged goods from around the world, including confectionaries, pastries, and cereals [215]. Effects have been similar for alcohol products: the volume of Australian wine imported in Thailand increased after the Thailand-Australia Free Trade

Agreement [218] and exports of distilled spirits globally from the US increased 86% from 1994 to 2005, following the US's accession to the WTO [212]. As countries are importing a greater volume of cheaper goods as a response to tariff reductions, they may also be focusing domestically on goods they can produce at a comparative advantage for export to the global market to take advantage of tariff reductions elsewhere.

#### *4.3.3.2.1.3 Prioritisation of export-oriented goods*

The growing market for global goods may increase a country's focus on export-oriented commodities, goods it can sell to the world to improve its balance of trade<sup>16</sup> and to enhance its position in the global economy. Fiji provides a clear example of the rising importance of cash crops and a growing emphasis on export promotion after liberalisation [215]. Export-oriented agriculture, or 'cash-cropping,' is an approach to agriculture that is generally more aligned with a state's economic goals than with its food security or environmental sustainability goals [220]. The most lucrative crops are those with the highest value per square kilometre, including wheat, barley, potatoes, tobacco, palm, rapeseed, soybeans, maize, sugar beet, and sugar cane [221], all of which are common inputs of ultra-processed food, alcohol, and tobacco products. A specific cash crop may be chosen for reasons other than financial return, however, such as historical factors, contractual obligations, limited opportunities, access to capital and inputs, or access to markets. Equally, farmers may not be able to grow alternative crops (e.g. organic vegetables) due to regulatory and administrative shortcomings (e.g. validating growing conditions), thus while alternative markets may actually offer a greater return, other factors may serve as barriers to entry. When export-oriented agriculture is intensified and targeted to crops with high monetary returns it may drive up the volume and down the price of common HHC agricultural inputs, subsequently reducing the price of HHCs globally, driving increased consumption of these products as they become more available and affordable.

#### *4.3.3.2.2 2nd Level Environmental Transformations*

The changes to import and export flows described above, including the volume and diversity of imports, the price of imports and market competition, and prioritisation of export-oriented goods,

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<sup>16</sup> Balance of trade is the difference between the value of a country's imports and the value of its exports. It comprises the largest component of a country's balance of payments. A country has a trade deficit if it imports more than it exports and a trade surplus if it exports more than it imports [219].

have implications for the availability and affordability of tobacco, alcohol, and ultra-processed food products, both within trading countries but also globally for its international price impacts.

#### *4.3.3.2.2.1 Availability of health-harmful commodities*

The changes described above influence what commodities are available, which is driven largely by product volume and diversity. The reviewed literature showed a consistent relationship between tariff reductions and increased import volumes. The health implications of this will vary based on whether the increased volumes reflect health-harmful or health-promoting products. Additionally, increased flows do not necessarily equate to increased consumption. Regional agreements like NAFTA and CAFTA-DR, which provide preferential tariff rates for member countries, may increase flows by diverting imports from a country not in the agreement rather than by absolute increases in consumption. The implications for dietary health of supplementing traditional agricultural crops with imported food products will largely reflect the quality of the imported food products. Where HHCs are a primary replacement, there are likely to be negative health outcomes.

#### *4.3.3.2.2.2 Affordability of health-harmful commodities*

The affordability of commodities is driven by product pricing and the domestic economy. Affordability has been associated with dietary quality, such that food of lower nutritional quality tends to cost less per calorie than food of higher nutritional quality [222], although these patterns may vary by economic development level [5,223]. In the PICs low-grade imported meat cuts are inexpensive and abundant, between 15% and 50% cheaper than local sources of healthier protein [224]. Availability and affordability of alcohol in New Zealand increased after it liberalised its alcohol policies [225]. These impacts are not always equitably distributed amongst trading blocs; after the implementation of NAFTA consumer food prices decreased in Canada while food prices rose significantly faster than inflation in Mexico [226].

#### *4.3.3.2.3 Summary of Findings and Need for Future Evidence*

The evidence reviewed for the direct health impacts of the facilitation of trade in goods supports the proposition in the framework that such provisions, namely the reduction of tariff barriers, results in a higher volume of cheaper imports flowing across borders, increasing their availability and affordability in the consumer environment. This may create an opportunity to improve global health if the increased volume of cheaper imports includes items such as nutritionally-dense food

products. Alternatively, this may present a health risk if these effects increase the availability and affordability of HHCs. Given that countries have retained some of the highest tariffs on agricultural products, these effects may be most pronounced in ultra-processed food and beverage products, which may be replacing healthier dietary components in some places. As states reorient their national economies to be more focused on export-oriented commodities, farmers may experience changes in the choices over their crops, and agricultural decisions may become more financially-oriented focusing on crops with the highest returns, many of which are common inputs of ultra-processed food, alcohol, and tobacco products, further exacerbating increased availability and affordability of these products.

The development of more robust evidence in the future should focus on contrasting applied tariffs before and after the agreement, addressing whether bound rates in the agreement are less than the currently applied tariff rates, and associating those modifications with changes in absolute volumes and retail price of imported HHCs. Additionally, future research could contrast the effects on healthy and unhealthy food products to draw comparisons of access to healthy and unhealthy diets facilitated by trade in goods. Discussion of the implications of changes to the availability and affordability of HHCs for the metabolic risk factors underlying NCDs will follow the overview of the remaining two pathways: services and investment, and domestic policy space and governance. Before turning to services and investment, the effects of changes to trade in goods for the social determinants of health are reviewed.

#### *4.3.3.3 Indirect Health Impacts*

##### *4.3.3.3.1 1st Level Environmental Transformations*

Market access, SPS, and TBT provisions have the capacity to influence the social determinants of health. Specifically, tariff reductions may remove a revenue stream for government-provided social and health services, while changes to a country's export production and new import-competition will alter the domestic economy and labour market. Additionally, provisions on SPS and TBT may act as barriers or facilitators for growth in export-production depending on a state's capacity to meet the international trading standards set-out in agreements, which will again affect their domestic economy and labour markets.

#### *4.3.3.1.1 Tariff revenues for government services*

Tariffs can be a valuable source of government revenue for public services, although an individual country's reliance on tariff revenue and its ability to recapture it through other means after liberalisation, such as domestic excise taxes, varies [227]. Middle-income countries have been able to recover between 40-60% on average, while low-income countries have fared worse, recovering between 0-30% on average [228]. Although tariff reductions may increase HHC consumption as noted above, tariff reductions that are offset by excise taxes can recapture part of this revenue stream and act as a deterrent to consumption of HHCs. In fact, excise taxes can actually be more effective from a health policy point of view, as they apply to all HHCs rather than just to imported ones [229,230].

#### *4.3.3.1.2 Domestic economy and labour market*

Shifts in what a country imports and exports as a consequence of tariff reductions has important implications for its domestic economy and labour markets. The value of the products a country imports relative to the value of the products a country exports may determine, in part, whether a country will see net gains or net losses following an agreement. Examining country-level aggregate economic gains and losses, however, does not account for the implications of liberalisation on trade in goods between and within sectors of the domestic economy. One such example is agriculture in Mexico. NAFTA was beneficial for many fruit, vegetable, and coffee producers in Mexico that had advantages in climate, geography, and labour costs and who could benefit from access to markets in Canada and the US; Mexican grain producers, however, lost due to disadvantages in climate, mechanisation, and US government subsidies to their domestic producers [231]. Moreover, the entry of TNCs after NAFTA displaced companies that had been producing for the domestic market [232]. Equally, the economic gains of one country may reflect losses in another. The phasing-out of the Multi-Fibre Agreement in 2005, which removed all tariff-rate quotas in the textile and clothing sector, had varying effects. Countries such as India and Bangladesh experienced an increase in textile and clothing employment of 21% and 40% respectively, while other countries such as Mexico and Romania experienced employment declines of 35% and 40% [233,234]. This variability demonstrates the difficulty in forecasting the economic implications of trade and investment agreements and suggests that the implications of trade and

investment agreements for domestic economies and labour markets are highly nuanced and context-dependent.

#### *4.3.3.3.1.3 Standards implementation and export growth*

Although countries may engage in tariff reduction to boost their own exports, this is only one part of the equation. For example, countries like China and India have the potential to be significant exporters of meat, however they face considerable constraints due to non-tariff barriers like the food safety standards of the SPS [235]. A country's ability to meet quality standards and administrative requirements for export promotion will partially determine its ability to experience economic gains from trade liberalisation.

#### *4.3.3.3.2 2nd Level Environmental Transformations*

Changes in government revenue streams as a result of tariff reductions may alter a state's capacity to provide a national health care system and other redistributive social services. Additionally, changes to the domestic economy and labour market from liberalisation of trade in goods discussed above are likely to influence the quality and quantity of employment for individuals, and the state's overall economic performance, a determinant of individual living conditions.

#### *4.3.3.3.2.1 Provision of health and social services*

A state's capacity to provide a national health care system and other redistributive social services is dependent, in part, on its ability to generate revenue through taxation, such as personal income taxes, land taxes, goods and services taxes, and tariffs. The potential implications of tariff revenue losses for the provision of health and social services varies based on a country's level of dependence on tariffs for government revenue. For example, the impact is likely to be more perceptible in the world's 53 poorest countries which rely on tariffs for 25-50% of all public revenue [228]. Whatever health and social services are being provided in these countries are likely to suffer when tariffs are reduced. The implications of liberalisation may compound when labour market insecurities rise simultaneously with tariff losses, which may diminish a state's capacity to finance health and social support programs to offset labour insecurity [236].

#### *4.3.3.3.2.2 Quantity and quality of employment*

Changes in the domestic economy and labour market described earlier affect the quality and quantity of employment for individuals in the country. The effect of NAFTA on employment in

the US is contested, with some suggesting that the Agreement created as many as 160,000 new jobs, and others suggesting that the gains are much smaller or reflect a net loss [237]. The increased demand for assembly labour in Mexico post-NAFTA [232] is estimated to have created approximately half a million jobs in the manufacturing sector from 1994-2002, although at least 30% of these jobs have since disappeared to even lower-wage economies [238]. Simultaneously, many agricultural labourers in Mexico lost their jobs, with 8.1 million employed in the sector in 1993 and only 1.3 million by 2002. Without reliable social safety nets much of this labour force moved into the informal economy, which now accounts for 46% of all Mexican jobs [238].

Implications for quality of employment vary between and within countries. After NAFTA, Mexico gained a large volume of unskilled, low-quality labour in manufacturing [232]. Individual attempts to attain higher quality employment through education offered little pay-off in Mexico, as increased attendance in high school and college education did not translate into better jobs, with less than a 1% increase within the top qualified jobs from 1996-2006 [239]. Conversely, much of the alleged job growth in US was suggested to have been in skilled labour [237]. In the US these effects were stratified as well, areas previously associated with higher-wage earners gained while states with more low-skilled labour lost due to labour diversion to Mexico. These losses can be mitigated in part through trade adjustment assistance (benefits to employees of select domestic sectors) [237] although this is not something that all countries are able to provide. Moreover, it may only benefit industries with strong domestic lobby groups, as was the case recently in Canada when the former Conservative government announced that the automotive and supply management sectors would receive assistance as a result of projected losses due to the TPP [240,241].

#### *4.3.3.3.2.3 Gross domestic product*

Although trade and investment agreements are argued to be drivers of economic growth [242–244], this does not always occur. NAFTA appears to have created very little economic growth in Mexico, one contributing factor being that component parts for manufacturing were imported, assembled with low-wage labour, and then exported back out [238]. In the first ten years of NAFTA (1995-2005) gross domestic product (GDP) growth in Mexico was below historic averages [245]: GDP growth averaged 5.8% annually from 1961-1985, slowing to 2.6% annually from 1985-2002 after extensive liberalisation began in 1985, even as trade volumes grew twenty-three fold over this period [246]. Similarly, the Thailand Development Research Institute found

that the projected growth from the Thailand-US free trade agreement was negligible, with the real GDP growth rate at only 1.34% [238]. Projected economic gains for all TPP countries amount to about 0.5% relative to a projected gain of 0.3% globally over the same period [247].

#### 4.3.3.3.3 Summary of Findings and Need for Future Evidence

The evidence reviewed for the indirect health impacts of the facilitation of trade in goods supports the proposition in the framework that such provisions, primarily the reduction of tariff barriers, influence tariff revenues for public services, domestic economies and the quality and quantity of employment, and economic growth. While the relationship between tariff reductions, lost government revenue, and reduced capacity to provide health and social services seems viable, our review did not return any empirical investigations of these relationships making this an important area for future research. The reviewed evidence demonstrates the level of nuance required to assess the implications of trade and investment agreements on the economy and the labour market, particularly that the direction and magnitude of effects may vary across countries in the agreement, within individual countries in the agreement, and within and between various sectors. Accurate forecasting of such multifaceted agreements operating in complex real-world systems seems unlikely. The implications of these potential changes to the social determinants of health for health transformations are reserved for later in the chapter. The next section turns to the second of the three main pathways: facilitation of services and investment.

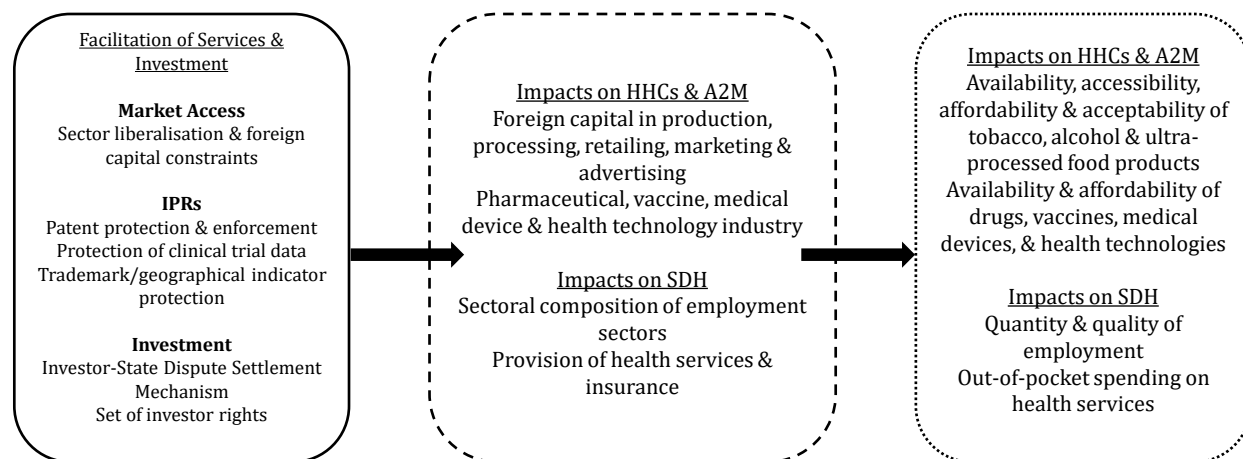
### **4.3.4 Facilitation of Services and Investment Pathway**

#### *4.3.4.1 Trade and Investment Chapters and Provisions*

This section of the framework conceptualises the pathways between the facilitation of services and investment and NCD morbidity and mortality (see Figure 7). Trade in services is facilitated by providing foreign investors new or greater market access to domestic service sectors within a services chapter of a trade agreement. The promotion of FDI on the other hand is multifaceted. One mode of service sector liberalisation, commercial presence (discussed below), is specific to the promotion of FDI. Moreover, intellectual property rights (IPRs) were subsumed under the trade and investment regime on the premise that a strong national IPR system would encourage FDI, particularly FDI into research and development (R&D) in the industrial and scientific fields [248]. Expansive investor rights and the inclusion of ISDS mechanisms may also assist in fostering FDI

inflows, however, similar to SPS and TBT these topics will be reserved for in-depth exploration in the final pathway: domestic policy space and governance.

Figure 7 Facilitation of services and investment pathway



#### 4.3.4.1.1 Services - Market Access

Trade in services encompasses an exceptionally wide range of domestic economic activity and can include all services that are commercially or competitively provided. Within the General Agreement on Trade in Services (GATS) in the WTO, services are organised by 12 broad sectors: business; communication; construction and engineering; distribution; education; environment; financial; health; tourism and travel; recreation, cultural, and sporting; transport; and other. Each sector has more specific subsectors, that is, a state could list *financial services*, or, more specifically, list *all insurance and insurance-related services* a sub-sector of *financial services*, or, even more specifically, list *life, accident and health insurance services* a sub-sector of *all insurance and insurance-related services* within *financial services*. By listing *financial services* alone, states would be committing all sub-sectors under this heading, alternatively they can choose to list only individual subsectors, of which there are 160 to select from.

The WTO uses a positive-listing approach where only the listed services are committed. Listing a service creates two primary obligations on states, the first of which is to provide market access to that service sector for foreign individuals and enterprises. Market access is provided for under four modes of service provision: (1) cross-border supply, the provision of a service within one country to another country (e.g. an American physician located in the US providing telehealth services to

a patient located in Canada); (2) consumption abroad, travelling to another country for a specific service (e.g. a Canadian travelling to the US to purchase medical services); (3) commercial presence, establishing a physical presence in another country through FDI to provide a service (e.g. an American laser eye surgery company opening a laser eye clinic in Canada); and (4) presence of natural persons, traveling to another country temporarily to provide a service (e.g. a Canadian physician travelling to the US to provide medical services).

The second obligation is to provide non-discriminatory treatment within committed service sectors through the right to most-favoured nation (MFN) and national treatment. As introduced in Chapter 1, MFN prevents discriminatory treatment among one country and its trading partners, that is, the most favourable conditions provided to one trading partner, must be provided to all trading partners. National treatment prevents discrimination between domestic and foreign producers, such that imported goods, services, or investments should be treated no less favourably than domestic goods, services, or investments. The GATS agreement allows each country to create a highly customisable schedule of commitments. States can place certain limitations on market access and national treatment either as horizontal exemptions for each of the four modes in all of the committed sectors, or as specific limitations for each of the four modes in each of the service sectors committed. Additionally, states can provide a separate document of MFN exemptions by service sector.

RTAs may draw on alternative classification schemes, such as the UN Central Product Classification which has five very broad service sector groupings: (1) constructions and construction services; (2) distributive trade services; accommodation, food and beverage serving services; transport services; and electricity, gas and water distribution services; (3) financial and related services; real estate services; and rental and leasing services; (4) business and production services; and (5) community, social and personal services. Additionally, RTAs may adopt a negative-listing approach, where only the listed sectors are considered not committed. A negative-listing approach is likely to lead to a greater number of sector commitments [249,250]. Finally, service chapters within RTAs do not always provide the level of customisation available in GATS. Exploring the influence of service sector commitments in trade and investment agreements on HHCs or access to health services in an HIA would require reviewing commitments in the agreement relative to existing commitments made by states in all relevant service sectors and

subsectors, which would vary by the classification scheme used by the agreement, including the loosening of any limitations on market access and national treatment, or exemptions to MFN.

#### 4.3.4.1.2 Intellectual Property Rights

Granting new or improved market access to commercial presence within service sectors is one way to encourage FDI inflows, another is providing enhanced IPRs. The main areas of IPRs are: copyright protections for literary or artistic works (*e.g.* books or paintings); trademarks (*e.g.* Nike's 'swoosh' or McDonald's 'golden arches'); geographical indications (*e.g.* Champagne or Basmati rice); industrial designs (*e.g.* Apple's iPhone design or Coca-Cola's bottle design); patents (*e.g.* pharmaceuticals and new plant varieties); and undisclosed information including trade secrets (*e.g.* KFC's '11 herbs and spices' or McDonald's 'secret sauce') and test data (*e.g.* safety and efficacy data from clinical trials). An agreement on IPRs establishes the minimum standards of protection including the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection, and may contain commitments regarding the enforcement of these rights.

HIAs of IPR provisions in contemporary RTAs should examine patent protection terms that exceed those in the WTO agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), including added time for delays in approval, or easing of the conditions for patent approvals such as allowing patents for new uses and methods of existing products regardless of additional therapeutic benefit [251]. Provisions may also introduce or extend the protection of clinical trial data, specifically for biologics, compounds produced through biological processes that are crucial for cancer treatment. Finally, IPR chapters may make changes to trademark protections, including the addition of positive rights for trademarks (*i.e.* the right to use vs. the right to exclude others from using) [252], or providing new protections for trademarks under geographical indication provisions, even when that geographical indicator is not the place of origin of that product (*e.g.* Kraft Romano cheese, or tobacco brands such as Marlboro or Salem) [253].

#### 4.3.4.2 *Direct Health Impacts on Health-Harmful Commodities and Access to Medicine*

##### 4.3.4.2.1 1st Level Environmental Transformations

Identifying drivers of FDI is complex and includes a suite of factors, including the host market size and its proximity to main markets, the level of real income, human capital and labour

standards, natural resources, infrastructure, political and macroeconomic stability, and investment incentives, such as export processing zones and tax holidays [254–256]. Trade and investment policies are another important part of the equation. It is important to note that while this section of the pathways identifies trade in services, IPRs, and investment protections, FDI also has connections with tariff structures. For example, if a trade and investment agreement permits goods to move across borders with little to no tariffs, it may become financially beneficial for companies to move production to countries with cheaper labour and export their products to other members of the agreement with reduced tariff rates. Consequently, FDI inflows may be influenced by tariff reductions, an effect that is further mediated by human capital and labour standards within the country. Similarly, companies may be more likely to establish foreign retail locations if they can import merchandise tariff free.

This pathway proposes that service sector liberalisation, in addition to promoting trade in services, can encourage FDI inflows through commercial presence. Additionally, enhanced IPRs as well as investment protections may encourage FDI as international commitments provide reassurances to investors about the treatment of their investment that are more credible than similar policy choices at the domestic level [257].

#### *4.3.4.2.1.1 Foreign direct investment in production, processing, retailing, marketing and advertising*

In the late 1980s Russia began unilaterally liberalising rules on FDI into the country, by 1991 foreign entities were allowed 100% ownership (up from 49% in 1987). By 1995 two major transnational food processors, Mars and Coca-Cola, entered Russia. Between 1995 and 1998 the annual FDI inflows into Russian food processing soared from US\$250 million to US\$1.2 billion, accounting for more than one-third of all FDI inflows. While FDI into food processing began to languish, down to US\$345 million in 2003, FDI into food retailing continued to climb, reaching US\$67 billion in the first half of 2007 [258]. Trade and investment liberalisation has been consistently connected to growth in FDI in food retailing, with 5- to 10-fold increases in FDI after full or partial liberalisation in China, Brazil, Mexico, Argentina, Indonesia, India, and various African countries during the 1990s [259].

US FDI into food production, food processing, consumer foodservice, and food retail in Mexico accelerated after NAFTA. The US invested in food production, such as poultry and pork products [186], but food processing has been the largest recipient of FDI within the food system [260]. Total

US FDI into food processing rose from US\$9 billion before NAFTA to US\$36 billion after NAFTA, which translated into a sales increase from US\$39.2 billion to US\$150 billion. Other countries also made investments into Mexico's food processing sector, but the US accounted for two-thirds of all investment [5].

FDI is often targeted at ultra-processed foods, for example in the 1990s Poland received more FDI into the confectionary sector than the meat, fish, flour, pasta, bread, sugar, potato products, fruits, vegetables, and vegetable oils and fats sectors put together. Foreign companies also tend to dominate in packaged foods like instant noodles, soft drinks, snacks, biscuits, and fast-foods, as demonstrated in China [260]. Much of the increase of snack foods available in Central America has been from US FDI rather than US exports [187].

Marketing and advertising services have been highly influential in the growth of tobacco, alcohol, and fast food markets. These services allow TNCs to overcome one of the most powerful market entry barriers: generating consumer preference for foreign products [261]. Research has found that children in developing countries are heavily exposed to food advertising of high-salt, high-sugar, and high-fat food products [262]. Similarly, the entry of transnational tobacco companies increased the volume of advertising in the former USSR, Ukraine, and Belarus, where these companies were consistently one of the top advertisers [263]. Public health bodies, particularly in countries with underfunded systems, have been unable to match the volume of advertising of HHCs by TNCs with messaging about the potential implications of misuse of such products [230].

Even when public health bodies have advertising and marketing bans in place, tobacco companies have found creative solutions to circumvent such policies, as was the case in South Korea when a ban on advertising to women and children (target populations) was introduced. Tobacco companies refocused efforts by sponsoring events not 'specifically' targeted to women or children, increased distribution at venues frequented by women, and diversified trademarks to appeal to a female market [3]. Transnational tobacco companies have also provided illegal financial incentives to retail outlets to place their products in more desirable locations and sponsor parties to advertise their brands [4]. After Russia banned television advertising tobacco transnationals became the top three purveyors of outdoor advertising [263].

What is unclear in these studies is whether trade and investment agreement commitments in advertising services have had any additional effects. When foreign companies invest in production, processing, and retailing of HHCs in a host country they will inevitably make investments in marketing and advertising; however, such marketing and advertising could come from domestic firms or foreign firms already able to operate domestically as a result of unilateral liberalisation. Additional evidence is needed to establish specific connections between commitments in advertising services (differentiating between new and existing commitments) and increases in marketing and advertising in order to separate the effects of services liberalisation from more general foreign participation in such markets.

#### *4.3.4.2.1.2 Pharmaceutical, vaccine, medical device, and health technology industry*

It has been argued that trade and investment provisions have assisted in designing an inequitable pharmaceutical system that rewards maximum prices, rather than maximum coverage and accessibility, and protects inefficient ways of purchasing R&D [264]. The patent system, promoted and protected by trade and investment agreements, is currently the leading incentive for R&D investments in pharmaceuticals and other health technologies. The WTO TRIPS agreement introduced a 20-year patent-based monopoly to reward drug developers for their investment and to prevent generic manufacturers from ‘free-riding’ on the brand-name companies that bear the R&D costs [265]. Expansive WTO+ protections introduced in more recent trade and investment agreements have been justified on this same rationale. All IPR provisions can be classified as providing stronger or longer monopoly protections, or enhanced enforcement measures which generate market exclusivity for a longer period of time on an increasingly comprehensive range of pharmaceuticals, vaccines, medical devices, and health technologies. These provisions delay the entry of generic competition into the market. Under the current patent system the R&D efforts of pharmaceutical companies are rewarded solely on product sales. Consequently, potential product sales are a key driver of R&D and products are pushed for as long as possible, to as many people as possible, at the highest price possible, to recover R&D investments and increase shareholder returns.

The introduction of biologics presents a particular challenge to the current patent system for brand-name manufacturing companies. Given the variability in the biologic development process biologic compounds are never identical and are not as effectively protected through traditional

patents. Preventing generic companies from ‘free-riding’ on the R&D behind biologics has required a focus on new protections, such as delaying access to clinical trial data and guaranteed periods of market exclusivity [266,267].

Whether the current system actually contributes to innovation as claimed is debatable, as available evidence suggests that only 10-15% of pharmaceutical revenues are directed towards R&D, and only 2-3% is spent on new drugs that offer therapeutic benefit beyond what is currently available [264,268]. Arguments on innovation aside though, a system of market incentives supported by the entrenchment and enforcement processes of trade and investment agreements may produce gaps for health and health equity, discussed in the later section on second level transformations.

#### 4.3.4.2.2 2<sup>nd</sup> Level Environmental Transformations

Changing levels of foreign capital in the production, processing, retailing, and marketing and advertising of HHCs has the potential to change the availability, accessibility, affordability, and acceptability of HHCs. Similarly, the structure of the pharmaceutical industry can influence the availability, accessibility, and affordability of drugs, vaccines, medical devices and other health technologies.

##### 4.3.4.2.2.1 *Availability, accessibility, affordability, and acceptability of health-harmful commodities*

Similar to changing flows of imports and exports facilitated by trade in goods, changing FDI flows also have the capacity to alter the availability and affordability of HHCs. In addition, when FDI is located in production, processing, retailing, and marketing and advertising in the host economy the implications reach beyond those of trade in goods. Specifically, FDI can alter what commodities are accessible (driven by the number and location of retail outlets), and what commodities are acceptable (driven by marketing and advertising). Changes in availability, accessibility, affordability, and acceptability are complicated to disaggregate, for example, the presence of foreign retailers is likely to influence what is accessible, as well as what is available, affordable, and acceptable, through its retail outlets.

Considerable change has occurred in Mexico’s retail sector since the introduction of NAFTA. Between 1997 and 2006, approximately the first ten years after NAFTA, the five largest US transnational food retailers doubled their market share from 24% to 48% [186]. Wal-Mart de Mexico is now the leading retailer. Retailer OXXO owned by a Coca-Cola subsidiary tripled its

outlets between 1999 and 2004, 7-Eleven doubled its outlets over the same period, and convenience stores now outnumber supermarkets [5].

The development of a concentrated food retailing sector shifts power away from food producers and processors to retailers, as they increasingly gain control and can make demands on suppliers about the quality, price, and diversity of their products [258]. FDI has been essential to supermarket growth, particularly chains from wealthier countries where markets are saturated, competition is greater, and profit margins are lower. For example, French supermarket chain Carrefour's margins are three times higher in Argentina compared to France [259].

FDI can increase the availability and affordability of ultra-processed food products, for example, after increased FDI inflows the price of ultra-processed food products fell by 30% in Brazil [269]. FDI can also introduce new foods into a region [215]. One example is the introduction of noodles into the PICs. In Fiji, noodles were not identified as a food in the national survey in 1980, but after a Nestlé instant noodle factory was built in 1984, noodles, nutritionally empty calories, were among the top 12 food items contributing to total energy in the diet by 1993. The opening of the factory also had regional implications such that trade in noodles among the islands became so substantial that Samoa had created a tariff line for ramen noodles by 1990 [215].

Increased investments in marketing and advertising by TNCs is also likely to alter what is acceptable, as research has found that children in developing countries are easily able to recall food advertising, report to enjoy it, and use it to guide their parents' purchasing behaviour [262]. Available evidence seems to indicate that ultra-processed food product sales are facilitated more effectively through FDI than traditional trade, as locating locally may allow TNCs to reduce costs, increase their market power, and improve the efficiency of distribution and marketing [260].

#### *4.3.4.2.2.2 Availability and affordability of medicines*

The profit-driven R&D agenda, shaped by the patent system and enforced by trade and investment policy, has implications for the availability and affordability of drugs, vaccines, medical devices, and health technologies. A near universal challenge is that delaying the entry of generic competition, through extensive monopoly rights reduces affordability of all medicines for all people. Drugs under patent are often substantially more expensive. As an example, the cost of antiretroviral (ARV) therapy for human immunodeficiency virus (HIV) decreased from

US\$10,000 per person when on patent, to US\$100 per person when made available generically [270]. This same challenge of the affordability of essential medicines for HIV is being experienced again with cancer drugs, such that the current estimated cost of treatment is over US\$100,000 per patient annually [271].

The design of the industry as influenced by the patent system also produces challenges for the availability of medicines. One challenge is that companies are less likely to invest in R&D to develop drugs for ‘neglected diseases’ that primarily affect the poor who are unable to provide sufficient return on investments [272]. For example, even though developing treatments for Human African Trypanosomiasis (sleeping sickness) may meet an important health need, the projected returns based on the population suffering from the disease and their inability to pay high prices means that this type of drug development is deprioritised [273]. Another challenge is that certain classes of drugs, such as antibiotics, are also poorly suited to market incentives, as they typically have a short-term use, require conservation for efficacy, and have low revenues relative to other classes of drugs [274]. Only two new antibiotics were approved in the US between 2008 and 2012, [275]; and only 1.6% of the pharmaceutical pipeline is comprised of new antibacterials [276]. This lack of innovation in R&D in antibiotics is occurring even as there is an emerging global health crisis of antibiotic resistance [277–279]. While these examples are related to communicable diseases, threats to the availability and affordability of medicines also introduces challenges in the prevention and treatment of the rising rates of NCDs globally.

#### 4.3.4.2.3 Summary of Findings and Need for Future Evidence

The evidence reviewed above supports the proposition in the framework that trade and investment provisions influence FDI into the production, processing, retailing, and marketing and advertising of HHCs, as well as the market for pharmaceuticals, vaccines, medical devices, and health technologies. This ultimately influences the availability, accessibility, affordability, and acceptability of these products. Although it is logical to suppose that services, IPRs, and investment would promote trade in services and FDI inflows, evidence for the explicit influence of these provisions is lacking. For instance, while multi-country statistical analyses have supported the relationship between comprehensive trade and investment agreements and increased FDI inflows [257,280,281]; evidence for the link between investment protections alone and FDI is mixed [51–56,242]. Additionally, the general consensus is that the service sector commitments

under GATS were very shallow [282], making it challenging to attribute rising FDI to these commitments. Links between enhanced IPRs and FDI into R&D are also questionable [264,268], although the enforcement provisions of trade and investment agreements arguably strengthen the current patent system and subsequently its impacts on the availability and affordability of medicines. Accordingly, FDI may be better understood as a consequence of the complete set of changes brought about by a trade and investment agreement, rather than specific to any one area of commitments as will be explored in Chapter 6.

A better understanding of the implications of FDI for the availability, accessibility, affordability, and acceptability of all HHCs, and connections between FDI and specific trade and investment liberalisation commitments is needed. Additionally, more robust evidence should be generated by reviewing commitments in the agreement relative to existing domestic commitments and exploring causal relationships with FDI inflows in varying areas of production, processing, retailing, and marketing and advertising. The implications for health of the changing HHC and medicines environment discussed in this section are reserved for later in this chapter, as the next section turns to the impacts of the facilitation of services and investment on the social determinants of health.

#### *4.3.4.3 Indirect Health Impacts*

##### *4.3.4.3.1 1st Level Environmental Transformations*

Changes in the presence of FDI in domestic service sectors has potential implications for the sectoral composition of the domestic labour market and for the provision of health and social services.

##### *4.3.4.3.1.1 Sectoral composition of domestic labour market*

As with trade in goods, the liberalisation of trade in services has the capacity to alter the composition of employment sectors within a domestic economy. The impacts of liberalised trade in services on the domestic economy and labour market would be impossible to distinguish from the effects of liberalised trade in goods (presented earlier). Consequently, the reviewed evidence will not be repeated in this section.

#### *4.3.4.3.1.2 Provision of health services and insurance*

As of 2004, 54 members of the WTO had made some liberalisation commitments under health services in the GATS, although this number rises to 78 when commitments under private health insurance are included [283]. No studies in our review examined whether these commitments represented progressive privatisation in health services, or commitments to the existing domestic policy situation, or whether there were any demonstrable connection to the provisions of such services.

#### *4.3.4.3.2 2nd Level Environmental Transformations*

Changes in the domestic labour market and the provision of health and social services have potential implications for the quantity and quality of employment to which individuals have access and as a result the level of their personal income, while potentially changing their out-of-pocket health spending.

##### *4.3.4.3.2.1 Quantity and quality of employment*

Many of the implications for employment and the domestic economy discussed under the facilitation of trade in goods pathway are equally applicable here. While the evidence is limited, the presence of foreign investment has been associated with higher wages in some situations [255,284], as well as with increasing inequality in others, as this positive impact on wages is greater for skilled labour than unskilled labour [285].

##### *4.3.4.3.2.2 Out-of-pocket spending on health services*

If new privatisation of health services were to occur as a result of trade and investment liberalisation, it may lead to increased out-of-pocket spending on health services. There were no studies in our review that linked levels of privatisations to trade and investment commitments. Accordingly, the evidence below is from studies in our review which linked privatisation in general to health spending.

The US, one of the few developed countries without a universal health care (UHC) system, spent 17.1% of total GDP on health expenditures in 2015. This can be contrasted against countries like Canada, New Zealand, and Australia which spent 10.9%, 9.7%, and 9.4%, respectively under UHC systems [286]. Cumulative public and private spending on healthcare in the US is higher than almost any developed country, yet US healthcare fails to outperform on any of the common

measures of health [287]. Privatised healthcare may also be highly inequitable; while UHC ensures basic care for all people, in the US 49 million people are uninsured, over 26,000 are estimated to die annually because of this, and medical bills remain the number one cause of personal bankruptcy [288].

China's transition to UHC in 1949 contributed to a drop in infant mortality rates from 200 per 1,000 to 34 per 1,000 live births, and an increase in life expectancy from 35 to 68 years between 1952 and 1982. In the early 1980s China dismantled this healthcare system and privatised most healthcare facilities. Under the privatised system only 29% of Chinese people have health insurance, although distribution is not equitable as this prevalence increases to 49% in urban areas and drops to 7% in rural areas and only 3% in some of the poorest rural areas. Costs have increased dramatically, between 1978 and 2002 out-of-pocket health expenditure rose from 20% to 58%, and per capita health spending increased from approximately US\$1.35 to US\$55.00 annually [289].

#### 4.3.4.3.3 Summary of Findings and Need for Future Evidence

Evidence for the proposed pathway in the framework that facilitation of trade in services and investment would have implications for the sectoral composition of the domestic labour market and the quantity and quality of employment is indistinguishable from the effects of the facilitation of trade in goods, or trade and investment agreements in general. Consequently, the evidence is not reviewed again in this section. There was a dearth of research in understanding the influence of services liberalisation from trade and investment agreements on national provision of health services and health insurance, and subsequent effects for out-of-pocket expenditures on these services. Evidence is needed regarding the impacts of locking-in existing levels of service liberalisation as well as new liberalisation on access to and affordability of health services. Available evidence appears to indicate that privatisation of health services is associated with rising costs but is not consistently associated with increases in quality. Concurrent changes in the domestic labour market associated with liberalisation will either offset the effects of rising out-of-pocket health expenditures or exasperate them depending on the direction of impacts on personal income. The next section reviews the third and final pathway, domestic policy space and governance, before concluding with a discussion of the implications of the three pathways on health transformations.

### **4.3.5 Domestic Policy Space and Governance**

#### *4.3.5.1 Trade and Investment Chapters and Provisions*

This section of the framework conceptualises the pathway between domestic policy space and governance and NCD morbidity and mortality (see Figure 8). The current pathway includes regulatory coherence provisions that establish governance mechanisms for the development of domestic policy; SPS and TBT chapters on standards; special annexes on publicly provided pharmacare plans; expansive investor rights and the inclusion of ISDS mechanisms; and government procurement provisions that regulate government contracts. Relative to the previous two pathways, there was considerably less empirical evidence for the relationships in this pathway captured in our review. At this point in time, the relationships in this pathway are largely theoretical.

##### **4.3.5.1.1 Regulatory Coherence**

Pathways through domestic policy space and governance have been expanded by the inclusion of regulatory coherence provisions in contemporary RTAs. These provisions should be examined for impacts on domestic policy-making requirements, including new rules governing the process of developing policy, requirements to provide opportunities for private input, and new documentation required for all current and proposed regulatory policies.

##### **4.3.5.1.1 SPS and TBT**

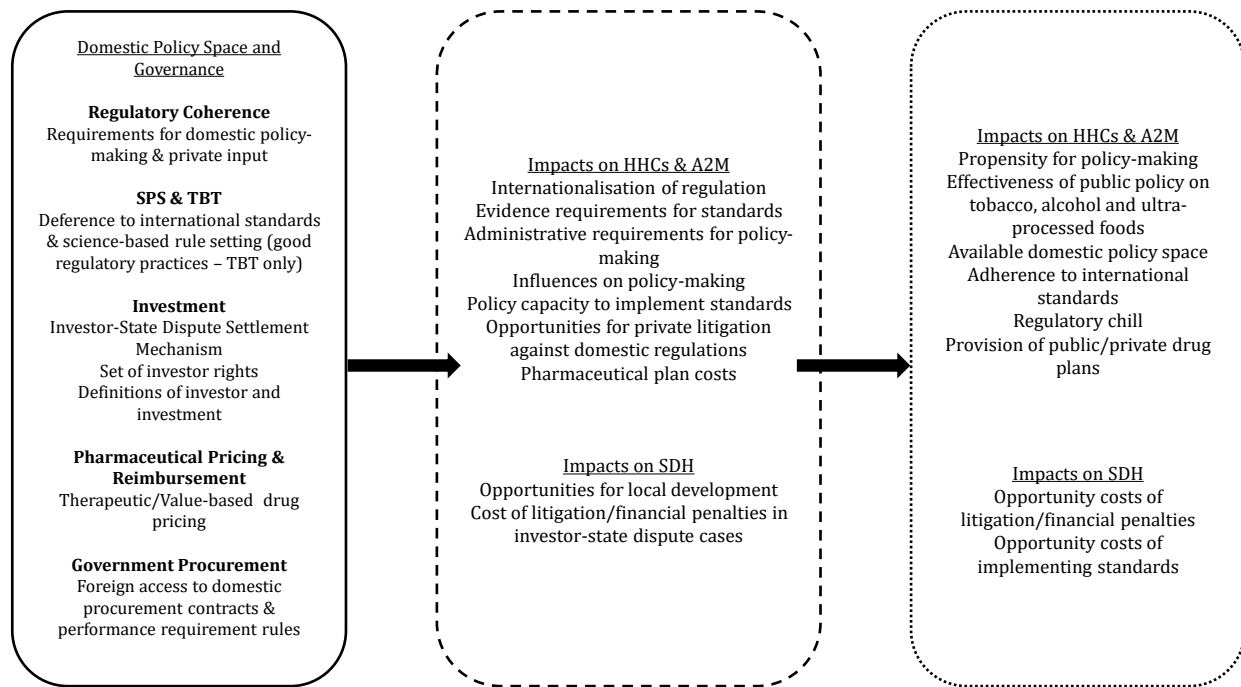
SPS and TBT were introduced in the facilitation of trade in goods pathway, as they are also important to the flow of goods across borders. However, the rules and restrictions on technical regulations, standards, and conformity procedures included in the SPS and TBT Agreements of the WTO, as well as WTO+ provisions in SPS and TBT chapters in RTAs operate through domestic policy space, and the creation of committees to oversee these Agreements and chapters form new mechanisms for governance.

##### **4.3.5.1.2 Annexes on Public Provision of Pharmacare**

Contemporary RTAs may also begin including provisions on pharmaceutical pricing and reimbursement procedures that will be important to account for in HIAs. Draft texts of the TPP had included measures restricting reference-based drug pricing, although these provisions did not

make it into the final text [290]. Reference-based pricing has been used as a cost-containment mechanism. One way drug pricing can be controlled is by establishing a maximum reimbursement value from patients and insurance plans to drug manufacturers for therapeutically similar drugs, based on the lowest cost drug in a specific therapeutic class [291]. Additionally, some have suggested value-based drug pricing, where reimbursement is determined based on how well a drug works. This system adds value based on patient benefits, treatment of rare diseases, public health burden of disease, new or novel mechanisms, costs of discovery and development, and deducts value for side effects [292]. New agreements should be carefully reviewed for any provisions that may obstruct therapeutic- or value-based reference pricing.

Figure 8 Domestic policy space and governance pathway



#### 4.3.5.1.3 Investor Rights and Investor-State Dispute Settlement Mechanisms

The inclusion of an investment chapter is critical to understanding the potential health impacts of an agreement. First and foremost it should be noted if the chapter contains an ISDS mechanism, and key details of the arbitral procedures available to administer these disputes. As well, it is important to note the definition of both an ‘investor’ and an ‘investment’, as these will, in part, determine whether the ISDS tribunals have jurisdiction to rule on the case. Additionally, it is

imperative to examine the specific set of investor rights provided for in the agreement, making particular note about the level of comprehensiveness and potential uncertainty produced by the language.

#### 4.3.5.1.4 Government Procurement

Finally, an extensive HIA may also include analysis of government procurement provisions. It is important to note the specific instances in which foreign companies are permitted access to the domestic procurement contract bidding process; as well as changing stipulations on performance requirements included within these contracts, such as limitations on requirements on domestic content, local labour, or even environmental standards.

#### 4.3.5.2 *Direct Health Impacts on Health-Harmful Commodities and Access to Medicines*

##### 4.3.5.2.1 1st Level Environmental Transformations

Regulatory coherence, SPS, TBT, investment, pharmaceutical pricing, and government procurement provisions all have the capacity to influence the domestic policy environment. The modifications to this environment may alter the internationalisation of regulation and the evidentiary requirements for setting domestic standards, the administrative requirements and sources of influence for policy-making, and the policy capacity needed to meet these requirements. Investment provisions specifically may alter opportunities for private litigation against domestic regulations, while the pharmaceutical provisions may influence the costs associated with administering publicly provided pharmaceutical plans.

##### 4.3.5.2.1.1 *Internationalisation of regulation and evidentiary requirements for standards*

In contemporary trade and investment agreements considerable attention is paid to progressing convergence and equivalence of regulation among varying countries [293]. This process of harmonisation, which existed in earlier generation WTO agreements like the SPS and TBT, is likely to produce inconsistent effects. For example, engaging in export production of ultra-processed food products that must adhere to the international norms set out by the SPS may result in improved food quality standards in countries where current standards are inadequate [294]. Alternatively, improving quality may have unintentional consequences for HHCs, such as occurred in Thailand when, after tobacco liberalisation, tobacco consumption increased because foreign-produced tobacco was seen as being of superior quality to nationally-produced tobacco [295].

Although upward harmonisation of standards is a distinct possibility, it is not guaranteed. For example, while requiring adherence to minimum international standards, the SPS and TBT Agreements also require that standards are not more trade restrictive than necessary and that any policies that create stricter requirements than the referenced international standards must justify their necessity with scientific evidence. As a result, these same standards expose countries with more restrictive standards than international norms to potential trade disputes. That WTO dispute settlement panels have previously struck down such ‘excessive’ policy measures suggests that these agreements are also capable of triggering downward harmonisation [296]. It has been suggested that the burden of scientific evidence may be higher in contemporary RTAs relative to the WTO Agreements [62], which is particularly troubling, as there may be a high level of evidentiary uncertainty when it comes to measures like labelling and packaging in preventing obesogenic diets [297], or equally in tobacco and alcohol control.

From the perspective of an HIA focusing on the development of NCDs, it is important to note that the SPS Agreement and SPS chapters address food quality purely from a safety perspective. There are currently no international standards on the nutritional quality of exported food products to mitigate import and export flows of energy-dense, low nutritional quality foods. For example, in Central America, an increase in poultry meats from the US is largely attributable to frozen cuts including frozen chicken-leg quarters, a by-product of the US’s market for the healthier chicken breast cuts [187]. In Tonga, trade liberalisation was followed by a three-fold increase in mutton flaps (high-fat scrap meat difficult to sell in other markets) from New Zealand, while the PICs in general are one of the largest recipients of low-grade meat cuts [224]. Whereas these Latin American countries and PICs can use the SPS to impose restrictions when foods contain certain additives or contaminants, there are no mechanisms for imposing restrictions based on nutritional hazards such as excessively high fat or sugar content.

#### *4.3.5.2.1.2 Administrative requirements and influences on policy and capacity to implement standards*

Countries may maintain variation in standards for a number of reasons, including different social objectives and the availability of resources to implement and monitor such standards. When the cost of compliance with international standards is high there tends to be greater negative impacts on developing countries and smaller producers [298]. Developing countries have numerous

barriers to complying with international standards, including a lack of infrastructure and financial means, a lack of technical and scientific capacity, limitations on access to best practice technologies, and a wider gap between current national standards and international standards [294,299,300].

While the SPS and TBT Agreements were designed to address non-tariff barriers by harmonising standards, regulatory coherence provisions qualitatively ‘raise the bar’ on the type of demands placed on domestic policy-makers [293]. As regulatory coherence chapters are new, and are not yet included in any agreement in force at the time of writing, the implications of such a chapter are largely hypothetical at this point. It is reasonable to assume that increased demands during policy development and reporting have the potential to alter the administrative requirements for policy-making; and that the farther a country’s current processes are from the new standards of the agreement, the larger burden it will introduce. Moreover, regulatory coherence provisions may create new opportunities for non-governmental sector participation in policy development, including private industry. While increased transparency and reporting requirements present opportunities for improved governance, increased corporate participation in shaping the rules that regulate its industry presents a threat to the development of effective policies for HHCs [88].

#### *4.3.5.2.1.3 Opportunities for private litigation against domestic regulations*

The inclusion of an ISDS mechanism in an investment chapter creates an opportunity for foreign investors to initiate litigation against governments for domestic regulations that are perceived to violate an expansive set of investor rights provided by the agreement. The likelihood of pursuing an ISDS claim may be mediated by the definition of investor or investment, and the level of comprehensiveness and ambiguity in the investor rights language. More specifically, less onerous definitions of an investor or an investment, and investor rights written with more comprehensive and ambiguous language are arguably more likely to result in an ISDS claim. While the use of ISDS first emerged in 1987, for the first ten years there were no more than ten cases annually. This began to rise in the early 2000s, with new claims peaking in 2013 at 66 and again in 2015 at 70 [41]. Historically, developed countries were the respondent in an average of 28% of cases; but this too is on the rise, such that in 2015, 43% of all new claims were against a developed country [41]. Disaggregating cases into each of the two decisions made, jurisdiction (authority of the ISDS tribunal to make a legal decision) and merits (the substance of the case), investors have won 72%

of jurisdictional determinations, and 60% of cases decided on merits [301]. A review of 196 ISDS claims found that approximately 20% involved a disputed health or environmental protection, including measures regarding food safety, pharmaceuticals and tobacco control [302].

#### *4.3.5.2.1.4 Pharmaceutical plan costs*

Any provisions that seek to intervene in therapeutic- or value-based drug pricing have the capacity to influence drug plan costs, altering the affordability of NCD treatments. Implementing therapeutic reference-based drug pricing has been estimated to save the province of British Columbia up to CA\$44 million annually [303]. Review of reference-based pricing in Australia, Denmark, Germany, Netherlands, New Zealand, Norway, and Sweden suggests short-term savings, although long-term savings are controversial due to continually climbing pharmaceutical expenditures. Therapeutic reference-based pricing may have limited efficacy for price containment as it only affects two drivers of cost: price inflation and substitution of more expensive drugs for therapeutically-equivalent less expensive treatments [304]. Value-based drug pricing would have varying effects on drug plan costs, as it would create lower prices for some drugs, but may not decrease overall spending if new and valuable drugs are developed that warrant high prices within such a system [305].

#### *4.3.5.2.2 2nd Level Environmental Transformations*

Through the environmental transformations highlighted above, trade and investment provisions have the capacity to impact the domestic policy environment. The impacts may include the propensity for new HHC policy to be developed, the expected efficacy of new HHC policies, and available health regulatory policy space. Changing policy capacity required to implement these agreements may influence a state's ability to adhere to the standards, while ISDS may influence the policy process resulting in regulatory chill outcomes. Finally, changing costs associated with public pharmaceutical plans may alter the viability of their introduction or maintenance, which will influence affordability of NCD treatment.

##### *4.3.5.2.2.1 Propensity to develop and adhere to new policy*

Changes to the administrative requirements for policy making and the capacity required to implement treaty standards may alter a state's propensity to develop or adhere to new policy, such as those regulating HHCs. For example, if states experience a significant increase in administrative

requirements during policy development and reporting, it is possible that they may forgo policy decisions where the administrative cost is perceived to outweigh the policy gain. Increased administrative policy requirements can be seen in the Regulatory Coherence chapter of the recent TPP agreement, including: public provision of documentation on all domestic regulatory measures relevant to the TPP agreement within a year of the agreement coming into force (art. 25.3); interagency consultation and coordination mechanisms for regulatory measures (art. 25.4, ¶1); regulatory impact assessments for proposed regulations (art. 25.5, ¶1); and periodic review of domestic regulatory measures (art. 25.5, ¶6).

#### 4.3.5.2.2.2 *Effectiveness of new health-harmful commodities policy*

The internationalisation of regulation may alter the effectiveness of public policy for HHCs. For example, in order to accede to the WTO, Samoa was required to lift its import ban on the high-fat meat products referred to as turkey tails. Any measures to control consumption of these products after its WTO accession need to be trade compliant and require Samoa to produce evidence regarding the necessity of such policies [173]. Similarly, policies that provide differential tax rates based on alcohol content are vulnerable to challenge under national treatment provisions for discrimination, that is, if the policy in practice favours low-alcohol domestic brands relative to high-alcohol imported brands [212]. Norway attempted to restrict the sale of ‘alcopops’ to the state’s alcohol monopoly retailer, rather than allowing sales in grocery stores to prevent youth consumption. However, since beer with an alcohol percentage up to 4.75% was allowed to be sold in grocery stores, this was deemed a violation of the European Economic Agreement that all beverages with between 2.5 and 4.75% alcohol must be treated equally. As of 2003, alcopops have been made available in all grocery stores in Norway [306].

In addition, changes to the evidentiary requirements to demonstrate the necessity of HHC policy may alter the level of efficacy of available policy options. Again, changes to these requirements can be seen in the TPP’s SPS Chapter, which transformed the language of the WTO’s SPS Agreement that states could exceed international standards “...*if there is a scientific justification*” (art. 3.3) to if “...*they are based on documented and objective scientific evidence*” (art. 7.9), a seemingly marked difference in the evidentiary burden. Policies targeting the composition of HHCs, a ban on trans fats for example, may require additional evidence for demonstrating necessity under an SPS chapter in an RTA relative to the SPS Agreement of the WTO. If a state cannot

demonstrate necessity to the satisfaction of the ruling tribunal the policy may be reversed. Also, concerns have been expressed that industry participation in the development of the very rules that regulate their industries may result in weaker policies [88].

#### *4.3.5.2.2.3 Health regulatory policy space and regulatory chill*

Changes to the language of provisions within chapters relevant to domestic policy space and governance may also introduce new limitations on available policy space. For example, the TPP is the first trade agreement to include a provision on biologics in its IPR chapter (art.18.52, ¶1). Consequently, domestic policy space for patent terms specific to biologic drugs may be altered depending on a country's existing domestic policies for biologic patents. In contrast to actual changes in available policy space, regulatory chill occurs when new domestic policies are abandoned, delayed, or compromised out of a perceived threat of claims by investors or states in treaty based dispute settlement. That is, the policy space may exist but regulators are unsure of potential conflicts with international trade and investment commitments. A clear example of regulatory chill was the official statement from the government of New Zealand that they would not pursue tobacco plain packaging legislation until a decision was made in the investor-state litigation against Australia for the same policy [307]. While evidence is accruing for this phenomenon [308–310], disagreement over how real or prevalent it is still exists [311].

#### *4.3.5.2.3 Summary of Findings and Need for Future Evidence*

The direct health impacts of international trade and investment agreements on HHCs and access to medicines through the domestic policy space and governance pathways have little to no empirical evidence in the literature. The causal connections proposed above, although largely speculative, are also theoretically driven and rational. Trade and investment provisions that influence the policy-making process, set international standards, and restrict policy-space, whether just perceived or in actual fact, may alter a state's propensity for policy-making and the efficacy of those policies. The subsequent work in this dissertation will elaborate on some of the proposed relationships in the domestic policy space and governance pathway. For example, Chapter 5 explores the themes of administrative requirements during policy development and reporting, evidentiary burden in policy-setting, and TNC involvement in policy development through the lens of the food industry and the TPP; and Chapter 7 explores the pathway of ISDS and investor rights on the policy decision-making environment and regulatory chill outcomes.

### 4.3.5.3 *Indirect Health Impacts*

#### 4.3.5.3.1 1st Level Environmental Transformations

Changes to rules regarding government procurement and the inclusion of ISDS mechanisms may have impacts on the social determinants of health through alterations to opportunities for local development, and costs associated with ISDS litigation and any financial awards.

##### 4.3.5.3.1.1 *Opportunities for local development*

Government procurement has been an important tool for economic development by creating demand for locally produced goods and services often under conditions that promote equity, social justice, and environmental sustainability [312]. For example, construction of a new government-funded hospital may be built with the intention of improving access to health services, however, the actual construction project could also produce indirect health impacts through the income generated for domestic companies and employment opportunities for local labourers. The inclusion of government procurement provisions within an agreement (or as a separate agreement such as the WTO's plurilateral Agreement on Government Procurement [AGP]) opens government contracts over a set value to foreign competition. Although this may create a more competitive bidding process that may reduce construction expenditures, when foreign companies do successfully outbid domestic companies taxpayer dollars for domestic projects are diverted to foreign company profits [293]. Moreover, investor rights restricting performance requirements such as requiring that a percentage of materials are sourced domestically could increase use of imported building materials rather than locally sourced products. This is compounded by the inclusion of labour mobility provisions (contained in labour chapters not included in this framework) which ease the entry of temporary labour, opening up the possibility that the generated employment opportunities will be filled by foreign workers. For example, under the Comprehensive Economic Trade Agreement (CETA) between Canada and the EU, "EU companies that win Canadian contracts may be able to ship in workers indiscriminately to complete the contract even if qualified Canadian workers are available. Construction workers' designation as 'contractual service suppliers' under CETA gives them broad mobility rights on a temporary basis" (p.29) [313].

#### 4.3.5.3.1.2 *Costs of investor-state dispute settlement procedures*

While government procurement funds are potentially being diverted out of the local economy, government budgets may also be redirected to cover the costs associated with ISDS. The rise in ISDS claims creates increased costs through potential financial awards to investors and the costs associated with litigation. The average claim in an ISDS case is approximately US\$492 million [314], although multibillion dollar claims are on the rise, with 43 such cases by the end of 2012 [315]. On average when claimants are successful they will receive approximately 41% of the amount claimed [314]. Between 1990 and 2013 a total of US\$6.8 trillion (before interest) was awarded to investors over 83 claims. The highest among them was a US\$1.77 billion award for Occidental in a dispute with Ecuador [316]. This data did not include the award in 2014 to Yukos Oil Company for US\$50 billion in compensation from Russia for dissolving the company. Even when investors fail to win their claim, states must still contend with the costs of litigation, which has been estimated at US\$8 million each for the state and the investor [317]. Individual cases, such as *Yukos Oil v Russia* and *Fraport v the Philippines*, cost the state US\$42.5 million and US\$50 million, respectively, to defend. The recently concluded *Philip Morris v Australia* is reported to have cost Australia US\$50 million just to get through a first-stage ruling on jurisdiction [318]. The costs associated with ISDS cases are likely another contributing factor to regulatory chill.

#### 4.3.5.3.2 2nd Level Environmental Transformations

##### 4.3.5.3.2.1 *Opportunity costs*

It is reasonable to assume that government funds to cover the costs associated with ISDS litigation and funding for the administrative resources to implement domestic policy requirements, such as supporting public and private engagement and transparency in policy-making, are reallocated from other areas of state budgets. Such a diversion of funds is relevant to HIAs if spending is diverted from the provision of health and social services or any other redistributive or welfare spending that would affect the social determinants of health.

##### 4.3.5.3.3 Summary of Findings and Need for Future Evidence

Although it is reasonable to presume that diverting government procurement contracts from local developers to foreign developers will influence opportunities for local development, empirical evidence is still required to demonstrate the magnitude of these impacts and make direct

connections to government procurement agreements, such as those in RTAs or the recent AGP. Evidence for the opportunity costs of fees associated with ISDS is also needed. The final section turns to the cumulative impacts of the three main pathways, facilitation of trade in goods, facilitation of services and investment, and domestic policy space and governance on health transformations underlying NCD morbidity and mortality.

### **4.3.6 Health Transformations**

#### *4.3.6.1 1<sup>st</sup> Level Health Transformations*

It has been well-established in the public health literature that changes in the availability, accessibility, affordability, and acceptability of tobacco, alcohol, and ultra-processed food products resulting from the highlighted trade and investment provisions alters the consumer environment in ways that lead to changes in sales and consumption of these HHCs [319–326].

##### 4.3.6.1.1 Ultra-Processed Food Products

A number of studies have linked changes in consumption to changes in trade and investment liberalisation. To continue with the account of the PICs throughout this chapter, the changes in imports of HHCs after trade liberalisation ultimately increased consumption of the increasingly available and affordable low-grade meats, such as mutton flaps which have a mean fat content of 27.4%, considerably higher than the traditional sources of protein on these islands [224]. The packaged products that exist on the islands that contain high levels of fat, sugar and salt, are almost entirely imported products [173]. Likewise, following on from the discussion of changes in the food environment in Mexico in the years after NAFTA, between 1999 and 2006 the consumption of energy beverages more than doubled for adolescents, and tripled for adult women. In 2006, an estimated 20.1% of the total energy intake per capita among adolescents came from high-sugar energy beverages and soft drinks. Similarly, spending on snack foods in Mexico increased from US\$1.2 billion in 1999 to US\$1.8 billion in 2001 [186]. Increased FDI has been associated with increased consumption of ultra-processed food products in a study of 127 countries [327]; and growth in grocery retail sales in Sub-Saharan African countries [79]. Greater market deregulation was also found to be a significant predictor of higher fast food consumption in 25 high-income countries [328]. Finally, trade and investment liberalisation in Vietnam led to a rapid rise in FDI

inflows and subsequently increased sales in sugar-sweetened carbonated beverages (SSCBs) [329], the detailed results of which are presented in Chapter 6.

#### 4.3.6.1.2 Tobacco and Alcohol Products

Availability and affordability of alcohol in New Zealand increased after it liberalised its alcohol policies, with increased rates of consumption and binge drinking and increased consumption by vulnerable populations such as Pacific Island New Zealanders [225]. Liberalisation policies that lead to reduced prices are also associated with youth drinking, as that population is more price-sensitive [330]. Liberalisation of tobacco markets in South Korea impacted smoking prevalence among males aged 16 to 18, such that the smoking prevalence went from 23% in 1988, to 32% in 1991, and 35.3% in 1997 [4]. Moreover, as noted in the introduction within the first ten years of liberalisation female smoking rates rose from 1.6% to 13% [3,4]. The World Bank concluded that the impact of trade liberalisation and the entry of transnational tobacco companies on tobacco consumption in low-income countries has been large and significant, with lesser but still important effects in middle-income countries. The effects on high-income countries have been negligible [331].

#### 4.3.6.1.3 Access and Adherence to Medical Treatment

Trade and investment protections for IPRs that delay the entry of generic drugs, vaccines, medical devices and other health technologies into the market, alongside changes to health insurance that increase costs to the patient, can result in decreased access and adherence to medical treatment [332]. A review of 66 published papers found that 85% of studies that investigated the relationship between costs and adherence found a significant negative effect [333].

#### 4.3.6.1.4 Social Determinants of Health

A large body of evidence has been collected for the role of globalisation, including trade and investment policy, in altering the social determinants of health [236]. As well as for the role of employment and working conditions [334], health services [335], and a range of other social determinants of health, including social services, income and social status [336], on health outcomes.

#### 4.3.6.2 *2<sup>nd</sup> Level Health Transformations*

##### 4.3.6.2.1 Noncommunicable Disease Morbidity and Mortality

Increased consumption of HHCs is a behavioural risk factor for metabolic changes underlying the development of NCDs [13]. The ability of individuals diagnosed with these conditions to mitigate NCD morbidity and mortality is threatened when they lack access and adherence to medical treatment. Estimated rates of non-adherence in patients with hypertension, type 2 diabetes, and high cholesterol are 28%, 35%, and 45%, respectively [337]. Of 33 studies that investigated the relationship between medication adherence and outcomes, increased adherence resulted in improved clinical outcomes in 80% of patients with diabetes, 73% of patients with hypertension, and 83% of patients with coronary artery disease [333]. Although trade and investment provisions are in no way the sole contributor to NCD morbidity and mortality, the subsequent environmental transformations that modify consumer environments, as outlined throughout this chapter, are drivers of behavioural risk factors for NCDs, and influence both access and adherence to medical treatment that may mitigate NCD morbidity and mortality.

## 4.4 Discussion

Assessing the health impacts of international trade and investment agreements is a complex process. Changes along the pathways are interconnected, context-dependent, and occur over extended periods of time, all of which makes establishing and measuring causality highly problematic. The conceptual framework was developed with the intention to inform researchers of the relevant provisions within such agreements, and provide a high-level overview of the various ways in which they influence health. It can also be used in future HIAs during the screening stage to identify causal pathways for detailed inquiry in localised contexts.

The realist review used to assist in the development and validation of the conceptual framework, highlighted where evidence currently does and does not exist for the proposed pathways. What was clear from the reviewed evidence is that more research is needed in all areas of the framework, particularly connecting trade and investment provisions to more distal outcomes such as the consumer environment and health outcomes. Likewise, relatively more evidence is needed in the pathways addressing contemporary trade and investment provisions, that is, services and

investment and domestic policy space and governance, relative to the more traditional provisions of tariff reductions in the trade in goods pathway.

Additionally, going forward evidence should be of a more robust nature, that is, when conducting prospective analyses of a new trade and investment agreement it is important to account for the current trade and investment landscape within a state. Each new agreement should be explored for the changes it makes to the terms of the agreements that are already in force, focusing on the new commitments it introduces, as well as the degree to which the trade agreement requires actual changes in the domestic regime as opposed to restricting future changes to reverse liberalisation. Where possible, interactions with the local context, including institutions, geography, development status, inequality, gender and culture should all be considered for a more accurate account of the effects.

The conceptual framework in this chapter illustrates one of main components of the theoretical framework developed in Chapter 2, specifically, the institutionalisation of neoliberal trade and investment policies. Equally important to the institutions are the interests or actors behind trade and investment policy development. More specifically, institutions are mutually constituted with actors, that is, institutions are both defined by and defining of actors, and actors are both defined by and defining of institutions. Furthermore, those institutions and actors reflect and reinforce a hegemonic ideology. This interplay between institutions, interests, and ideology could not be adequately captured in this chapter. In its attempt to address a complex topic in a feasible manner and produce a usable output, development of the conceptual framework placed a dominant focus on structural processes. Omitting the role of actors necessarily meant a limitation in addressing many of the complexities within which these structural relationships play out when combined with various actor interests and power relations, including the ways in which corporate global production chains are developed and sustained or inequalities in decision-making power within consumer environments. Future development of this framework should consider the utility of embedding corporate and consumer agency within the structural determinants for a more complete understanding of the dynamics between actors and institutions that together co-create the health outcomes from trade and investment agreements. The theoretical framework is useful in identifying the limitations of the conceptual framework to fully capture the political realities of public policy development.

Developing a better understanding of the complex economic implications of trade and investment agreements for the social determinants of health, including employment and working conditions, individual income and social status, and access to health and social services, should be a priority area for future research. Effort is needed from researchers engaged in trade and investment and health research to discuss realist evaluation methods for developing quality evidence and directing attention to areas where evidence is currently absent or inadequate. It is the hope that the development of this conceptual framework will encourage capacity and inclination among a greater number of researchers to undertake HIAs of trade and investment agreements to generate an extensive and robust evidence-base to guide future policy actions in this area.

The pathways developed in the conceptual framework in this chapter establish the rationale for how international trade and investment agreements affect NCD morbidity and mortality behind the investigations throughout the remainder of this dissertation. The framework, notwithstanding the limitations noted above, demonstrates that TNCs stand to gain from provisions that promote and protect their access to global HHC markets explored in Chapter 5. It establishes how tariff reductions may encourage larger volumes of cheaper imported HHCs, and how FDI into production, processing, retailing, marketing and advertising may alter the consumer environment in a manner that increases the availability, accessibility, affordability, and acceptability of HHCs explored in Chapter 6. Finally, it shows how provisions that extend ‘behind-the-border’ into policy-making processes, including a set of expansive investor rights and ISDS mechanisms, may create regulatory chill outcomes along with opportunity costs for health explored in Chapter 7. Up to this point Chapter 1 has provided an introduction to international trade and investment agreements and health, as well as the thesis, aims, and objectives of this dissertation, while Chapters 2 through 4 have developed the theoretical, methodological, and conceptual approaches for investigating the relationships between trade and investment and health. The next chapter begins the first of three analytical components exploring the role of food industry in the negotiation of trade and investment agreements and the capacity of such actors to use privileged access to negotiations to influence provisions that promote and protect their profitability.

## CHAPTER 5

TRANSNATIONAL CORPORATIONS AND THE NEGOTIATION OF TRADE AND INVESTMENT AGREEMENTS: AN EXPLORATION OF CANADIAN FOOD INDUSTRY IN THE TRANS-PACIFIC PARTNERSHIP NEGOTIATIONS

“HOW PEOPLE THEMSELVES PERCEIVE WHAT THEY ARE DOING IS NOT A QUESTION THAT INTERESTS ME. I MEAN, THERE ARE VERY FEW PEOPLE WHO ARE GOING TO LOOK INTO THE MIRROR AND SAY, 'THAT PERSON I SEE IS A SAVAGE MONSTER'; INSTEAD, THEY MAKE UP SOME CONSTRUCTION THAT JUSTIFIES WHAT THEY DO. IF YOU ASK THE CEO OF SOME MAJOR CORPORATION WHAT HE DOES HE WILL SAY, IN ALL HONESTY, THAT HE IS SLAVING 20 HOURS A DAY TO PROVIDE HIS CUSTOMERS WITH THE BEST GOODS OR SERVICES HE CAN AND CREATING THE BEST POSSIBLE WORKING CONDITIONS FOR HIS EMPLOYEES. BUT THEN YOU TAKE A LOOK AT WHAT THE CORPORATION DOES, THE EFFECT OF ITS LEGAL STRUCTURE, THE VAST INEQUALITIES IN PAY AND CONDITIONS, AND YOU SEE THE REALITY IS SOMETHING FAR DIFFERENT.”

— Noam Chomsky

## 5.1 Introduction

The previous chapter presented a conceptual framework for exploring the pathways between international trade and investment agreement provisions and noncommunicable diseases (NCDs). It demonstrated that even though evidence is still required in a number of areas, there are several evidence-informed and theoretically sound associations between these agreements and health. This chapter is the first of three investigative components and is primarily concerned with the influence of transnational corporations (TNCs) on trade and investment provisions during treaty negotiations. A key question, based on the theoretical arguments developed in Chapter 2, is the extent to which these provisions embody or reflect the stated interests of TNCs and other elite economic actors for whom such agreements form a new constitutionalism, entrenching more expansive rights and privileges for them globally. This chapter narrows the investigation of the relationships between international trade and investment agreements and health to food and nutrition-related health risks within the focal agreement of this dissertation, the Trans-Pacific Partnership (TPP).

During the negotiation of the TPP agreement (2008-2015), one could scarcely find a critical commentary of the deal that failed to mention the approximately 600 corporate lobbyists appointed as official advisers by the United States (US) [338–340]. Unease regarding corporate influence was situated within larger concerns regarding the lack of transparency and public consultation in a deal with such broad implications [341]. In Canada, former Prime Minister Steven Harper signed the deal just two weeks prior to a federal election having failed to share the details of the deal with any of the elected representatives of the opposition parties. A representative of the Liberal party publicised an invitation from the former Harper government received days before the election to a secret meeting for a briefing on the proposal, for which they were given less than 24 hours' notice, in which 90 minutes was allotted to review the 1,500+ pages of text, and all of which would be retained under embargo [342]. The Liberal party declined the invitation. The imbalance between the public and its elected representatives, and corporations and their representatives, gives cause to consider whose interests are prioritised in such agreements.

Although no representatives for 'Big Tobacco' were included on the list of US corporate advisers to the TPP negotiations [86], perhaps reflective of the current optics of politically engaging with

the tobacco industry (with the exception of tobacco farmers), numerous representatives of food industry were included. The food industry is diverse and accordingly advisers were there representing all areas of food production and processing, such as farmers, cattlemen, and dairy producers. But the food industry also included representatives from DuPont, Cargill, Archer Daniels Midland, Dow Agro-Sciences, the Grocery Manufacturers Association, Kraft Food, Ocean Spray, Starbucks Coffee Company, The Hershey Company, and Yum! Restaurants International, whose brands include Kentucky Fried Chicken, Pizza Hut, and Taco Bell. The variety of players in the food industry makes it challenging to isolate who or what is ‘Big Food,’ and while it may be accepted that ‘Big Tobacco’ is no longer an acceptable stakeholder within trade and investment negotiations or public policy forums, opinions are divided on the place of ‘Big Food’ at the table.

### **5.1.1 ‘Big Food’**

The concept of ‘Big Food’ has been used in reference to large TNCs that globally produce and distribute ultra-processed food and beverage products [343]. These products tend to be energy dense; high in fat, sugars, and sodium; and are often consumed in high quantities due to their palatability, aggressive marketing and ‘super-sized’ portions, leading to negative dietary health outcomes like obesity [344]. The ‘Big 10’ of the food and beverage industry (Associated British Foods, Coca-Cola, Danone, General Mills, Kellogg, Mars, Mondelez International, Nestlé, PepsiCo, and Unilever) together generate revenues of more than US\$1.1 billion a day [82]. The industry accounts for approximately 10% of the global economy and is valued at US\$7 trillion, greater than even the energy sector [82]. Six of the ‘Big 10’ are headquartered within the US and are generally perceived as US corporations even though they operate transnationally. No other country is the exclusive home to more than one of these corporations<sup>17</sup>. As noted in Chapter 1, TNCs are understood in this dissertation as being largely ‘stateless’; however, the association of TNCs with the US is relevant to explorations of international trade and investment agreement negotiations, as the US is often the ‘voice’ of corporate interests given the amount of political capital wielded through their financial contributions to political campaigns and abundant lobbying, discussed in the following section.

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<sup>17</sup> Associated British Foods is headquartered in the United Kingdom, Danone in France, Nestlé in Switzerland, and Unilever is co-headquartered in both the Netherlands and the United Kingdom.

As described in previous chapters, one of the core focuses of contemporary regional trade and investment agreements (RTAs) is a shift to the internationalisation of regulation through regulatory coherence and cooperation agreements. This is often proposed together with greater transparency for and participation from pertinent industries in domestic policy-making processes. Consequently, it is important to critically consider public health's engagement with 'Big Food'. Stuckler and Nestle [195] outlined three views on this engagement: (1) voluntary self-regulation; (2) partnering with industry; and (3) public regulation.

Unsurprisingly, 'Big Food' has been an advocate of the first view, actively pursuing self-regulation [345]. There are examples where voluntary self-regulation has worked. Consumer foodservice chain A&W's 'Better Beef' campaign increased the demand for antibiotic- and steroid-free beef, a win for public health and a win for A&W's sales [346]. Although sourcing antibiotic- and steroid-free beef is positive, it is also insufficient to address the negative dietary-health outcomes associated with overconsumption of such products. Moreover, win-win scenarios like these are few and far between. For example, attempts to improve the health of food products may have repercussions when they challenge consumer taste preferences, such as when Campbell's lost market share after reducing the salt content in its soups [347]. Voluntary product reformulations may divert sales to unmodified competitor products, making this an ineffective strategy for both participating companies and public health.

Others have argued that although 'Big Food' cannot be left to self-police, it will play a role in public health efforts, and attention should be directed to defining the rules of engagement [348]. Individuals of this view suggest that food is not tobacco and that we need food to live, thus public health can work with 'Big Food' to construct healthier products [195]. Public health should be cognisant of potential conflicts of interest and entrenched power relations when developing partnerships with 'Big Food', particularly within the policy-making arena where industry may have latitude to influence the guidelines that regulate their industry.

Advocates of the third view, Stuckler and Nestle [195] suggest that the legal mandate of corporations to maximise shareholder profit precludes effective self-regulation or public health partnerships. They suggest that the most effective form of minimising health risks associated with food and beverages will come from public health-informed state regulation. An increased prevalence of partnerships with 'Big Food', particularly during trade and investment agreement

negotiation, may undermine the implementation of the most effective regulatory measures and encroach upon the viability of this third view.

### 5.1.2 Political Influence of Big Food

A number of authors have written about industry's 'playbook,' a set of strategies designed to influence public opinion, legislation, regulation, litigation, and scientific evidence [80,344,348]. One of the most important strategies for industry has been to develop political influence, contributing to the blurred boundaries between political elites and economic elites referenced in Chapter 2. Table 4 offers a sample of industry tactics within this theme, among which, turning financial capital into political capital has been paramount.

*Table 4 Sample industry tactics to develop political influence*

Contribute funds to election campaigns of politicians in positions to influence legislation favourable to the corporation and to obtain favourable rulings from the judiciary

Participate as delegates in the policy-making or standard setting process to ensure the lowest or most lenient possible standards for corporate products and operations

Use lobbying to gain competitive advantage, or avoid or minimise regulation and taxation

Work to reduce government budgets for scientific, policy, and regulatory activities deemed contrary to the corporation's profit

From: Wiist, W. H. (2011). *The corporate play book, health, and democracy: the snack food and beverage industry's tactics in context. In Sick societies: Responding to the global challenge of chronic disease* (pp. 204–216). New York, NY: Oxford University Press.

During the period of TPP negotiations food and beverage companies spent US\$265,043,335<sup>18</sup> lobbying the US government (see Chart 1). The Coco-Cola Company and PepsiCo consistently spent the greatest sums of money on lobbying, with key contributions from Mars, McDonald's, YUM! Brands, and the National Restaurant Association (see Chart 2). Money spent on lobbying was highest in 2009, the same year that President Barack Obama took office for the first time, which meant a switch from a Republican government to a Democratic government. In the same period, the food and beverages industry made US\$78,844,171 in political campaign contributions, 63% of which went to Republican Party members (see Chart 3).

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<sup>18</sup> Data provided by OpenSecrets.org, originally sourced from the United States Senate Office of Public Records

Chart 1 Annual spending on lobbying in the United States by all food and beverage companies (US\$)

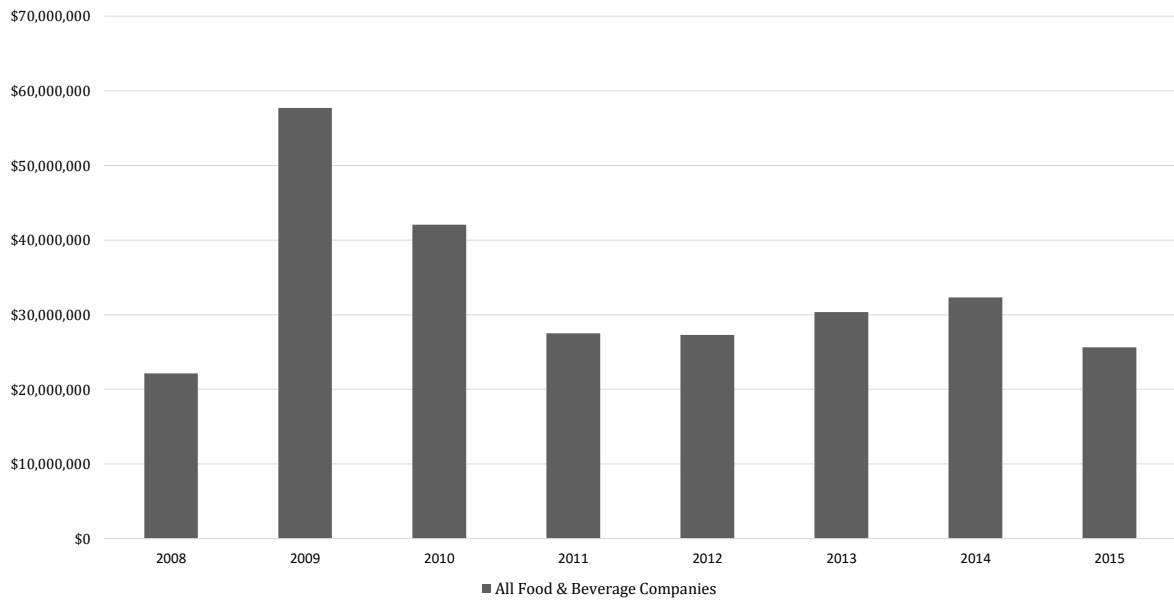
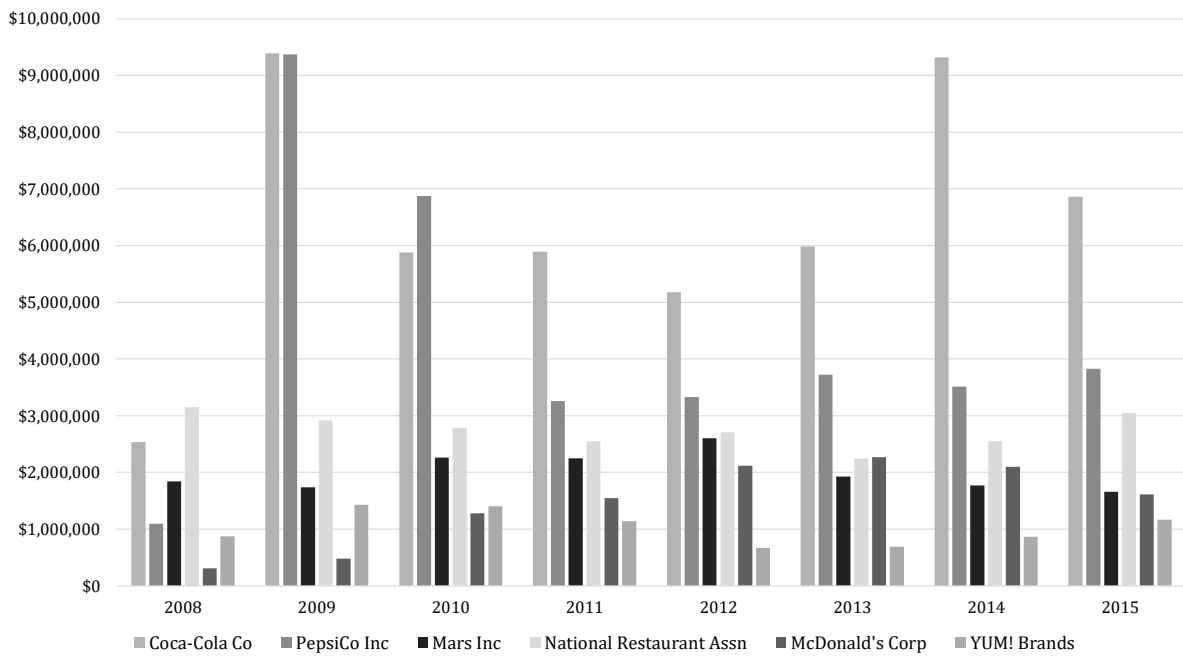


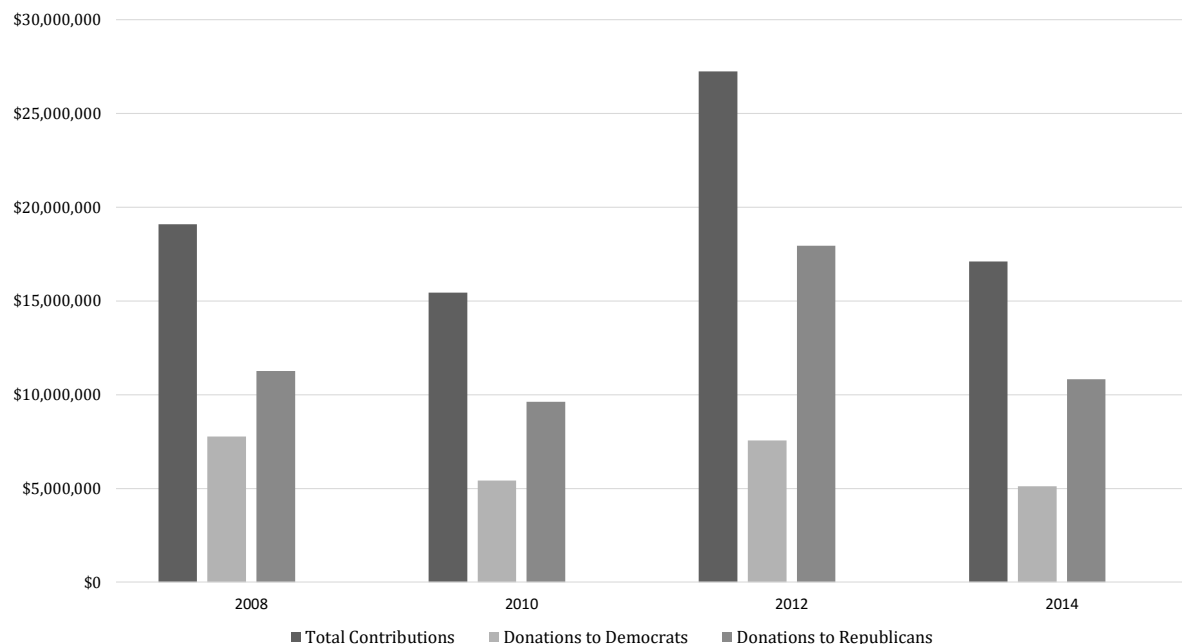
Chart 2 Annual spending on lobbying in the United States by top food and beverage companies (US\$)



The highest contribution level, and greatest disparity in contributions between the Republican and Democratic Parties occurred during the 2012 presidential race. This increased level of support to the Republican Party may have been a reflection of ‘Big Food’s’ dissatisfaction with First Lady

Michelle Obama's campaign against childhood obesity and President Obama's creation of a taskforce on childhood obesity [349].

*Chart 3 Campaign contributions in the United States by all food and beverage companies (US\$)*



Political contributions from 'Big Food' may improve its access to the negotiation of international trade and investment agreements. Representatives from DuPont, Cargill, Archer Daniels Midland, the Grocery Manufacturers Association, Dow Agro-Sciences, Kraft Food, Ocean Spray, Starbucks Coffee Company, The Hershey Company, and Yum! Brands all had access to TPP negotiators and negotiating texts throughout the process [350]. The potential influence of 'Big Food' on the terms of the agreement raises important concerns about the implications for dietary health and subsequent rates of NCDs. An agreement like the TPP sets the framework for the market rules, standards, and regulatory procedures that govern the food and beverage industry. The result is referred to colloquially as having 'the foxes guard the hen house', that is, 'Big Food' is involved in safeguarding a regulatory system it may have no interest in actually safeguarding.

One of the central theses of this dissertation is that TNCs, inclusive of the food and beverage industry, are highly influential actors within the trade and investment policy space, particularly within the negotiation of new agreements. As described in Chapter 2, access to negotiations provides TNCs a channel for hegemonic preservation through international trade and investment

agreements, an instrument of the new constitutionalism, which entrenches neoliberal policy preferences, including: liberalisation of trade and foreign direct investment (FDI); privatisation of public services; abolishment of regulations that impede or restrict goods, services, and capital through the internationalisation of regulation; and expansion of intellectual property rights (IPRs). All of which are enforced through the judicial empowerment of international arbitrators.

During TPP negotiations when draft texts were not publicly available, we investigated the interests of the food and beverage industry in the prospective TPP agreement. In an international comparative study we explored submissions by the food industry to the trade negotiating bodies of four TPP countries: Australia, New Zealand, Canada, and the US to learn how the food industry had framed their interests to maximise the terms of the TPP for their profit and protection [63]. This chapter reports on the Canadian arm of this study only; however, given the relative importance of the US food and beverage industry comparisons with US data are provided as well. Additionally, with the availability of the signed TPP text in November 2015, an accompanying analysis exploring if and how these interests were incorporated in the TPP agreement is included.

## **5.2 Method**

### **5.2.1 Document Selection**

We reviewed for inclusion all Canadian food industry submissions made to the Department of Foreign Affairs, Trade and Development Canada from December 2011 to February 2012 in response to a call from the government seeking advice and views on priorities, objectives, and concerns with respect to the TPP. The submissions were publicly available upon request as a result of a prior access to information request filed by an unknown third party. Based on the larger study criteria, documents were limited to English submissions from a major food importer or exporter, TNC, or major food player in the domestic market, or if from an association, the association had to include food industry members, and be national or international in coverage.

A total of 23 submissions met the inclusion criteria and were included in the Canadian analysis (see Appendix C for a list of the submissions included). All but one submission (Maple Leaf Foods, a processing and distribution company) were from food industry associations; more specifically 14 associations represented food production, four represented food processing, one represented food exporters, one represented a combination of the previous three, and two represented food

retailing. Two submissions had large portions redacted, specifically, the submissions from the Canadian Sugar Institute and Maple Leaf Foods.

The submission from the Food and Consumer Products of Canada (FCPC), whose membership includes many ‘Big Food’ subsidiaries, such as Campbell’s, Danone, Dole, General Mills, Heinz, Hershey’s, Kellogg’s, Kraft, Mars, McCain, Mondelez, Nestle, PepsiCo, Starbucks, Unilever and many others, was unexpectedly brief. Accordingly, very little could be inferred about this important component of the Canadian food industry from publicly available documentation. A review of public records from the Office of the Commissioner of Lobbying of Canada showed that they continued to lobby the government extensively behind closed doors during the TPP negotiations, for example, over the 2011 to 2015 period, the FCPC lobbied the Canadian government on the subject matter of international trade 37 times. Consequently, while their official submission revealed very little, it is apparent that their lobbying efforts have been more extensive on these issues.

### **5.2.2 Data Analysis**

Food industry submissions were analysed using thematic analysis, a method for identifying, analysing, and reporting patterns (or themes) across an entire data set [351]. A theme is used to describe a patterned response within the data that reveals something about the research question. We conducted our thematic analysis inductively using a data-driven or ‘bottom-up’ approach, where the themes remain highly associated with the original data [352]. Inductive thematic analysis is largely atheoretical and attempts to avoid researcher ideologies, although we recognise that coding cannot be conducted in ‘an epistemological vacuum’ [351]. Acknowledging that the current project was a part of a larger, multi-country analysis, coding was initially carried out semi-independently by three researchers, after which codes were discussed in an iterative process to create themes. The author of this dissertation was solely responsible for coding the Canadian submissions. Quotations were extracted to illustrate the themes. This method is similar to that used in a recent study analysing pharmaceutical industry statements and discourse on the TPP [353], and was previously applied in a public health discourse analysis of folate fortification as a policy strategy to reduce neural tube defects [354].

Following the atheoretical thematic analysis, a ‘policy-as-discourse’ analysis was completed based on the theoretical framework developed in Chapter 2 and Baachi’s ‘what is the problem represented to be’ analytical approach [355,356]. One of the primary purposes of exploring policy-as-discourse using Baachi’s approach is to draw attention to the idea that the way issues are presented places constraints on the possible solutions. Based on the theories of this dissertation we expected elite economic actors, specifically TNCs, to develop a neoliberal discourse on the necessity of further trade and investment liberalisation that would ultimately influence the final trade and investment policy. In this analysis we explored the neoliberal discourse established by TNCs in their submissions to the trade negotiating bodies, their representation of the problems surrounding trade and investment liberalisation, the effects of those representations, and what remains unproblematized based on those representations. We then examined the final TPP text to see if it reflected this neoliberal discourse.

## **5.3 Results**

### **5.3.1 General Findings**

The submissions generally focused on why Canada should join the TPP and changes to tariff and non-tariff barriers that would be beneficial to Canadian food industries. The submissions were written at a relatively early stage, before Canada became a party to the negotiations, and are thus broader and do not necessarily address the most recent issues within TPP negotiations. Nearly all Canadian food industry submissions endorsed the concept of trade liberalisation in varying degrees, and there was strong support for Canada joining the TPP negotiations, with 18 submissions clearly in favour. Four submissions expressed conditional support, including the Canadian Cattlemen’s Association which would support entering the TPP only if Japan enters negotiations as well, which it subsequently did; the Dairy Farmers of Canada and Egg Farmers of Canada, which would support entering the TPP so long as it did not change market access for their agricultural sectors; and the Canadian Federation of Agriculture, which was supportive provided the agreement creates meaningful market access opportunities for Canadian farmers. One submission, from the Dairy Processors Association of Canada, was notably against entering the TPP, stating that it “...cannot endorse this trade initiative, at this time, if it will negatively impact the Canadian dairy industry” (p.464) [357]. Notably, the dairy, egg, and poultry sectors are all

currently protected under Canada's supply management system, highlighting important areas of dissonance among food industry in their 'ideal' terms of trade liberalisation

Market access was the most pervasive topic, discussed at length or at least mentioned in every submission with the exception of the FCPC submission, which failed to include any substantive content. Coverage included general market access and related issues such as tariffs (17)<sup>19</sup>, quotas (12), sanitary and phytosanitary standards (10) and technical barriers to trade (7). Other prominent topics included regulatory coherence (10); the scientific bases of regulation (10); regulatory harmonisation (8); rules of origin (6); and the Canadian supply management system (6).

Food was discussed primarily in light of how trade liberalisation impacts revenue generated by food trade (4), the types of food imports and exports (4), and costs for food processors (2). Three submissions discussed food safety, specifically, the need for import policies to be consistent with the World Organisation for Animal Health standards on bovine spongiform encephalopathy, which the Canadian food industry feels is not being properly adhered to at present and is currently disadvantaging Canadian beef exports.

### **5.3.2 Thematic Findings**

Themes across all four countries included market access and regulatory coherence and the need for 'science-based' rules, while themes specific to the Canadian submissions included loss of competitiveness for the Canadian agricultural sector, supply management and domestic protections and subsidies, and the importance of Canadian membership in the TPP. Appendix D provides an overview of the findings of the thematic analysis by stakeholder.

#### *5.3.2.1 Market Access*

Market access was a universal theme across the submissions. Several focussed on what were portrayed as lingering prohibitive tariff levels to Canadian exports; the Canadian Sugar Institute highlighted the TPP's potential to eliminate "...all tariffs, tariff rate quotas" and its "...potential to address prohibitive sugar market access barriers, particularly for refined sugar, a value-added commodity, as well as many processed sugar-containing products" (p.407) [358]. The TPP was largely viewed as a chance to address remaining market access issues for agricultural goods, an

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<sup>19</sup> Numbers in parentheses indicate frequency of mention in submissions.

opportunity to create growth in all agricultural sectors rather than maintain protections for the few supply managed sectors, and that failure to join would reduce Canada's capacity to compete in key markets by being left out of preferential trading arrangements. A submission from the Canadian Agri-Food Trade Alliance (CAFTA) stated, "...the competitiveness of Canadian agri-food exporters is limited by market access restrictions including tariffs and quotas, trade distorting domestic support, export subsidies, differential export taxes, tariff escalation and non-tariff barriers" (p.302-3) [359]. Several submissions highlighted the need for a regional approach to Rules of Origin (ROO) to facilitate trade in goods, although there were varying suggestions for which approach to ROO should be taken.

### *5.3.2.2 Regulatory Coherence and the Need for "Science-Based" Rules*

The theme of regulatory coherence was prominent in the submissions, as noted by CAFTA, an association which represents Canadian food producers, processors and exporters, "[a] regional trade deal like the TPP could provide opportunities to ensure better cooperation in the development and enforcement of regulatory systems and requirements including greater transparency and regional consultation on the development of regulations" (p.308) [359]. Some submissions portrayed the current regulatory regime as ineffective, with CAFTA again noting that "[d]isparate regulatory standards, different approval and inspection systems, regulations that are not grounded in science and inconsistent adherence to policies developed by international bodies such as the OIE [Office International des Epizooties] and Codex are a growing issue for food exporters" (p.309) [25].

Canadian food industry emphasised the need for predictable science-based rules that may warrant developing TPP-specific regulatory regimes. In the submission from the Canadian Cattlemen's Association, they expressed the view that "[u]nfortunately over the past several years, Codex has shown disregard for its own scientific recommendations. Rather, product approvals by Codex have been subject to public opinion and political majorities. Consequently many scientifically validated safe products have failed to achieve Codex approval for unscientific reasons. We would like to see TPP create a vehicle to set its own standards that would be in effect in the TPP region in situations where Codex has either failed to act or the Codex process is unduly slow" (p.320) [360]. A submission from the Food Processors of Canada stated, "[p]olitics, not science, often governs the border practices" (p.487) [361] in reference to the US Food and Drug Administration Food Safety

Modernization Act<sup>20</sup>. Several submissions highlighted the lack of a scientific basis for pork imports from Canada to Australia and New Zealand being limited to cooked and boneless cuts.

There was also a focus in the submissions on the need for standards and procedures for biotechnological advances in food production, including policies on low-level presence (LLP)<sup>21</sup> of genetically modified organisms (GMOs) and maximum residue levels (MRLs) of pesticides<sup>22</sup>. A submission from the Canadian Seed Trade Association sought "...synchronous approvals of products of biotechnology and seed treatments" and "...mutual recognition of science based approval systems for seed related technologies, such as seed treatments and modern biotechnology" [365]. This theme was also captured in the submission from the Alberta Canola Producers Commission, "[t]he TPP is an ideal forum to advance solutions that minimize technical barriers to trade such as biotechnology approvals and the low-level presence of genetically modified material" (p.276) [366] and Pulse Canada, "...the TPP can capitalize on progress made on maximum residue limit (MRL) harmonization between Canada and the US within NAFTA" (p.127) [367].

### *5.3.2.3 Loss of Competitiveness for Canadian Agricultural Sectors*

A keen awareness of the competition within international food trade was apparent in the submissions, with warnings that Canada would suffer economic loss if it failed to join the TPP. Approximately half of all submissions suggested that the TPP would not bring new advantages to the Canadian food industry but would prevent a loss of competitiveness. Preferential trading agreements between countries such as the US and others to which Canada was not a party were portrayed as threats to Canada's potential share of key export markets. A submission from the Canadian Federation of Agriculture argued that if key competitors such as Australia and the US enter the TPP and Canada does not, it "...could be economically detrimental to Canadian livestock and grain producers" (p.343) [368]. Several of the submissions expressed concern about potential

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<sup>20</sup> The Food Safety Modernization Act revised US food safety standards and regulatory processes, which created new barriers to exporting goods for Canadian exporters [362]

<sup>21</sup> "Once a genetically modified (GM) crop is authorized for commercial use in a country, trace amounts of that crop may become mixed with other varieties of crops in that country or in transit. As a result, a GM crop that is authorized in an exporting country may be present at low levels in grain, food and feed shipments that are imported into another country where the GM crop is not authorized. This is where occurrences of low level presence (LLP) originate" [363].

<sup>22</sup> States set maximum residue limits (MRLs) on pesticide-treated foods. "The MRLs set for each pesticide-crop combination are set at levels well below the amount that could pose a health concern. Typically, an MRL applies to the identified raw agricultural food commodity as well as to any processed food product that contains it. However, where a processed product may require a higher MRL than that specified for its raw agricultural commodity, separate MRLs are specified" [364].

loss of market share to US industries, especially in Japan and Vietnam, as noted by Canada Pork International “...Canadian pork exporters cannot allow U.S. competitors to secure a tariff (or quota) advantage over us in the high value Japanese market” (p.291) [369], an opinion echoed by the Canadian Meat Council in its submission which warned “[s]hould Canada not gain access to the TPP negotiations but Japan succeeds, Canada will lose this significant market for meat. Should other members of the TPP like the United States of America get preferential access to Japan they will achieve a tariff (or quota) advantage over us in the very valuable Japanese market for pork, beef and horse meat” (p.396) [370].

#### *5.3.2.4 Supply Management and Domestic Protection and Subsidies*

Canada’s system of supply management figures prominently in some submissions, particularly those from the dairy and egg industry. Industries benefitting from supply management (dairy, poultry, and eggs) argued that the system should not be compromised in TPP negotiations. Some submissions suggested that the Canadian dairy market should not be opened when countries such as the US heavily subsidise their own dairy industry, as addressed by the Dairy Farmers of Canada, “[t]here is no doubt that these subsidies confer to the U.S. dairy industry an incredible advantage and explain why the U.S. dairy stakeholders were all calling for increased access from Canada as part of the U.S. consultation exercise...” (p.459) [371]. A submission from the Food Processors of Canada, blunt and demanding in tone, claimed they were “...unable to tap into US school lunch programs and US defence food contracts, yet the US could service Canadian defence contracts, penitentiary purchases and more...The US has a world arsenal of weapons for exporting food and subsidizing its domestic processors...” (p.488) [361]. It went on to claim Canadian companies were considering a move to the US as a more ‘predictable environment’ with cheaper inputs, concluding with, “[t]his is the first instalment of requests/considerations which we want Canada to pursue. Others will follow” (p.488) [361]. Industries which do not benefit from the supply management system argued that it is unacceptable to continue protecting the few supply managed sectors to the detriment of all other agricultural sectors, as captured by comments from the Canadian Restaurant and Foodservices Association, “[i]n past trade negotiations, Canada has chosen to use its political capital to protect supply management and has harmed other agricultural sectors by reducing our ability to negotiate market access abroad” (p.400) [372].

### *5.3.2.5 Importance of Canadian Membership in the TPP*

The submissions were nearly unanimous in their support for Canada joining the TPP negotiations, and many included a sense of urgency in Canada achieving membership. The Canadian Pork Council commented that, “[t]he sooner Canada becomes a [TPP] participant, the greater is its ability to help shape and to prevent it taking on characteristics that later on make it less favourable to Canada's interests” (p.398-399) [373], a sentiment mirrored by CAFTA, “[i]f we are unsuccessful in securing TPP membership, Canada will undoubtedly lose trade markets and will be in a ‘take it or leave it’ position down the road as the TPP initiative expands to include more Pacific-rim partners” (p.303) [359].

The significance of joining the TPP was also conveyed by highlighting the potential for growing membership over time of economically important Asia-Pacific Economic Cooperation (APEC) nations. The submission from Canadian Pork International indicated that the Pacific Region includes many more emerging economies with significant growth in per capita income and population, factors that are associated with, “...rapid increases in consumption, and importation, of animal products” (p.398) [369] and stated that “[w]e anticipate several of these nations which are not yet TPP members – such as Philippines, South Korea, and Thailand – will soon want to join the Trans-Pacific Partnership” (p.398) [369]. There were several submissions which expressed that joining the TPP would only be worthwhile if it involved Japan, and that a bilateral agreement should be pursued in case the TPP falls through.

Finally, some felt that the TPP could be a vehicle for establishing and advancing comprehensive trade rules and norms, in some cases setting the standard for the World Trade Organisation (WTO), as expressed by the Grain Farmers of Canada, “[a] large multi-lateral agreement on low level presence, such as TPP, could provide the framework for other trade agreements and possibly the WTO” (p.92) [374].

### *5.3.2.6 Comparison with US Data*

Submissions from the Canadian and US food industries were more alike than not. The US submissions, which included transnational food and beverage corporations, similarly highlighted that the TPP would be an important deal that would bring significant job and economic growth, and that it was also important because it had the potential to include more countries over time and

could possibly influence the terms of future trade deals. Its submissions also focused on market access and expressed a fear of losing market share if the US did not join. Though in contrast they highlighted that markets like Canada were overly protectionist. US food industry submissions also addressed a need for regulatory coherence, although with the addition that the new standards should be aligned with current US standards. The need to address current regulatory regimes that were disrupting trade in food derived from biotechnology was also brought up in a number of submissions. The US submissions stressed more heavily market access for ultra-processed foods, and unlike in Canada, submissions were received from individual corporations rather than just representative associations. The largest difference was that, distinct from the Canadian submissions, the US submissions addressed investment protections and a desire for investor-state dispute settlement mechanisms (ISDS) in the agreement [63].

### **5.3.3 'Policy-as-Discourse' Analysis of Industry Submissions**

The following is a 'policy-as-discourse' analysis of the manner in which industry has shaped how issues and problems are constructed or perceived [355,356]. This analysis is guided by Baachi's [355] analytical framework which questions: (1) the representation of the problems; (2) the effects of those representations and who stands to benefit; and (3) what remains unproblematised.

Overall, the Canadian food industry submissions were in favour of trade and investment liberalisation to promote economic growth in general, and of Canada joining the TPP more specifically to achieve those aims. This is highly reflective of neoliberal ideological principles emphasising economic growth and free trade in the interest of elite economic actors, such as TNCs, introduced in Chapter 2. Following from this, the submissions focused on problematising sustained restrictions to fully open market access and inconsistent regulatory regimes, including numerous concerns raised around the need for consistent approaches to biotechnology approvals, LLP policies, and MRLs. One of the effects of representing the problem in this way is that open markets and fully liberalised trade rules that result in one regulatory regime become evident policy solutions. That is, when we start from an ideological position of economic growth as a fundamental goal in and of itself, irrespective of the distribution of that growth, and free trade as necessary to economic growth, then the problem becomes barriers to trade and the solution to remove those barriers.

Importantly, increased agricultural trade liberalisation has not always led to economic prosperity for farmers, nor has that economic prosperity been equally distributed [377]. Moreover, as regards economic benefits for the general population, while projections on potential economic gains from the TPP are debated, the latest figures from pro-TPP organisation, Peterson Institute for International Economics, operating under a "...litany of optimistic assumptions" show that "...the much-touted 'benefit' from the TPP would amount to an extra quarter per person per day" [378] in the US by 2025. The Centre for Economic and Policy Research has responded with a report showing that these gains are unlikely to be equally distributed across the US population, and that those with annual incomes below \$87,000 (the 90<sup>th</sup> percentile in wages) would actually receive a pay cut due to the TPP. Highlighting that the economic gains from these agreements are concentrated among those with the greatest wealth, including large and powerful TNCs. A more recent study using the United Nations Global Policy Model, which incorporates the impact changes in employment and inequality have on aggregate demand and economic growth, equally predicts losses from the TPP. Notable in its findings are that over a ten year period the TPP would: generate net losses of GDP in the US and Japan; generate economic gains of less than 1% for other developed countries and less than 3% for developing ones; result in approximately 771,000 lost jobs and higher inequality; and would create losses in GDP and employment in non-TPP countries, primarily in Europe, China, and India [379].

The support of a 'science-based' rules system in the submissions was unqualified by attempts to operationalise what such a system might look like, for example, what scientific standards will be adhered to, who will define these, and how will health precautions be treated in the absence of demonstrable or conclusive risks to health. This was a part of the broader discourse of redefining the state's role as regulator in the national interest, to regulator in the industry's interest, by focusing on streamlining regulation to facilitate the movement of goods across borders.

Additionally, this type of discourse when applied to food reflects larger neoliberal processes of the commodification of goods and services, that is, this discourse frames food as a just another tradeable commodity while covertly removing other possible representations and meanings attributed to food in society. Transforming food into a commodity normalises problematisations such as barriers to importing and exporting the commodity or discrepancies in regulating the commodity. The 'food as commodity' discourse implies that solutions within trade and investment

policy should support increased imports and exports or increased investment into the commodity. This ‘food as commodity’ lens comes as the cost of alternative lenses such as a health policy ‘food as nutrition’ lens, an environmental ‘food system sustainability’ lens, a human rights ‘food security’ lens, or even an anthropological ‘food as cultural transmission’ lens. Subsequently, enhancing nutritional quality, food sustainability, food security, or respecting cultural considerations are not framed as part of the problem, and thus are not addressed in the solution.

As long as neoliberal ideology guides the hegemonic discourse on international economic relations, alternative discourses rooted in improving health and human equity through environmentally and developmentally sustainable processes will remain at the margins. Equally, the corresponding problematisations of rising NCD rates, growing inequity, and climate change, and policy solutions to address these challenges, will remain outside international economic negotiations. Even though international treaties are negotiated on these issues, such as the Framework Convention on Tobacco Control or the United Nations Framework Convention on Climate Change; these treaties do not come with the level of accountability and enforceability of international economic agreements, and the varying ideologies guiding these treaty-making processes inevitably results in incoherencies within the international policy agenda. The next section examines the final TPP text, and whether a neoliberal discourse reflecting the interests of elite economic actors, including food industry, is reproduced in the final agreement.

### **5.3.4 Reflection of Food Industry Requests in the Final TPP Text**

#### *5.3.4.1 Request One: Market Access*

The TPP chapter on National Treatment and Market Access for Goods includes a 67 page document followed by 40 additional annexes on country-specific notes on tariff schedules, tariff elimination schedules, tariff rate quotas, and safeguard measures, as well as bilateral arrangements on select goods. Consequently, a primary review of the TPP text to assess market access changes for Canadian agricultural exports is outside the scope of the current project.

Initial media reports have indicated that Japan, an important export market for Canadian agriculture, will remove tariffs on 32% of all agricultural imports once the TPP comes into effect, with more reductions over the subsequent two decades. Canadian beef and pork exporters made significant gains, with Japan dropping tariffs on a range of pork products in the first ten years, and

dropping its tariffs on beef from 50% to 9% over the first 15 years. Relatedly, Vietnam will remove its tariff of 31% on fresh and frozen beef within two years of the deal being implemented. It has been reported that Australia, Malaysia, and New Zealand have all agreed to eliminate over 90% of all agricultural tariffs once the TPP has been ratified [382]. However, a cursory review of these countries' tariff elimination schedules reveals that their 2010 base tariff rates on agricultural products rarely exceed 5%, suggesting that any gains will be small. Canadian supply managed sectors (dairy, poultry, and eggs) have been forced into small concessions, permitting between 2%-3.2% more imports into the Canadian market [383], although the previous Canadian government had promised CA\$4.3 billion to these sectors to compensate for any losses. These media reports are, however, an inadequate evaluation of the TPP's implications for Canadian food and agricultural industry. Thorough economic impact assessments of projected changes due to tariff reductions in the TPP relative to current applied tariff rates are required for evidence-based decision-making.

#### 5.3.4.2 *Request Two: Regulatory Coherence*

Canadian food industry made consistent requests for regulatory coherence in its submissions, the success of which is at least partially indicated by the inclusion of a Regulatory Coherence Chapter in the TPP. As outlined in the domestic policy space and governance pathway in Chapter 4 regulatory coherence provisions play a contributing role in the internationalisation of regulation, one of the contentious provisions of the new constitutionalism benefitting elite economic actors discussed in Chapter 2. Variation across domestic regulatory systems is a fundamental issue for almost all industry, thus food industry could hardly be viewed as the sole instigator of such a chapter. In defining what is meant by regulatory coherence the Chapter text suggests that “...*regulatory coherence refers to the use of good regulatory practices in the process of planning, designing, issuing, implementing and reviewing regulatory measures in order to facilitate achievement of domestic policy objectives, and in efforts across governments to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment*” (art.25.2, ¶1). While the Chapter acknowledges “...*each Party's sovereign right to identify its regulatory priorities and establish and implement regulatory measures to address these priorities, at the levels that the Party considers appropriate*” (art 25.2, ¶2b), the language used to preface this, that they “*affirm the importance of*” merely forms

part of the interpretive context, relative to binding obligations using language that a party “*shall*” do something.

Several provisions within the Chapter may alter the burden on domestic regulatory systems. For example, within one year after entry into force in their territory, each Party must “...*make publicly available the scope of its covered regulatory measures. In determining the scope of covered regulatory measures, each Party should aim to achieve significant coverage*” (art.25.3). Additionally, the Chapter states that, “...*regulatory coherence can be facilitated through domestic mechanisms that increase interagency consultation and coordination associated with processes for developing regulatory measures. Accordingly, each Party shall endeavour to ensure that it has processes or mechanisms to facilitate the effective interagency coordination and review of proposed covered regulatory measures*” (art.25.4, ¶1). As well, “[*e*]ach Party should review, at intervals it deems appropriate, its covered regulatory measures to determine whether specific regulatory measures it has implemented should be modified, streamlined, expanded or repealed...” (art.25.5, ¶6). Finally, that each party should, “...*conduct regulatory impact assessments when developing proposed covered regulatory measures that exceed a threshold of economic impact, or other regulatory impact...*” (art.25.5, ¶1) and “...*in a manner it deems appropriate, and consistent with its laws and regulations, provide annual public notice of any covered regulatory measure that it reasonably expects its regulatory agencies to issue within the following 12-month period*” (art.25.5, ¶7). To the extent that these procedures deviate from current regulatory practice, and to the extent that a state may perceive them as obligatory, these provisions could become a financial and administrative burden that may dissuade governments from developing new regulations. It is reasonable to suspect that lower-income members of the Agreement may have reduced resources for such administrative tasks and bear a disproportionate burden during implementation.

The Regulatory Coherence Chapter also provides avenues for private actor engagement in the regulatory environment, specifically that the TPP’s Committee on Regulatory Coherence shall “...*provide opportunities for interested persons of the Parties to provide input on matters relevant to enhancing regulatory coherence*” (art.25.8), and that they will take this input into account in the development of regulatory measures. Depending on current state practice, this may develop a window for TNCs to influence domestic regulatory decision-making. Technically this provision opens the process up to contributions from all private actors, including nongovernmental

organisations, academics, the public, *etc.* This increased transparency and participation in public regulatory processes would arguably be a positive outcome. It is unlikely, however, that all private actors would have equal participation and influence. TNCs for example would have an advantageous position given that industry generally has clear ‘asks’ and a relatively cohesive agenda, relative to many public interest groups, as well as the financial and administrative resources to maintain consistent and comprehensive involvement.

Arguably this Chapter was less of a win for industry given that all provisions within it lack recourse to state-state dispute settlement procedures (art.25.11), meaning that industry cannot lobby states to initiate a dispute over any alleged failures to comply with the regulatory coherence terms. As there are no agreements currently in force which contain a chapter on regulatory coherence, time is needed to understand what, if any, impact it will have on public health regulatory processes. Regulatory coherence is also realised through provisions within the Technical Barriers to Trade (TBT) Chapter. The terms of the Chapter are extensive and largely address harmonisation and transparency in the development of technical regulations, standards, and conformity assessments; another contributing factor to the internationalisation of regulation producing benefits for industry and burdens for some states.

The Chapter includes a provision that “...*nothing in this Chapter shall prevent a Party from adopting or maintaining technical regulations or standards, in accordance with its rights and obligations under this Agreement, the TBT Agreement and any other relevant international obligations*” (art.8.3¶5). The first part of this provision gives the illusion that there will be protection of domestic policy space and national sovereignty, but the second part clearly limits those actions to ones in accordance with the obligations of the Agreement. In plain language they are saying that states can do whatever they like so long as it does not violate anything in this Agreement, which can hardly be perceived as any additional protection for the state. The Chapter also includes a particularly unusual provision that “[*t*]he Parties shall cooperate with each other, where feasible and appropriate, to ensure that international standards, guides and recommendations that are likely to become a basis for technical regulations and conformity assessment procedures do not create unnecessary obstacles to international trade” (art.8.5¶3). Under the WTO’s TBT Agreement dispute settlement panels refer to international standards when weighing the necessity of regulations. These standards were designed to protect things like

consumer health and safety or the environment. The TBT provision in the TPP suggests that TPP parties agree to design international standards in advance to be least trade restrictive, in practice limiting any new protective standards to those that have already been vetted as trade-compliant.

Similar to the Regulatory Coherence Chapter, the TBT Chapter may also develop a window for TNCs to influence domestic regulatory decision-making, depending once again on current state practice. The Chapter states that “[e]ach Party shall allow persons of the other Parties to participate in the development of technical regulations, standards and conformity assessment procedures by its central government bodies...on terms no less favourable than those it accords to its own persons” (art.8.7¶1). According to the general definitions of the Agreement a person of a party means a national or an enterprise of a party (art.1.3), meaning persons would include TNCs that can claim nationality of that party. The Agreement further seeks to have these rules extend outside state decision-making, adding that “[w]here appropriate, each Party shall encourage non-governmental bodies in its territory to observe the requirements” (art.8.7¶3). In Canada this may apply to Crown corporations which are not technically governmental bodies, such as the Standards Council of Canada. This Council’s mandate is to promote efficient and effective voluntary standardisation in Canada where it is not expressly provided for by law, and represents Canada's interests in standards-related matters in foreign and international forums. Unlike the Regulatory Coherence Chapter, the TBT Chapter is enforceable through dispute settlement.

#### 5.3.4.3 Request Three: Science-Based Rules

There were frequent demands from Canadian food industry to ensure that all food safety standards are grounded in science-based rules. The governing agreement on food safety standards for traded goods has been the Sanitary and Phytosanitary Standards (SPS) Agreement within the WTO, which defers to the *Codex Alimentarius Commission* for food safety, as well as the *Office International des Epizooties* for animal health, and the *International Plant Protection Convention* for plant health. The TPP member states negotiated an SPS Chapter intended to “...reinforce and build on the SPS Agreement” (art.7.2b). Unlike the SPS Agreement within the WTO, the SPS Chapter in the TPP does not explicitly refer to the standards, guidelines, and recommendations established by the Codex as guiding food safety, though presumably these would still be a recognised source. Even though the Codex is tasked with two objectives, to protect the health of consumers and ensure fair practices in food trade, the protection of consumer health has been

considered their primary objective [384]. This stands in contrast to the stated objective of the SPS Chapter, to “...*protect human, animal and plant life or health in the territories of the Parties while facilitating and expanding trade by a variety of means to seek to address and resolve sanitary and phytosanitary issues*” (art.7.2a). The Codex was never intended to ‘facilitate’ and ‘expand’ trade, only to ensure that trade practices were fair and protected human health first and foremost. The SPS Chapter in the TPP has effectively subordinated health aims to trade aims.

The changing nature of SPS from a set of baseline criteria to protect human health, to maximum acceptable standards for the protection of trade, has meant associated changes in the requirements to exceed the maximum standards. The WTO SPS Agreement acknowledged that, “[*m*]embers may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification...” (art.3.3). The TPP’s SPS Chapter states instead that “[*e*]ach Party shall ensure that its sanitary and phytosanitary measures either conform to the relevant international standards, guidelines or recommendations or, if its sanitary and phytosanitary measures do not conform to international standards, guidelines or recommendations, that they are based on documented and objective scientific evidence...” (art.7.9). While the WTO SPS leads with a permissive statement that states are able to implement higher protections, the TPP SPS highlights the importance of conformity to international standards. Moreover, if a country elects to enforce standards that exceed the requirements of international standards, the burden for doing so shifts from a ‘scientific justification’ to one ‘based on documented and objective scientific evidence.’ Under the WTO Agreement ‘scientific justification’ has been found to allow measures that are based on a minority scientific opinion [385] which has been pivotal in permitting the implementation of the precautionary principle<sup>23</sup>, something the TPP may undermine. The effect of this can only be fully understood after disputes have been raised and resolved under the SPS Chapter and contrasted with those of the SPS Agreement, however, it is reasonable to believe that that the TPP’s SPS Chapter has qualitatively ‘raised the bar’ for the burden of scientific evidence required to introduce domestic food safety protections that exceed international standards.

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<sup>23</sup> “The precautionary principle asserts that the burden of proof for potentially harmful actions by industry or government rests on the assurance of safety and that when there are threats of serious damage, scientific uncertainty must be resolved in favor of prevention” (p.1358) [386].

Further to this point, the SPS Chapter has created a system for Cooperative Technical Consultations (CTC) for parties to discuss matters under the Chapter that may adversely affect trade, which must be pursued before parties are able to seek dispute settlement. That all communications and documentation generated during a CTC are kept confidential unless otherwise agreed by the parties, has created a concern that the parties' discourse on understandings of 'science' will be considered confidential information reducing transparency for the public regarding such developments [384]. This provision also seems to be contradictory to the TPP Chapter on Transparency and Anti-Corruption which states that “[e]ach Party shall ensure that its laws, regulations, procedures and administrative rulings of general application with respect to any matter covered by this Agreement are promptly published or otherwise made available in a manner that enables interested persons and Parties to become acquainted with them” (art.26.2, ¶1).

Finally, within the framework of 'science-based' rule setting, the food industry was seeking clearer standards and procedures for biotechnological advances in food production including policies on GMOs. However, the SPS Chapter in the TPP, the purpose of which is to address matters of trade and food safety, and which consequently has wide significance for GMO products [387], made no reference to GMOs. In an interesting turn of events the negotiators located Trade in Products of Modern Biotechnology for agricultural goods in the TPP Chapter on National Treatment and Market Access for Goods, agreeing that “...nothing in this Article shall require a Party to adopt or modify its laws, regulations, and policies for the control of products of modern biotechnology within its territory” (art.2.29, ¶¶2-3). However, this applies only to the content of this specific article, which focuses primarily on inadvertent LLP occurrences of GMOs permitted in the exporting, but not the importing, country.

The TPP may create avenues for GMO exporting countries, such as the US, to exert pressure on TPP member states holding to a 'zero tolerance' policy for LLP or relatively strict MRLs [387]. One such avenue is the creation of a Working Group “...for information exchange and cooperation on trade-related matters associated with products of modern biotechnology” for which all parties are able to “name one or more representatives to the Working Group” (art.2.29, ¶9). It would not be unreasonable to suggest that parties, such as the US, may allow representation to include corporations that receive direct financial benefit from the development and distribution of

biotechnology in agriculture, such as representatives from companies like DuPont, Cargill, and Dow Agro-Sciences which all acted as private corporate advisers to the US during negotiations [350]. In a critical outlook on this placement of biotechnology outside of the SPS Chapter, one US policy analyst suggests that Article 2.29 should come with a footnote warning, “Expect a visit from the U.S. State Department officer for biotechnology and/or the Foreign Agricultural Service representative in your Embassy to discuss how you can adopt our regulations or modify your laws and regulations to better expedite the import of our agricultural products of modern biotechnology. If you refuse the visit, either expect to look for a new job or expect market entry problems for your country’s exports” (p.5) [384].

While it may look as if food industry failed to have this specific request addressed in the TPP, it is possible that industry was favourable to the idea of shifting these issues to other forums, such as the Working Group or political lobbying, that may actually be less transparent than the TPP, the text of which would ultimately have to be made public. As with all of the provisions discussed above, time is needed to fully understand the impacts of the TPP agreement, although convergence in biotechnology policies across the 12 member states, particularly convergence towards US policy, will be an interesting area for observation.

#### **5.4 Discussion**

Without a statement from TPP negotiators that the included provisions were developed under the guidance of or based on the interests of the food industry, it is impossible to categorically demonstrate that food industry influenced the final text of the TPP agreement. What can be concluded is that the publicly presented interests of Canadian food industry, as well as food industry in the US, Australia, and New Zealand [63], grounded in the neoliberal ideology of the necessity of trade and investment liberalisation to achieve economic growth in the interest of elite economic actors, were largely reflected in the final text of the TPP.

Submissions from Canadian food industry requested increased market access for agricultural goods and although changes in market access provisions require considerable additional analysis to clarify the extent to which such access has been improved, the deal appears to have provided tariff reductions on agricultural products. It is worth noting that this is a rather unremarkable

finding, since the fundamental purpose of a trade agreement is to facilitate the movement of goods across borders through increased market access.

Canadian food industry also made a consistent appeal for increased regulatory coherence, the success of which is demonstrated in part by the inclusion of a Regulatory Coherence Chapter, although the Chapter content ultimately has no recourse to dispute settlement which undermines its enforceability. Provisions included in the TBT Chapter, an enforceable chapter, also appear to contribute to regulatory coherence. Food industry also made requests for an emphasis on ‘science-based’ rules, reflected in several provisions in the SPS Chapter. Interestingly, while Canadian food industry requested clear standards on controversial topics like LLPs for GMOs and MRLs for pesticide-treated foods, the issue remained largely unresolved in the TPP text. Whether this was a failure of industry to obtain its goals, or a reflection of a more subtle strategy to shift these policies to less visible arenas remains to be seen.

One of the limitations of examining the submissions from the Canadian food industry is that only a small number of the submissions would be classified as being a part of ‘Big Food’, as Canada is home to very few transnational food and beverage companies and none of the ‘Big 10’, although these companies do have subsidiaries established in Canada. It seems reasonable to submit that congruity among the requests from the Canadian food industry and the final TPP text likely had less to do with the Canadian food industry being a source of international political influence and more to do with its interests being well aligned with export-oriented industry in general and, in large part, with the powerful food and beverage industry in the US. For our purposes this is inconsequential, as the intention was not to demonstrate the influence of Canadian food industry *per se* but to demonstrate influence of industry in general on the negotiation of trade and investment agreements.

Likewise, the submission from the FCPC, the association representative of Canada’s ‘Big Food’ subsidiaries, made a brief and nondescript submission. This raises the concern that the FCPC evaded a detailed request through a publicly accessible forum in favour of comprehensive private lobbying. The *Office of the Commissioner of Lobbying of Canada* discloses that the FCPC has lobbied the Canadian government on international trade negotiations with respect to: identifying trade interests and concerns on a global level and improving market access for food and consumer products; and providing feedback to trade negotiators and monitoring developments [388]. In its

submission it noted that “...you can rely on FCPC to engage our members and work with Canada’s negotiating team” [389], which suggests that the FCPC had more to say on the topic than alluded to in their publicly available submission.

Although the methodology employed here precludes statements of certainty, the findings presented in this chapter lend support to the argument that TNCs, as highly influential actors within the trade and investment policy space, were able to gain privileged access to the TPP negotiations, which may have been used to influence the provisions of the treaty in favour of their interests. The main thesis of this dissertation has asserted that TNC interests in international trade and investment agreements will be reflected in provisions that maximise TNC profits and protections. Specifically, this will include provisions that foster the internationalisation of regulation to enhance the flow of goods and services across borders, the liberalisation of trade and investment market access for their products, and expansive investor rights and ISDS, all of which were demonstrated in the food industry submissions. The next chapter, and the second of three analytical components of this dissertation, will explore the role of international trade and investment agreements as facilitators of highly profitable health-harmful commodities (HHCs) spread by transnational food and beverage products, through the expansion and entrenchment of trade and investment liberalisation.

## CHAPTER 6

TRANSNATIONAL CORPORATIONS AND THE SPREAD OF HEALTH-HARMFUL  
COMMODITIES THROUGH INTERNATIONAL TRADE AND INVESTMENT  
AGREEMENTS: AN EXPLORATION OF SUGAR-SWEETENED CARBONATED  
BEVERAGE MARKETS IN VIETNAM AND PHILIPPINES

“SO THAT'S US: PROCESSED CORN, WALKING.”

– Michael Pollan

## 6.1 Introduction

The theory developed in Chapter 2 proposes that elite economic actors, including transnational corporations (TNCs), in partnership with judicial and political elites use instruments of the new constitutionalism, such as international trade and investment agreements, to entrench neoliberal policy preferences at the domestic level that can be enforced through international judicial systems. The previous chapter examined, albeit indirectly, the privileged access TNCs have to negotiations and how they can insert their interests, specifically provisions that maximise their profits and protections, into the negotiation of new agreements by exploring the role of the food industry in negotiations of the Trans-Pacific Partnership (TPP); as well as the extent to which their interests were captured in the signed text. Chapter 5 emphasised TNC interests in the internationalisation of regulation to facilitate the movement of goods across borders. This chapter will explore how TNC interests, manifested through provisions that facilitate the spread of profitable products, affect markets for health-harmful commodities (HHCs). This chapter also draws on the causal pathways developed in Chapter 4 regarding the influence of the facilitation of trade in goods, services, and investment, as well changes to domestic policy and governance on the consumption of ultra-processed food and beverage products, risk factors for noncommunicable diseases (NCDs).

There are growing concerns that trade and investment agreements create market conditions that facilitate the availability, sale, and consumption of unhealthy dietary products in low- and middle-income countries [76,260,390]. Rising consumption of sugar-sweetened beverages is particularly concerning given the body of epidemiological evidence linking consumption to obesity, type II diabetes, and cardiovascular diseases [87,391,392]. In children, each additional serving of a sugar-sweetened drink daily was associated with a 0.24kg/m<sup>2</sup> increase in body mass index and 1.6 times greater odds of being obese, after adjusting for anthropometric, demographic, dietary, and lifestyle variables [393].

Obesity and diabetes continue to be pressing public health concerns, accounting for 2.8 and 1.5 million deaths globally each year [394]. To our knowledge, no country has reversed its obesity epidemic [14], suggesting that current approaches to obesity prevention are inadequate. As introduced in Chapter 1, conceptualising and addressing the role of structural drivers of diet-related

health outcomes, including trade and investment policy, is an important development in tackling the complexity of the problem. Two broadly differing frameworks have defined public health interventions addressing obesity. An individualising framework, both more pervasive and market-friendly, places the onus on individuals and their ‘lifestyle’ choices, with little to no government regulatory action concerning the food industry; and a systemic framework, which puts the onus on wider environmental factors and encourages governments to act on behalf of the public, including regulating food markets from production through to consumption [14]. This chapter attempts to unpack some of the complexity at the systemic level by examining the role of trade and investment agreements in the creation and maintenance of obesogenic food environments.

Increased trade and investment between nations may have positive health impacts. It can stimulate economic growth, potentially reducing poverty and its detrimental health impacts, promote and enable investments in health care, education, and other population health determinants, and increase access to life-saving goods and technologies [30,395,396]. However, such health gains are not automatic and depend on progressive public policy for equitable distribution throughout society. There are also potential health risks with trade and investment [397], including the spread of sugar-sweetened carbonated beverages (SSCBs) and other unhealthy dietary products through increased flows of imports and foreign direct investment (FDI) [76,77]. As noted in the review of the evidence in Chapter 4, few studies to date have provided quantitative relational evidence of these effects.

Stuckler and colleagues evaluated exposure to United States (US) Free Trade Agreements across 80 countries, finding that those nations with a free trade agreement with the US had 63.4% higher soft drink sales per capita than those that did not, after correcting for gross domestic product (GDP) and other macroeconomic confounders [398]. Another study attempted to empirically link trade liberalisation to diet-related health outcomes, such as obesity, finding support for the impact of economic globalisation over and above those accounted for by GDP and urbanisation [79]. A cross-national study of 25 countries between 1999 and 2008 found market deregulation policies facilitated the spread of fast food outlets, which correlated with higher population mean body mass indices among high-income countries [328]

Apart from this limited set of comparative cross-national studies, the bulk of analyses have drawn on case studies and descriptive accounts. One study examined data in Mexico pre and post-North

American Free Trade Agreement (NAFTA), identifying subsequent increases in US exports of corn, soybeans, sugar, snack foods, and meat products as well as increased investment in production, processing, and retailing of similar ultra-processed food products [186]. A similar analysis of the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), concluded that the agreement led to increased investment in and production of meat, dairy, and ultra-processed food products [187]. Case studies of Pacific Island Countries (PICs) also suggest that trade policies accelerate domestic transition to imported ultra-processed food products [215,399].

The conceptual framework presented in Chapter 4 identified multiple pathways through which trade and investment agreements may impact the consumer environment for HHCs including trade in goods, services, and investment, and constraints on domestic policy space. Each of these pathways is complex and interconnected. For example, FDI in HHC markets can be accounted for by multiple sections of trade and investment agreements, such as the complex interrelationships with tariff reductions, service sector commitments, investor rights, and dispute settlement mechanisms. Additionally, FDI is guided by a series of market factors, such as the host market size, its proximity to main markets, the level of real income, human capital and labour standards, natural resources, infrastructure, political and macroeconomic stability, and investment incentives [254–256]. Many of these market factors also interact with trade and investment agreements. Consequently, FDI in HHC markets, may be better understood as influenced by the complete set of changes brought about by a trade and investment agreement, rather than specific to any one area of commitments.

The current chapter will explore whether trade and investment agreements facilitate changes in the consumer environment for HHCs, specifically SSCBs. We examined two sets of international trade and investment commitments that would provide transnational food and beverage companies with access to the types of provisions that maximise profits and protections, specifically, accession to the multilateral agreements of the World Trade Organisation (WTO), and bilateral trade and investment relations with the US. Accession to the WTO involves a comprehensive set of commitments, obligations, and enforcement measures requiring considerable reconstruction of domestic policies generally perceived to reduce the role of government in markets while increasingly privatising the production and distribution of goods and services (see Chapter 4 for

an overview of the various relevant WTO agreements) [212]. According to the World Bank the cost of accession is rising, with higher levels of liberalisation and commitments expected from new members [400]. Trade and investment agreements with the US were also considered given the heavy concentration of ‘Big Food’ in the US, introduced in Chapter 5. Specifically six of the top ten companies are headquartered in the US, including Coca-Cola and PepsiCo [82], companies that are highly relevant to an analysis of SSCBs given that together they accounted for 68.7% of the global carbonated beverage market in 2013 [401].

Using a natural experiment design we tested whether Vietnam’s accession to the WTO in 2007, alongside parallel commitments introduced in a bilateral trade and investment agreement with the US, resulted in changes to its domestic SSCB market, and more specifically, foreign concentration within that market as a result of TNC investment. The experience of Vietnam, a relatively new WTO member and economic partner with the US, was contrasted alongside the experience of the Philippines, an original member of the WTO in 1995 with prolonged economic relations with the US. Furthermore, we explored these changes as a potential consequence of fluctuations to FDI inflows and import and export flows as a part of the pathway between trade and investment and NCDs introduced in Chapter 4. This chapter is intended to contribute to the body of quantitative evidence exploring the diet-related health effects of trade and investment agreements by providing robust evidence for the link between trade and investment agreements and changes to the food environment. Additionally, it is intended to develop support for the argument that TNC interests are manifested through provisions that contribute to their profitability by facilitating trade and investment in HHC markets.

## **6.2 Methods**

### **6.2.1 Study Design and Case Selection**

We employed a natural experiment design, which takes advantage of variations in the timing, geography, or eligibility of an intervention. This design is recommended in situations when randomised trials are not available for ethical or pragmatic reasons, as is the case with trade and investment treaties [402]. Unlike in randomised controlled trials, in a natural experiment the intervention is assigned by a policy not by the researcher. In this study the intervention is the ratification of new trade and investment agreements, specifically accession to the WTO and a

bilateral trade and investment agreement with the US. To maintain a focus on the potential implications of the newly negotiated TPP agreement we elected to examine the role of international trade and investment agreements in the HHC market of a TPP signatory member, in order to project impacts in the country in the event that the TPP is ratified. Additionally, acknowledging that HHC markets have become saturated in high-income countries [398], and that a primary source of growth for such products in the coming years will be in developing countries [403,404], we limited our case country selection to developing countries in the TPP which include Brunei, Chile, Mexico, Malaysia, Peru, Singapore, and Vietnam. Vietnam was selected on the grounds that it has been identified as a strong emerging market for SSCBs [405], and is newly integrated in the global economy, which would permit a clearer demonstration of the impacts of international trade and investment agreements given the relative paucity of disaggregated historical market-level data available in developing countries.

#### *6.2.1.1 Case Country: Vietnam*

In 1975, as a result of the victory of the communist party of North Vietnam over the US-backed anti-communist party of South Vietnam, the US severed economic relations with the country. In 1994, the 19 year long trade embargo was lifted, and in 2001, Vietnam and the USA entered into a bilateral trade and investment agreement. In 2007 the two nations signed a Trade and Investment Framework Agreement, a precursor to a trade and investment agreement, to establish a formal dialogue to discuss new initiatives to deepen the trade and investment relationship, and in 2015 both countries became signatory members to the TPP. Additionally, after twelve years of preparation, Vietnam formally acceded to the WTO in January 2007. Membership in the WTO required numerous changes to its legal and regulatory framework regarding taxation, intellectual property, price and foreign exchange controls, as well as enactment of the Law on Investment and the Law on Enterprises, both of which made domestic and foreign investors subject to the same laws as domestic investors and put them on more equal terms [406]. The US-Vietnam agreement was phased-in over a protracted period of time with substantial overlap with the WTO agreements, which is to say that the impacts of these agreements would be impossible to separate. Consequently, our ‘intervention’, that is, accession to the WTO and trade and investment relations with the US, will be measured collectively and will be considered in effect as of January 2007.

### 6.2.1.2 *Control Country: the Philippines*

We then sought a control country with a different pattern of exposure, that is, consistent economic integration with the US and early accession to the WTO, but which was similar in other respects. Here, a neighboring country, the Philippines, was identified as the control country. It had acceded to the WTO upon its inception on January 1 1995, but has a similar demographic profile and GDP per capita as Vietnam (\$4,700 and \$4,000, respectively) [407,408]. The US and the Philippines have had uninterrupted economic relations for more than a hundred years. Although they signed a Trade and Investment Framework Agreement in November 1989, no bilateral trade agreements or investment treaties have been produced. The Philippines is not a signatory member of the TPP, although the country has expressed strong interest in joining [409] and has been involved in technical consultations with the United States Trade Representative [410].

The Philippines engaged with the global market earlier than Vietnam, having long-term economic relations with the US and joining the WTO upon its creation, but has been quite stagnant in terms of new market access since then. Vietnam, as a former closed economy with strained US relations, was previously relatively inactive in the global economy, but has taken a more aggressive approach to furthering its trade and investment commitments as of late. While both Vietnam and the Philippines have domestic laws permitting foreign investment (not explored in this chapter), that Vietnam has made more internationally enforceable commitments is important as they are considered more credible to investors than similar policy choices at the domestic level [257]. For example, Vietnam committed 105 service sectors in the General Agreement on Trade in Services (GATS), relative to the 51 service sectors committed by the Philippines, which could also reflect the relative openness of these domestic markets. Additionally, the US-Vietnam agreement provides expansive investor rights enforced by the investor-state dispute (ISDS) system introduced in Chapter 1, which may influence TNC decision-making on where to invest in production and distribution. The Philippines on the other hand has yet to sign any treaty with the US providing investor rights and access to ISDS.

## 6.2.2 **Statistical Analysis**

We performed four difference-in-difference (DID) models before and after Vietnam's trade and investment policy intervention to test for changes in Vietnam's SSCB market and contrast those

changes against the SSCB market in the Philippines. In addition to having the Philippines as a control country for Vietnam, we established a control product for SSCBs, specifically, an aggregate of unprocessed foods, as previous research has demonstrated these areas are less likely to be targeted by FDI from transnational food and beverage companies since they have lower profit margins [260]. To strengthen the connection between changes in domestic SSCB markets as a consequence of changes in trade and investment agreements, we were also interested in SSCB sales growth specific to foreign companies, and utilised domestic company sales as a control variable. In summary, we tested the differences in SSCBs between Vietnam and the Philippines (1); differences between SSCBs and unprocessed foods in Vietnam (2a) and in the Philippines (2b); differences in foreign company sales between Vietnam and the Philippines (3); and differences between foreign and domestic company sales in Vietnam (4a) and in the Philippines (4b). The formulas for the models tested are displayed in Table 5; where T1 represents estimates in the pre-intervention period; T2 represents estimates in the post-intervention period; UPF represents unprocessed foods; and FCS and DCS represent foreign and domestic company sales, respectively:

*Table 5 Formulas for models tested in Vietnam and the Philippines*

MODEL	FORMULA
1	$\Delta\Delta\text{SSCB} = (\Delta\text{SSCB}_{\text{Vietnam}} [\text{SSCBT2} - \text{SSCBT1}] - \Delta\text{SSCB}_{\text{Philippines}} [\text{SSCBT2} - \text{SSCBT1}])$
2A	$\Delta\Delta\text{SSCB}/\text{UPF}_{\text{Vietnam}} = (\Delta\text{SSCB} [\text{SSCBT2} - \text{SSCBT1}] - \Delta\text{UPF} [\text{UPFT2} - \text{UPFT1}])$
2B	$\Delta\Delta\text{SSCB}/\text{UPF}_{\text{Philippines}} = (\Delta\text{SSCB} [\text{SSCBT2} - \text{SSCBT1}] - \Delta\text{UPF} [\text{UPFT2} - \text{UPFT1}])$
3	$\Delta\Delta\text{FCS} = (\Delta\text{FCS}_{\text{Vietnam}} [\text{FCST2} - \text{FCST1}] - \Delta\text{FCS}_{\text{Philippines}} [\text{FCST2} - \text{FCST1}])$
4A	$\Delta\Delta\text{FCS}/\text{DCS}_{\text{Vietnam}} = (\Delta\text{FCS} [\text{FCST2} - \text{FCST1}] - \Delta\text{DCS} [\text{DCST2} - \text{DCST1}])$
4B	$\Delta\Delta\text{FCS}/\text{DCS}_{\text{Philippines}} = (\Delta\text{FCS} [\text{FCST2} - \text{FCST1}] - \Delta\text{DCS} [\text{DCST2} - \text{DCST1}])$

The DID models utilised the average of annual per capita sales estimates over the pre- and post-intervention years. We time-lagged the intervention point two years after accession to allow for changes in the SSCB market to begin to take effect. Vietnam's accession protocol with the WTO as well as in the US bilateral agreement, however, includes commitments in goods and services with varying implementation timelines, some with up to seven years before they are fully implemented, indicating that some effects may become magnified over time. Nevertheless, the

time-lagged intervention year is considered to be 2009 with the effects of the intervention beginning to take effect in 2010, making our pre-intervention period inclusive of the years 1999-2009, and the post-intervention period inclusive of the years 2010-2013 (with the exception of sales data by foreign and domestic companies, which were only available post 2004). Changes in SSCB sales may also be explained by changes in economic growth. To test this relationship we adjusted our models for GDP. We also included a linear time trend in the model to test whether the observed increase in SSCBs is consistent with, or in addition to, the background trend.

After an initial examination of the data it was decided that actual volumes were only applicable for use in the first test (comparing SSCB sales volumes between Vietnam and Philippines), while the remaining analyses would require growth rates to compensate for variability in the scales (*i.e.* contrasting volumes measured in litres (L) and tonnes, and when ranges of values were too large for comparison). All models were performed using STATA v13.0.

### **6.2.3 Sources of Data**

Growth of SSCB sales data were taken from the Euromonitor Database 2014 edition in units of litres per capita sold off-trade (*i.e.* through retail outlets), covering the years 1999-2013. Euromonitor's carbonated beverages category is inclusive of all sweetened (both naturally and artificially) non-alcoholic drinks containing carbon dioxide, including all carbonated products containing fruit juice ("sparkling juices"), but excludes tea-based drink, energy drinks and carbonated bottled water. It is important to note the variety of sweeteners that can be utilised. The first category is nutritive sweeteners or caloric sweeteners, which includes sucrose (sugar cane and sugar beets and its derivatives), as well as agave nectar, corn syrup, dextrose, fructose, glucose, high-fructose corn syrup, honey, inverted sugar, lactose, maple syrup, and molasses [411,412]. Some sugars naturally occur in foods (*e.g.* fructose in fruit juices), while others (*e.g.* sucrose) are added sugars. The second category is nonnutritive sweeteners or noncaloric sweeteners including aspartame, sucralose, saccharin, stevia, acesulfame K, neotame, nectresse and cyclamates [412,413].

Carbonated beverages can be sweetened with any combination of these sweeteners, although high-fructose corn syrup is the most common source according to US data [414]. In this chapter we aim specifically to explore sugar-sweetened carbonated beverages (*i.e.* nutritive or caloric sweeteners)

given their link to diabetes and obesity. While Euromonitor does not disaggregate the data by caloric and noncaloric sweeteners, an examination of the SSCB market data between 2009 and 2014 by brand shares reveals that noncaloric or ‘diet’ brands comprise only 1.4% of the market in Vietnam and 2.3% of the market in the Philippines (data were unavailable before 2009). While it is not possible to remove these diet products from the aggregated data we believe that their contribution remains negligible.

The control product established for SSCBs for the first two tests, that is unprocessed foods (*i.e.* excluding packaged and processed products), was created by aggregating sales data for fresh eggs, fruits, meats, nuts, seafood, and vegetables. In the second two tests we disaggregated the SSCBs sales data into sales attributable to foreign and domestic beverage companies to examine growth specific to TNCs. Import and export data were taken from the UN Comtrade database. SSCBs are classified with non-alcoholic beverages not including water, fruit juices, vegetable juices, or milk as HS Code 2202.90.90.

## 6.3 Results

### 6.3.1 Comparing Sugar-Sweetened Carbonated Beverage Markets in Vietnam and the Philippines

Chart 4 shows the trends in SSCB sales in Vietnam and the Philippines before and after Vietnam’s trade and investment policy intervention. Average per capita sales of SSCBs in Vietnam rose from 1.9L (95% CI: 1.6 to 2.2) to 3.9L (95% CI: 3.4 to 4.3) post-intervention. Over the same period per capita sales in the Philippines dropped from 28.7L (95% CI: 28.4 to 29.0) to 26.1L (95% CI: 25.6 to 26.6). The DID model revealed a significant difference between the two countries pre- and post-intervention (4.6L, 95% CI: 3.8 to 5.4,  $p=0.008$ ) that was robust to adjustments for GDP and underlying time trends (see Table 6).

Chart 4 Sugar-sweetened carbonated beverage sales in Vietnam and the Philippines before and after Vietnam's trade and investment policy intervention

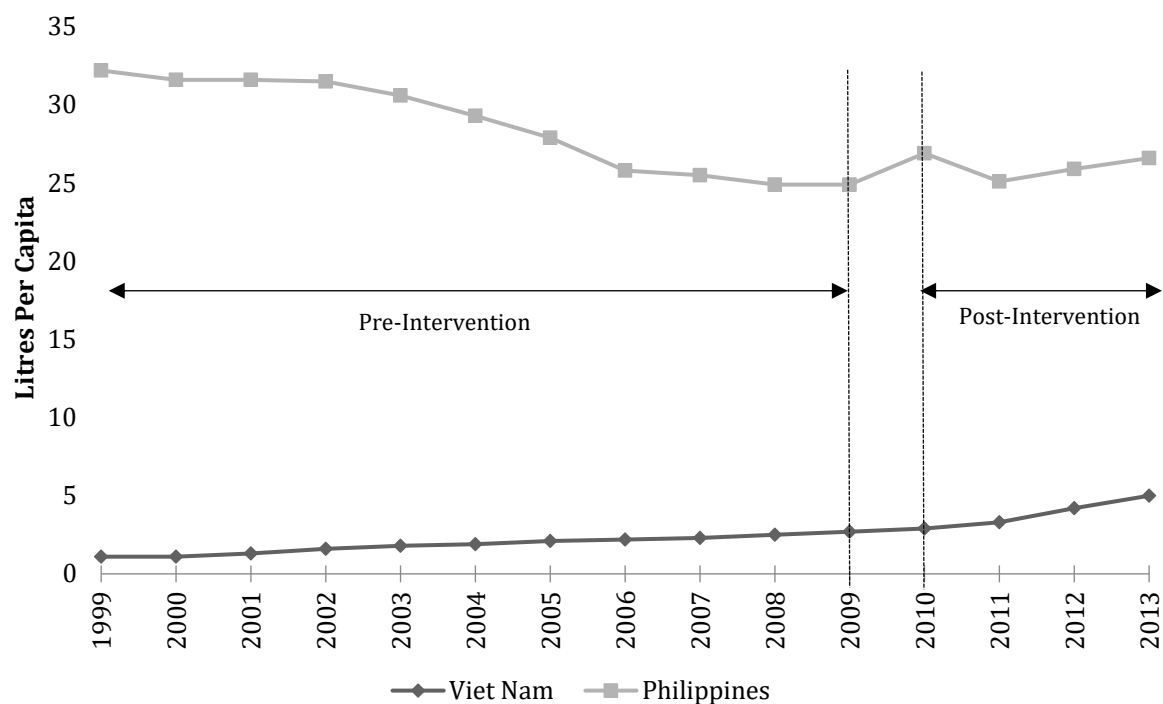


Table 6 Pre and post differences in sugar-sweetened carbonated beverage sales between Vietnam and the Philippines

	UNADJUSTED	ADJUSTED FOR GDP	ADJUSTED FOR GDP AND TIME TRENDS
BETWEEN COUNTRY DIFFERENCE-IN-DIFFERENCE ESTIMATE	4.6** (1.6)	4.6** (1.5)	4.3** (1.3)
R-SQUARED	0.98	0.98	0.98

Notes: \* p<0.05, \*\* p<0.01, \*\*\* p<0.001

### 6.3.2 Comparing Sugar-Sweetened Carbonated Beverage Markets with Unprocessed Food Markets in Vietnam and the Philippines

Chart 5 and Chart 6 display the trends in sales growth of SSCBs and unprocessed food within Vietnam and the Philippines, respectively. There was substantial sales growth in SSCBs in Vietnam post-intervention, with a growth rate of 12.1% (95% CI: 11.1 to 13.1) relative to the prior growth rate of 3.3% (95% CI: 2.7 to 4.0); while sales growth in the unprocessed food category remained largely unaffected, with a post-intervention rate of 2.1% (95% CI: 1.1 to 3.1) and a 2.2%

growth rate prior (95% CI: 1.6 to 2.9). This contrasts with the data shown for the Philippines, which equally had little movement in the growth rates of unprocessed food from pre-intervention (1.5%; 95% CI: 1.1 to 1.9) to post-intervention (2.1%; 95% CI: 1.5 to 2.8); but showed a tendency for negative growth rates in SSCB sales pre-intervention (-2.8%; 95% CI: -3.2 to -2.4); and no discernible trend towards increased growth post-intervention (1.0%; 95% CI: 0.4 to 1.7). The DID model supported a significant difference between the two categories in Vietnam (8.9%; 95% CI: 7.3 to 10.6,  $p=0.011$ ), robust to adjustment for GDP and underlying time trends, and no significant difference within the Philippines (3.2%; 95% CI: 2.1 to 4.3,  $p=0.141$ , see Table 7).

Chart 5 Growth in sugar-sweetened carbonated beverage and unprocessed food sales before and after Vietnam's trade and investment policy intervention

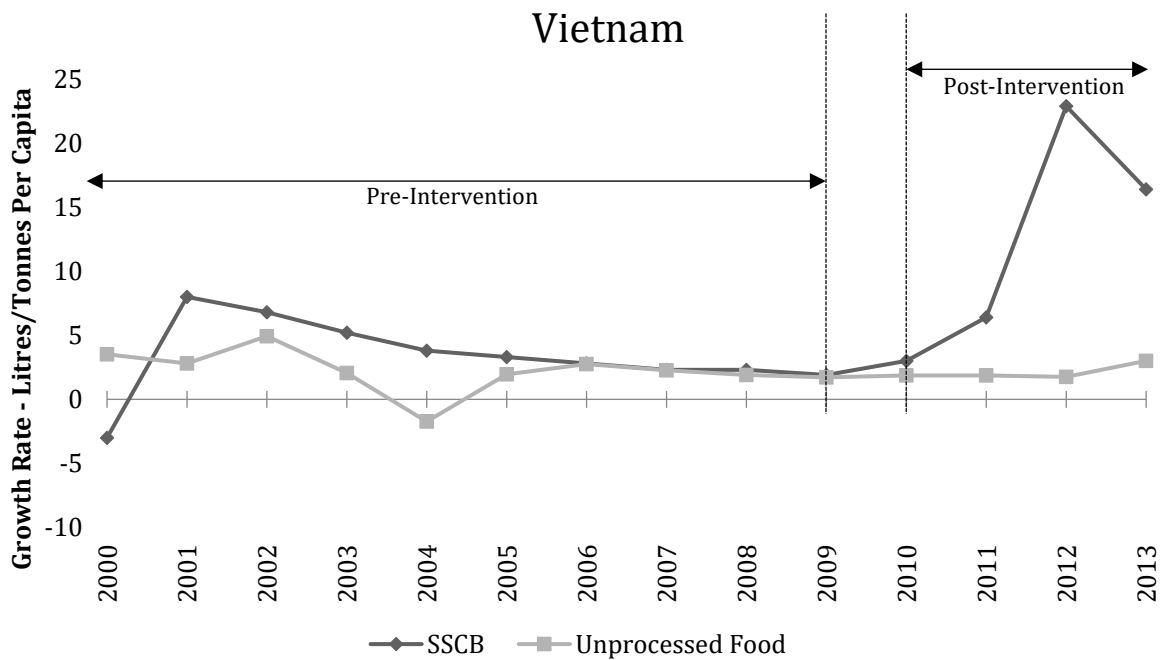


Chart 6 Growth in sugar-sweetened carbonated beverage and unprocessed food sales in the Philippines

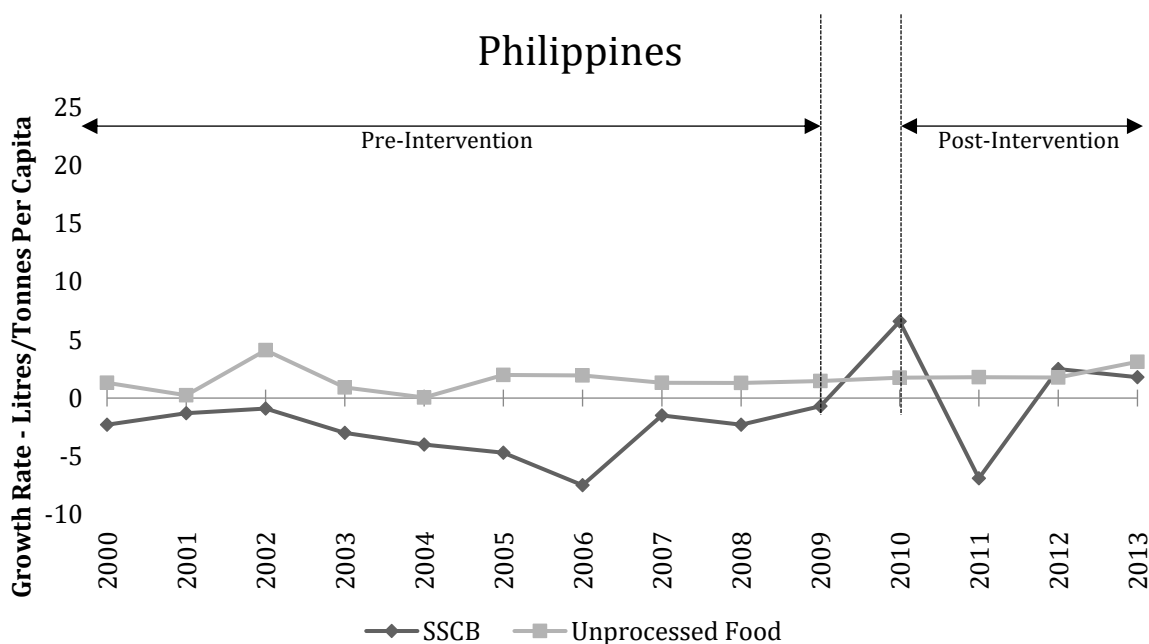


Table 7 Pre and post differences in sugar-sweetened carbonated beverage and unprocessed food sales within Vietnam and the Philippines

	VIETNAM			PHILIPPINES		
	Unadjusted	Adjusted for GDP	Adjusted for GDP and time trends	Unadjusted	Adjusted for GDP	Adjusted for GDP and time trends
WITHIN COUNTRY DIFFERENCE-IN-DIFFERENCE ESTIMATE	8.9* (3.2)	8.9* (3.2)	8.9* (3.4)	3.2 (2.1)	3.2 (2.1)	3.1 (2.2)
R-SQUARED	0.47	0.47	0.47	0.45	0.45	0.45

Notes: \* p<0.05, \*\* p<0.01, \*\*\* p<0.001

<sup>1</sup>Aggregate of sales growth in tonnes of eggs, meats, seafood, fruits, vegetables and nuts

### 6.3.3 Comparing Foreign Company Sales Growth in Vietnam and the Philippines

Chart 7 presents the trends in sales growth in millions of litres of SSCBs by foreign companies in Vietnam and the Philippines. Foreign company sales growth rates in Vietnam rose rapidly post-

intervention from 6.7% (95% CI: 4.9 to 8.5) annually to 23.1% (95% CI: 21.1 to 25.1), a level of growth unmatched in the Philippines, which showed a modest rise from -0.8% (95% CI: -2.58 to 1.0) annually to 3.6% (1.6 to 5.7). The unadjusted DID model failed to find a significant difference ( $p = 0.057$ ); although after adjusting for GDP and underlying time trends, the difference between the two countries differences pre- and post-intervention was significant (12.3%; 95% CI: 8.6 to 16.0,  $p= 0.049$ , see Table 8).

Chart 7 Growth in foreign sugar-sweetened carbonated beverage sales in Vietnam and the Philippines before and after Vietnam's trade and investment policy intervention

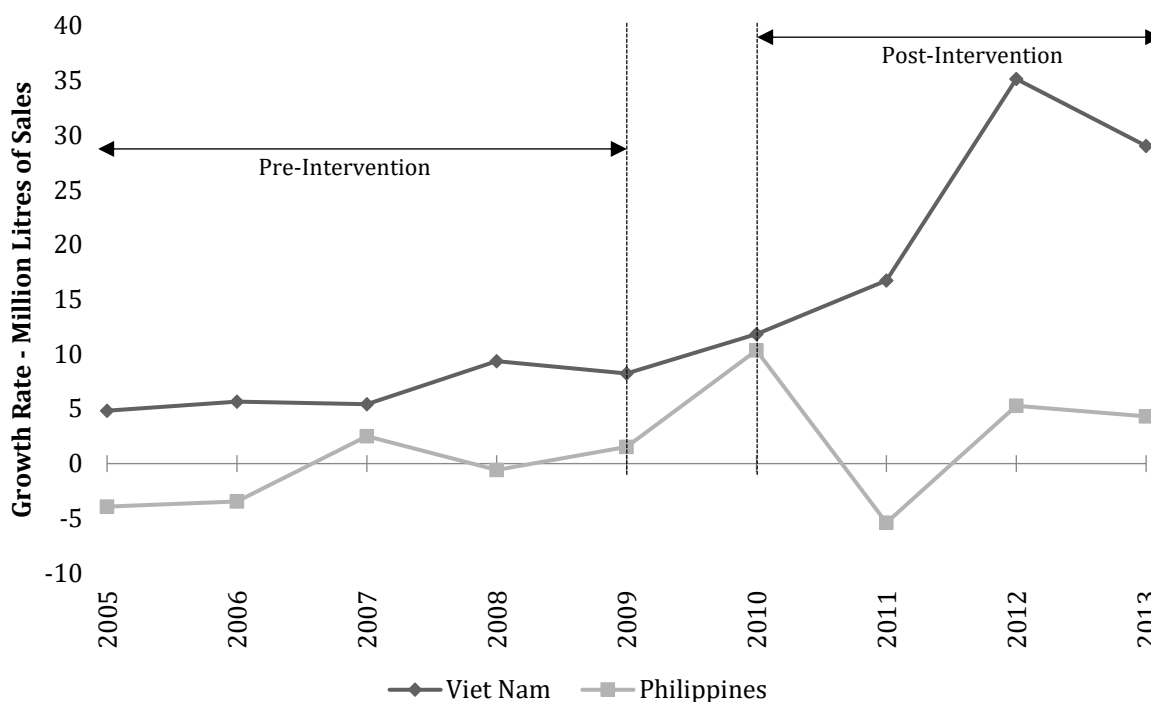


Table 8 Pre and post differences in foreign sugar-sweetened carbonated beverage sales between Vietnam and the Philippines

	UNADJUSTED	ADJUSTED FOR GDP	ADJUSTED FOR GDP AND TIME TRENDS
BETWEEN COUNTRY DIFFERENCE-IN-DIFFERENCE ESTIMATE	12.1 <sup>1</sup> (5.8)	12.4* (5.4)	12.3* (5.6)
R-SQUARED	0.73	0.78	0.78

Notes: \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$  <sup>1</sup> $p = 0.057$

### 6.3.4 Comparing Foreign with Domestic Company Sales Growth in Vietnam and the Philippines

Trends over time in the sales growth of SSCBs in millions of litres for all foreign and domestic beverage companies for Vietnam and the Philippines are presented in Chart 8 and Chart 9, respectively. Sales growth for foreign companies in both countries are reported above. Sales growth for domestic companies declined in Vietnam, from 13.1% (95% CI: 10.2 to 16) annually to -5.8% (95% CI: -9.1 to -2.6) post-intervention. The Philippines also had a considerable decline in domestic sales growth over the same period, from 18.0% (95% CI: 15.1 to 20.9) annually to 2.3% (95% CI: -1.0 to 5.6). The DID model supported a significant difference between foreign and domestic sales growth in Vietnam (35.4%; 95% CI: 29.3 to 41.5,  $p=0.002$ ), robust to adjustment for GDP and underlying time trends, and no significant difference within the Philippines (20.1%; 95% CI: 11.0 to 29.2,  $p=0.170$ , see Table 9).

*Chart 8 Growth in foreign and domestic sugar-sweetened carbonated beverage sales before and after Vietnam's trade and investment policy intervention*

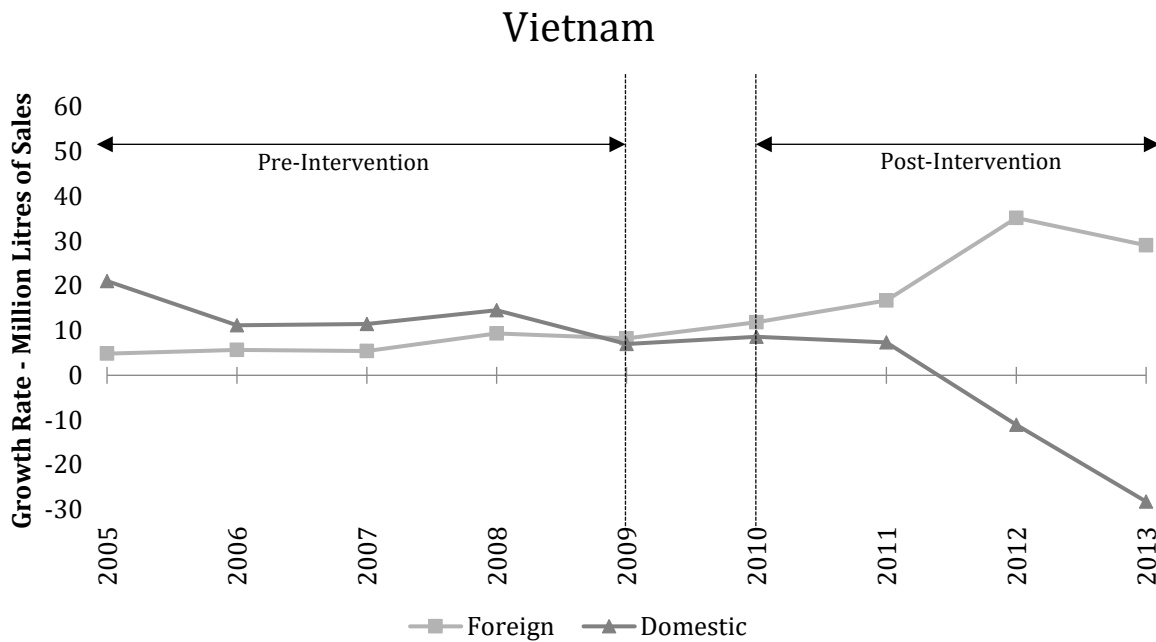


Chart 9 Growth in foreign and domestic sugar-sweetened carbonated beverage sales in the Philippines

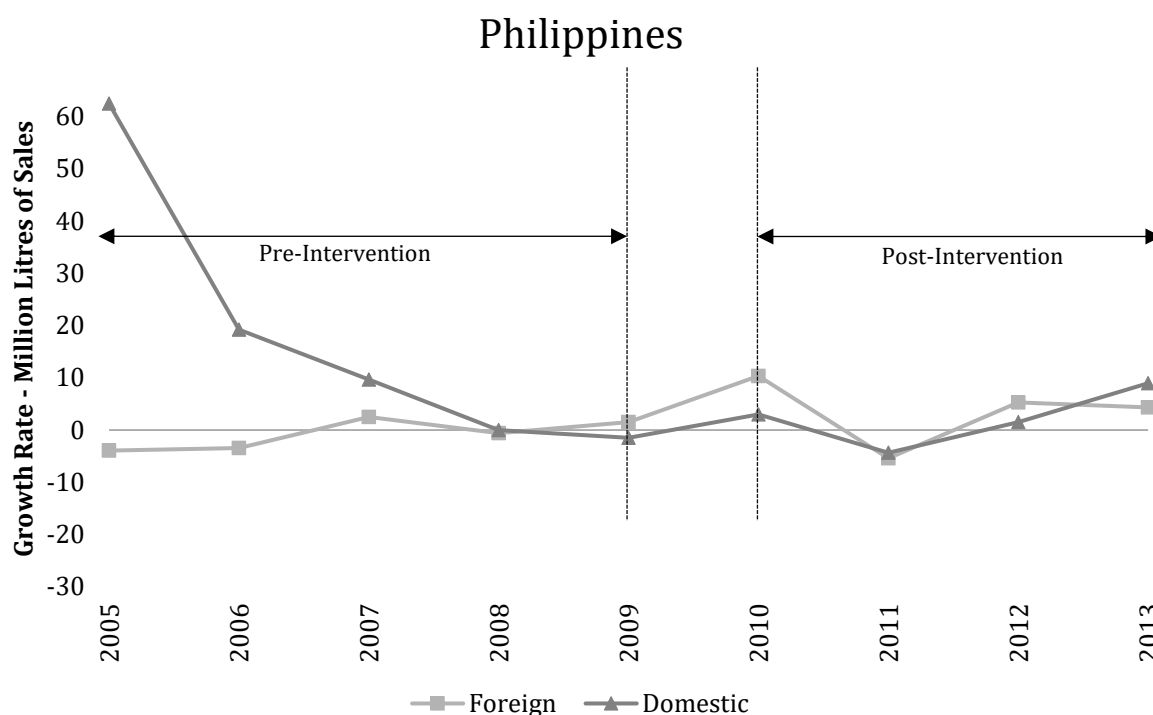


Table 9 Pre and post differences in foreign and domestic sugar-sweetened carbonated beverage sales within Vietnam and the Philippines

	VIETNAM			PHILIPPINES		
	Unadjusted	Adjusted for GDP	Adjusted for GDP and time trends	Unadjusted	Adjusted for GDP	Adjusted for GDP and time trends
DIFFERENCE-IN-DIFFERENCE ESTIMATE	35.4** (9.4)	35.0** (9.2)	33.6** (8.85)	20.1 (13.9)	19.6 (13.7)	21.7 (13.1)
R-SQUARED	0.56	0.61	0.68	0.25	0.33	0.44

Notes: \* p<0.05, \*\* p<0.01, \*\*\* p<0.001

### 6.3.5 Foreign and Domestic Company Concentration in Vietnam and the Philippines

Sales of SSCBs in the Philippines are more heavily concentrated within foreign companies (98.3% of all sales in 2013, up from 94.5% in 2004) than in Vietnam (82.6% of all sales in 2013, up from

74.0% in 2004). Within the Philippines, Coca-Cola is the dominant player accounting for 72.1% of all sales in 2013 (a slight drop from 74.2% in 2004); PepsiCo is a distant second, with 14.3% of sales in 2013 (relatively unchanged from 14.4% in 2004). Canadian company Cott Corp saw a notable increase to 11.9% of sales in 2013 (up from 5.9% in 2004) ostensibly drawn from sales previously captured by the *other* category, which dropped from 5.4% to 1.5% over this period. Domestic brand Zest-O-Corp holds a minuscule percentage of the market, growing from 0.1% in 2004 to 0.3% in 2013.

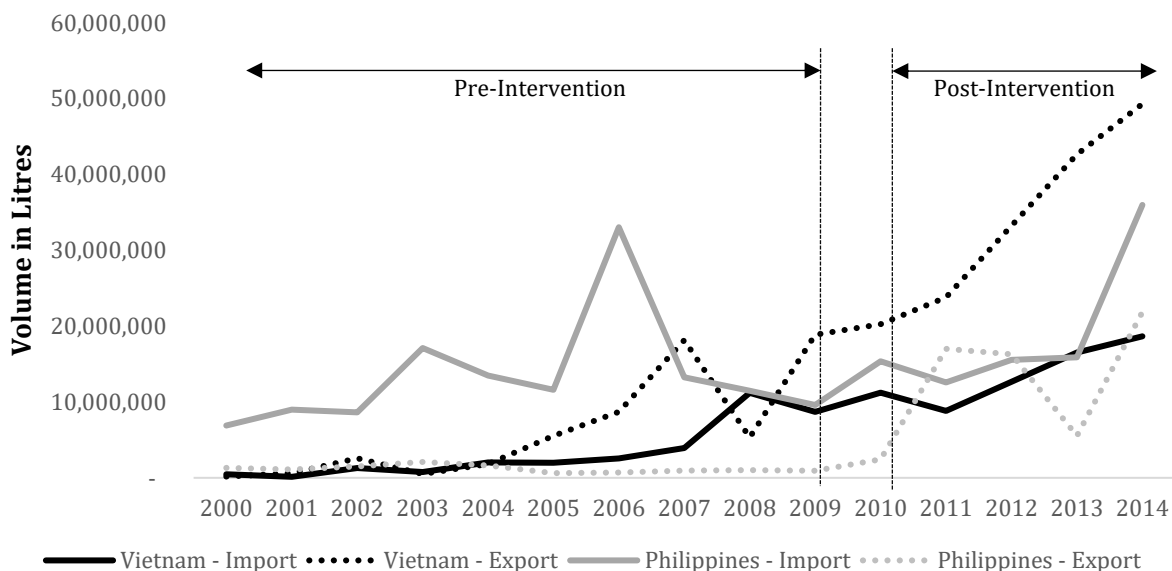
PepsiCo and Coca-Cola are in closer competition in Vietnam, holding respectively 40.1% and 36.8% of all sales in 2013, a small change from 37.4% and 35.0% in 2004. Vietnamese domestic companies, Chuong Duong Beverages JSC and Saigon Beverages JSC, which combined held between 13% and 21% of the market share from 2004 to 2012, folded after 2012. A new domestic company Saigon Alcohol Beer and Beverages Corp appeared on the market in 2013, although it accounts for only 7.8% of the market share. A portion of this forfeited market appears to have been captured by PepsiCo, as well as Chinese company Uni-President Enterprises Corp (holding 4.4% of market share in 2013) and Peruvian company Aje Group (with 1.2% of market share). The *other* category, while in flux during this period, held 9.4% of market share in both 2004 and 2013.

### **6.3.6 Imports and Foreign Direct Investment as Drivers of SSCB Markets**

The results above indicate significant changes in Vietnam's SSCB market after its trade and investment policy intervention, changes which were not seen in the same period in the Philippines, which had undergone its own trade and investment policy intervention over a decade earlier. Having demonstrated support between trade and investment agreements and the SSCB market, this final section explores whether these market changes can be attributed to increased imports and FDI inflows, theoretically, subsequent to tariff reductions and provisions promoting and protecting foreign investment.

Vietnam maintains higher tariffs on the soft drinks category than the Philippines. The WTO reports that while the Philippines has an average applied tariff of 7.5% on these products, Vietnam has an average applied tariff of 27.5%. At the time of its WTO accession Vietnam was bound to the rate of 40%, but committed to reducing this to 20% by 2012, which may help explain the increased volume of imports displayed in Chart 10.

Chart 10 Soft drink import and export flows in Vietnam and the Philippines before and after Vietnam's trade and investment policy intervention

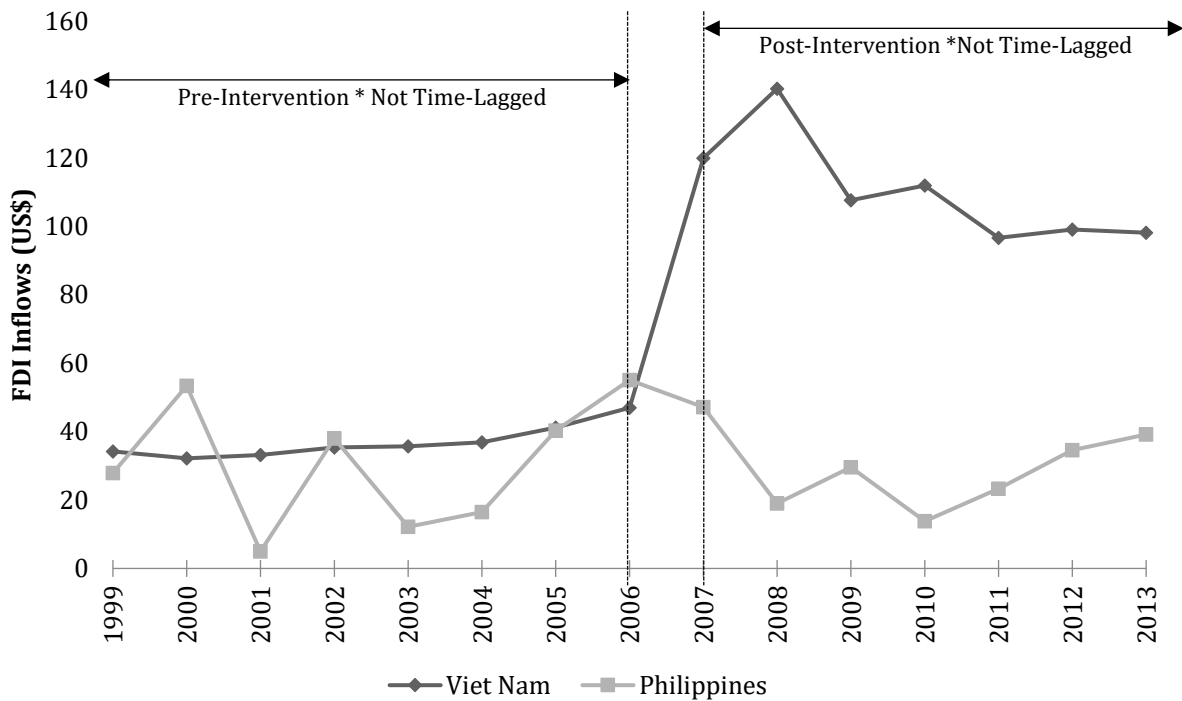


Vietnam continues to protect its soft drink sector through higher tariffs relative to the Philippines. Both countries are members of the ASEAN Trade in Goods Agreement (ATIGA) which entered into force in May 2010, in which Vietnam committed to a bound tariff rate of 5% while the Philippines removed tariffs on soft drinks altogether (previously bound to 20% in WTO). The Philippines' maintenance of lower tariffs over time may help explain their higher volume of imports. What is of particular note in Chart 10 is the rapid increase in exports from Vietnam, a trend beginning in the years leading up to its trade and investment policy intervention and rising steeply thereafter. While the Philippines also saw an increase in volume of exports after 2010, it has been more variable and less dramatic than Vietnam. One contributing factor may be increased FDI in soft drink production in Vietnam, capable of increasing supply for both the domestic and export market.

This section will briefly explore the data without time-lagging the intervention, as changes in FDI may be more immediate than ascertaining market-level changes following the introduction of FDI. Prior to the implementation of Vietnam's trade and investment intervention, from 1999 to 2006, FDI inflows into Vietnam averaged about US\$37.0 per capita annually. Following accession, the average inflow rose to US\$110.6 per capita annually in the years 2007 to 2013 (see Chart 11). While it is not possible to obtain a detailed sectoral breakdown, FDI from the beverage industry is

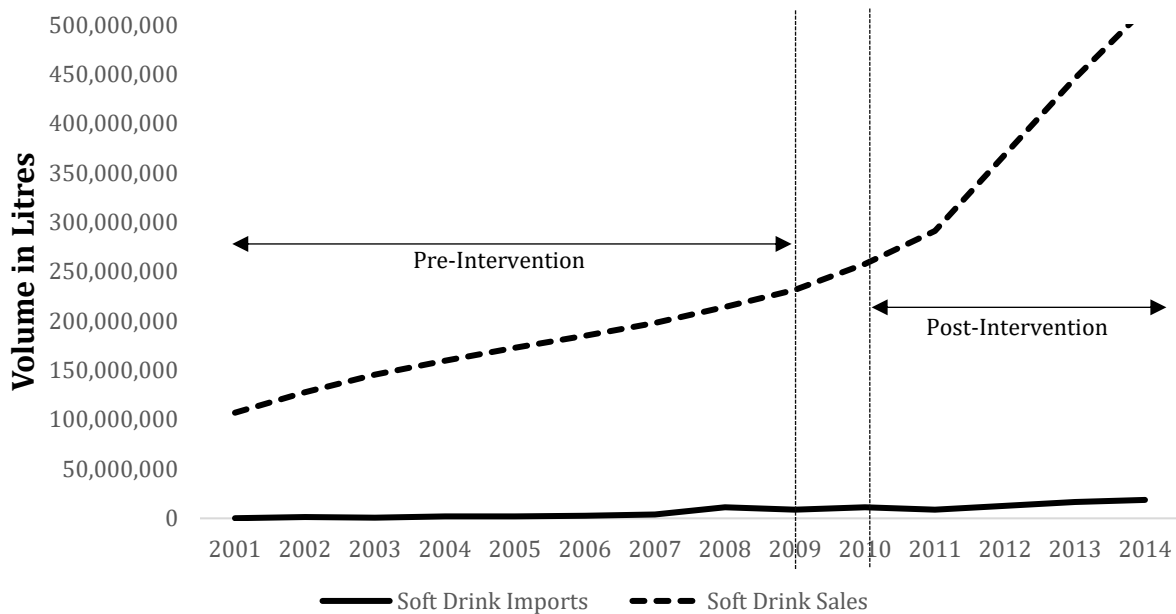
a potential source of this increase. Vietnam is projected to be one of the largest growth markets for Coca-Cola and PepsiCo over the next few years [403,404]. In contrast, the Philippines did not experience a marked change in FDI from 1999 to 2013.

Chart 11 Foreign direct investment inflows in Vietnam and the Philippines before and after Vietnam’s trade and investment policy intervention



Additionally, if the increased SSCB market in Vietnam is a result of increased FDI we would expect to see domestic sales rising at a faster rate than the growth in imports, such that the increased demand in domestic sales was not being met by increased foreign imports but rather by increased domestic production. Chart 12 demonstrates that soft drink imports (which includes SSCBs) into Vietnam have not kept pace with the increase in domestic sales meaning production must be increasing locally. Furthermore, as demonstrated in Chart 8, foreign company sales growth rates in Vietnam climbed from 6.7% annually pre-intervention to 23.1% post-intervention, while sales growth for domestic companies declined from 13.1% annually to -5.8% over the same period. This suggests that domestic market growth may be due to increased FDI from TNCs, primarily Coca-Cola and PepsiCo, which can account for both the increased domestic consumption and rising level of exports.

Chart 12 Soft drink imports and sales in Vietnam before and after Vietnam's trade and investment policy intervention



These findings on FDI are consistent with available market reports from Coca-Cola and PepsiCo. In 2012 Coca-Cola announced that they would invest US\$300 million into Vietnam, bringing their total investment up to US\$500 million since 2010 [415]. The supply chain manager for Coca-Cola Vietnam remarked that growth has been very fast since 2009 and that their facilities have struggled to meet the demand. Coca-Cola has made investments in its existing plants to maximise production, increasing hourly output from 24,000 bottles to 28,000 bottles in Ho Chi Minh City, and from 30,000 bottles to 35,500 bottles in Hanoi [416]. The company has also invested in new cold-drink coolers to improve sales in local retailers [415]. PepsiCo announced a new investment of US\$250 million into Vietnam as of 2011 [417], and has opened three new facilities since 2009, a number equal to what it had opened since entering Vietnam in 1994 [418,419]. The new facilities include one that was announced to be the largest food and beverage production plant in Asia [417]. Prior to these investments, in the first approximately 16 years that both companies operated in Vietnam, Coca-Cola had invested less than US\$150 million and PepsiCo around US\$250 million, amounts equal to, or considerably less (in the case of Coca-Cola) than what they have committed in just the past few years [417,420]. Publicly available announcements of investments into the Philippines have been sparser. In 2013, Coca-Cola announced a commitment to invest US\$1

billion into the Philippines over a 5 year period, where their original investment was considerably larger, with 22 plants to maintain [421]. This came in the same month that Coca-Cola announced it would be moving its concentration plant operations from the Philippines to Singapore, citing a need to improve efficiencies [422]. There was an announcement from PepsiCo that they would be investing PHP650 million (approximately US\$14.5 million) into the Philippines, although this was limited to its snack foods brands, rather than an investment in beverage manufacturing [423].

In summary, tariff reductions may be contributing to increased volumes of imports of SSCBs into both Vietnam and the Philippines. Additionally, Vietnam may also be creating a more investor-friendly climate through trade and investment agreements, inclusive of expansive investor rights and ISDS systems. Vietnam has demonstrated a continued commitment to comprehensive economic integration as a signatory member of the TPP, alongside having a promising emerging market for investors that is not yet saturated with profitable products such as HHCs like SSCBs. Widespread changes to Vietnam's market access, investment, and domestic policy environment through trade and investment agreements may explain increased FDI inflows from companies like Coca-Cola and PepsiCo that are contributing to increased SSCB production, ultimately driving growth in its domestic SSCB market, as well as rising volumes of exports.

#### **6.4 Discussion**

Our analyses revealed two main findings. First, after Vietnam's accession to the WTO, alongside a bilateral trade and investment agreement with the US, there was a significant increase in sales of SSCBs that was not seen in the control country, Philippines, or in other food sectors we would expect to be unaffected (*i.e.* unprocessed foods). Second, the main beneficiaries of this growth were foreign beverage companies, namely Coca-Cola and PepsiCo, while domestic beverage companies lost market share. These findings together provide support for the link between trade and investment agreements and changing food environments, particularly TNC concentration in HHC markets. There is evidence to suggest that these changes in SSCB markets may be driven in part by increased import flows following tariff reductions, and increased FDI inflows following provisions related to the promotion and protection of investment.

Worth noting is that the Philippines, which economically integrated with both the WTO and the US considerably sooner, has a much larger domestic SSCB market relative to Vietnam. This is

consistent with previous findings that trade and investment relations, particularly those with the US, lead to changes in food environments more closely mirroring those in the US [186]. Vietnam had delayed trade and investment relations with both the US and the WTO, which may explain its relatively small, albeit rapidly growing, SSCB market.

Over the intervention period per capita sales of SSCBs per person rose by 2 litres annually in Vietnam. Nutrition information provided by Coca-Cola, which distributes the top selling SSCB in Vietnam (Coca-Cola, 22% of market share) reports 39 grams of sugar in 12 fluid ounces. Thus 2 litres of Coca-Cola would potentially introduce approximately 220 grams of added caloric sugar per capita per year into the Vietnamese diet wholly from SSCBs. This is not a dramatic increase, although Euromonitor predicts that consumption will rise by another 7 litres per capita per year by 2019, which could introduce another 770 grams of added sugar. Equally, the Philippines larger SSCB market may be an indicator of the effects of prolonged exposure.

Moreover, SSCBs are not the only product introducing increased availability of sugar in the beverage market, in Vietnam one of the fastest growing soft drink sectors are ready to drink teas with per capita sales rising from 0.2 litres annually in 2000 to 9 litres in 2013, almost double carbonate sales, making this another important area to watch for dietary change. Vietnam, as a promising emerging market, will also continue to be a prime target for foreign investors looking for growth rates no longer seen in developed countries [398,403,404]. Although the data presented in this paper are limited to carbonated beverages sold in retail stores, Vietnam is expected to see further development of its consumer foodservices sector, particularly with leading fast food chains, including KFC, Lotteria, and Jollibee, with whom both PepsiCo Vietnam and Coca-Cola Beverages Vietnam Co Ltd have been collaborating. Fountain sales of soft drinks are forecasted to see increased growth in the next few years making this an important area to watch for increased sales and consumption of SSCBs and an important area for future research [405].

#### **6.4.1 Implications for Vietnam if the Trans-Pacific Partnership is Ratified**

Our key findings, namely the growth of Vietnam's SSCB market captured chiefly by foreign companies, have important implications for Vietnam in light of the recently signed TPP. Among the signatory states, Vietnam is the most likely to struggle with adequate policy capacity to implement and adhere to the level of regulatory coherence and administrative requirements

mandated by the agreement [424]. TPP signatory states are economically, geographically, and demographically diverse; with GDP per capita adjusted for purchasing power parity ranging from US\$4,000 in Vietnam to over US\$62,000 in Singapore [407,425]. Vietnam is an especially vulnerable member, with a GDP per capita over seven thousand dollars less than the next economically weakest member, Peru [426].

One of the most controversial elements of the TPP is the inclusion of the ISDS mechanism. ISDS allows foreign investors to sue national governments to seek financial recourse against state actions addressing public welfare that may unfavorably affect their investment. This has many in public health concerned for the viability of introducing new regulations to control increased volumes of ultra-processed food and beverages [32,427], particularly among developing countries which are both resource-constrained and key markets for such products, such as Vietnam.

Vietnam has already abandoned a policy initiative to address its growing SSCB market which may have been related to the perception of a possible trade dispute within the WTO. The Vietnamese government attempted to introduce an excise tax on all carbonated soft drinks on the grounds that they posed a health risk, however it was abandoned in July 2014 just months after the American Chamber of Commerce, representing American carbonated beverage companies, released their response stating that “[t]here is a possibility that the tax could be found by international trade bodies to violate Vietnam’s free trade agreements, and it will certainly erode foreign investors’ confidence in Vietnam’s commitment to the national treatment principle [428].” Although it is unlikely that the American Chamber of Commerce was the determining factor in Vietnam’s decision to abandon the policy, it may foreshadow for Vietnam the influence of foreign companies in policy development in the future and the possibility of regulatory chill outcomes explored in the next chapter. While Vietnam already has an ISDS mechanism with the US through a previous bilateral trade and investment agreement, the set of rights for investors has evolved since the agreement was signed in 2001. An analysis of the investment chapter in the TPP demonstrated that its high standards go beyond the majority of international investment agreements (IIAs) previously concluded by TPP members [429], thus future analyses may find that Vietnam will experience new vulnerabilities for investor disputes under the TPP.

#### **6.4.2 Limitations**

A randomised controlled trial of national trade and investment policy and population dietary outcomes would be inconceivable, thus we made constructive use of naturally occurring conditions in Vietnam and the Philippines to help estimate such effects. Natural experiments can yield valuable evidence where it would be otherwise unattainable. Future analyses of this nature could be strengthened by excluding alternative explanations, including a wider range of falsification tests, or the use of a synthetic control (a composite of multiple regions), rather than a single control country. Additionally, there may have been one or more significant events that took place in Vietnam that may equally or better explain our findings that were outside of the knowledge and control of the researchers.

Attributing specific patterns in FDI to trade and investment agreements is challenging with even the most sophisticated econometric techniques which is due in part to the long-term implementation periods of these agreements which make it challenging to capture all FDI activity attributable to the agreement; the difficulty in obtaining disaggregated FDI data due to confidentiality provisions; and the modelling challenges of isolating the effects of these agreements from other variables [430]. Deciding where to introduce the time of intervention is also complicated as it may take longer than two years to begin realising changes in consumer environments, and equally, changes may have occurred in the environment leading up to treaty ratification as domestic policies were modified to meet the requirements of ratification. Our findings are limited by the restricted range of data available and will need further analysis with additional data points to validate.

The current analysis has provided additional quantitative evidence for the link between trade and investment agreements and changes to the food environment, namely SSCBs. The concurrent nature of the work conducted in this dissertation, however, meant that the analytical component of this chapter was completed before the development of the conceptual framework and review of evidence in Chapter 4. Accordingly, this analysis did not benefit from the guidance of how to develop more robust evidence through more detailed examinations of changes to domestic regulatory policy from trade and investment provisions and the outcomes on food environments. Revisiting this data in more depth is a viable option for future research. Ongoing efforts to monitor the impacts of trade and investment agreements on food environments [76] will assist in shifting the discourse for action to address the growing burden of diet-related noncommunicable diseases

away from individual-oriented strategies to systemic frameworks that recognise structural drivers, including TNCs and their supporting neoliberal policy preferences. Unifying efforts to build a body of evidence empirically demonstrating the contribution of trade and investment policies to changing food environments and patterns of health outcomes is a first step in being able to make defensible policy decisions to mitigate these impacts, including reforming trade and investment provisions to minimise negative externalities for health.

This chapter was the second of three analytical components of this dissertation. It explored the manifestation of TNC interests incorporated into trade and investment agreements, investigated in Chapter 5, as provisions that maximise the profitability of TNCs and facilitate the spread of HHCs. This chapter provides support for the motivations of economic elites in international trade and investment agreements central to the theoretical framework in Chapter 2, that is, increased sales in global markets. The theoretical framework was also essential in driving the analytical approach taken in this chapter by emphasising the political-economic context of HHC consumption grounded in a neoliberal market ideology of free trade and the ‘commodification’ of food. This chapter aimed to challenge this ideology of free markets and individual choice by changing the conversation from ‘individuals drink too much sugar-sweetened beverages’ to ‘our institutional structures support the influx of unhealthy food and beverages paired highly influential advertising to increase their desirability in the economic interest of elite transnational actors’. This chapter also contributes empirical support to the causal pathways proposed in the conceptual framework in Chapter 4. The next chapter, and the last of the analytical components, explores the manifestation of TNC interests in trade and investment agreements through expansive investor rights enforced through the international investment arbitration system, rights that may provide enhanced protection for the investments discussed in this chapter. Chapter 7 will explore the implications of these rights for health policy and options for strengthening the right to regulate within the international investment system.

## **CHAPTER 7**

TRANSNATIONAL CORPORATIONS, INVESTOR RIGHTS, AND INVESTOR-STATE  
DISPUTE SETTLEMENT: AN EXPLORATION OF TRIBUNAL AWARDS IN  
INVESTOR-STATE ARBITRATION AND THE IMPLICATIONS FOR DOMESTIC  
HEALTH POLICY

**“THERE IS LITTLE USE IN GOING TO LAW WITH THE  
DEVIL WHILE THE COURT IS HELD IN HELL.”**

- Humphrey O'Sullivan

## 7.1 Introduction

The material in the previous two chapters explored points of interaction between transnational corporations (TNCs) and international trade and investment agreements: first, Chapter 5 investigated the role of Canadian food industry in the negotiation of the Trans-Pacific Partnership (TPP) and how its interests were reflected in the final text of the Agreement; and second, Chapter 6 explored trade and investment agreements as a facilitator for TNCs to invest in the global production of health-harmful commodities (HHCs), specifically, sugar-sweetened carbonated beverages (SSCBs) in Vietnam and the Philippines. The current chapter is the third and final piece exploring points of interaction between TNCs and international trade and investment agreements before turning to the conclusions produced from this body of work. This chapter is primarily concerned with the third argument of this thesis, that international trade and investment agreements are empowering TNCs at the expense of domestic public policy through an expansive set of rights for foreign investors enforced by the highly problematic investor-state dispute settlement (ISDS) arbitral system.

The investor-state arbitration system is one of the contentious provisions of contemporary regional trade and investment agreements (RTAs) at the core of the new constitutionalism, that is, the entrenchment of an expanded set of private property rights through the empowerment of an international group of arbitrators to protect foreign investor rights against actions of the state. As noted in Chapter 1, it is the largest companies (whose very access to ISDS defines them as TNCs) with over US\$10 billion in annual revenue who have profited the most from ISDS compensation. TNCs have been awarded over US\$6.5 billion to date or 65% of all compensation awarded in these cases [70]. The ISDS legal industry, including lawyers and arbitrators, are the second largest beneficiary of this system, having earned over US\$1.7 billion in total, or US\$8 million per case [70]. The analysis in this chapter will explore key investor rights provided by international investment agreements (IIAs) through an examination of arbitral awards adjudicating those rights. This chapter demonstrates one of the processes created and sustained by international trade and investment agreements that prioritises TNC interests over state interests by undermining state capacity to execute its sovereignty in policy-making areas affecting health.

### 7.1.1 Investor Rights

There are two main components to an IIA, a set of substantive rights provided for foreign investors, and a system of international arbitration to enforce those rights. States party to an IIA provide rights to foreign investors with the nationality of another state party to the IIA (the home state) with investments in their state (the host state). Substantive rights for foreign investors include, among others, the right to fair and equitable treatment (FET) or a minimum standard of treatment, protection against expropriation without compensation, the right to full protection and security, protection against unreasonable or arbitrary measures, an umbrella clause, and the right to national treatment and most-favoured nation.

The right to full protection and security requires due diligence, or the absence of negligence, on the part of the state in relation to ensuring the physical protection of a foreign investment [431]. Some treaties also provide protection against ‘unreasonable’ or ‘arbitrary’ measures that significantly damage the value of a foreign investment [432]. The inclusion of a so-called ‘umbrella clause’ results in the expansion of the subject matter that would fall within the jurisdiction of the dispute procedures provided by an IIA. An IIA drafted without an umbrella clause would indicate that a dispute can only be initiated under the agreement based on a claim that an obligation contained within the agreement itself has been breached. This scope for dispute settlement can be expanded to cover other obligations undertaken by states to investors with the inclusion of an umbrella clause to cover, ‘any dispute relating to investments,’ ‘any obligation the state may have entered to,’ ‘any obligation the state has assumed’ and other comparable formulations [433]. The right to national treatment and most-favoured nation (MFN) protects against discriminatory treatment. The former ensures treatment no less favourable for foreign investors relative to domestic investors operating in like circumstances [434], and MFN operates similarly to ensure equal treatment between foreign investors operating in like circumstances [435]. The right to FET and protections against the state expropriating a foreign investment without compensation are the focus of this chapter and will be explored in depth in later sections.

The rights listed above are the ones most frequently cited in international arbitration, although a number of other rights exist in many IIAs, including: rights regarding the transfer of funds related to an investment; protection against losses sustained due to insurrection, war, or similar events; and the right to freedom from performance requirements imposed by the host state on an

investment such as requirements to transfer technology, operate in a joint venture with a local business, and meet mandatory minimum targets for local procurement of goods and services [41,436]. Table 10 sets out the number of breaches alleged for each right, as well as the number of times a breach has been found based on data for 422 cases initiated between 1987 and 2015 provided by UNCTAD's *Investment Policy Hub* [41]. The right to FET and protection against illegal expropriation (both direct and indirect) are the rights most frequently cited by investors, comprising 51% of all alleged breaches.

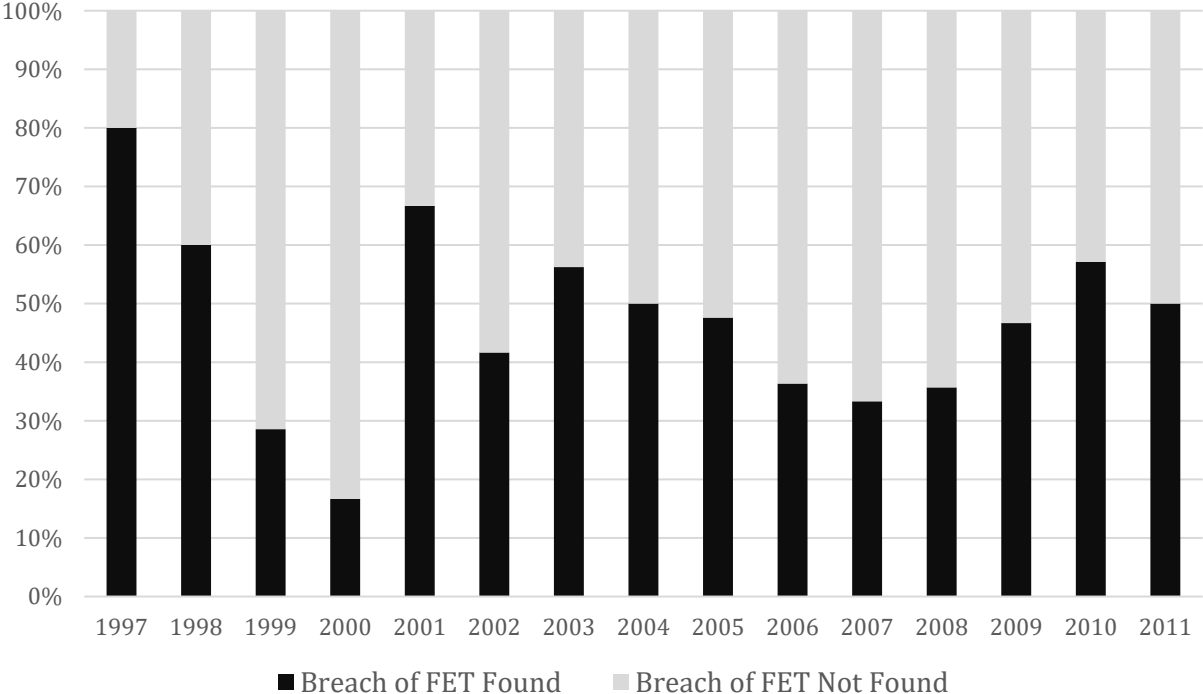
*Table 10 Frequency of alleged breaches of investor rights and found breaches of investor rights in investor-state dispute settlement cases*

<b><i>Investor Right</i></b>	<b><i>Breaches Alleged (N)</i></b>	<b><i>Breaches Found (N)</i></b>	<b><i>Breaches Found (%)</i></b>
<i>Fair and equitable treatment/minimum standard of treatment</i>	347	86	25%
<i>Expropriation</i>	392	58	15%
<i>Indirect expropriation</i>	317	43	14%
<i>Direct expropriation</i>	75	15	20%
<i>Full protection and security</i>	183	15	8%
<i>Unreasonable/arbitrary measures</i>	156	22	14%
<i>Umbrella clause</i>	100	13	13%
<i>National treatment</i>	98	8	8%
<i>Most-favoured nation treatment</i>	77	2	3%
<i>Other</i>	92	14	15%
<b><i>Total</i></b>	<b>1,445</b>	<b>218</b>	<b>15%</b>

FET is not only the most frequently alleged breach, it also has the highest rates of success for investors at 25%. The data in Table 10, however, include not only cases concluded through an arbitral decision based on the merits of the case, but also cases declined on jurisdiction, cases settled or discontinued, and cases still pending. Consequently, the success rates of alleged breaches for investors are deflated. If we explore the success rates of the two most frequently alleged breaches, FET and indirect expropriation, limited to cases where an arbitral decision was made based on an evaluation of the merits of the case, that is, where a tribunal actually ruled on an alleged breach of a substantive right, between 1997 (first decision on FET as reported by *Investment Policy Hub*) and 2011, the success rates rise from 25% and 14% in the larger data set

to 47% and 27%, respectively, although there is considerable variation from year to year (see Chart 13 and Chart 14 for additional data). The majority of cases initiated since 2012 are still pending and require continued observation to monitor trends, but available data suggest that if a dispute enters into the merits phase a tribunal is likely to find a breach of FET in approximately half of all cases, and a breach of indirect expropriation in approximately one-quarter of all cases.

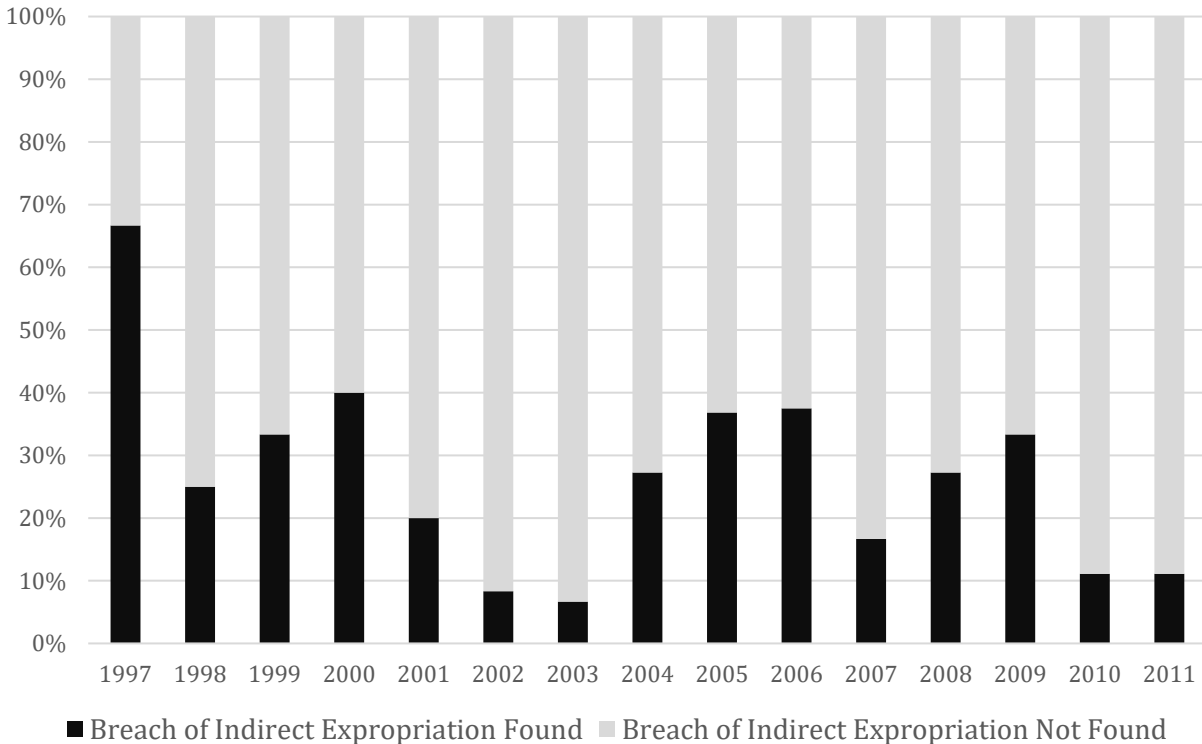
*Chart 13 Proportion of alleged fair and equitable treatment breaches found for investor (cases concluded on merits 1997-2011)*



**7.1.2 The Right to Investor-State Arbitration**

If a foreign investor perceives that one of the above rights has been breached, many IIAs will provide the right to seek arbitration with a state directly through an ISDS system of international arbitration. Substantive rights for foreign investors can exist separately from the right to ISDS, and in the absence of an ISDS mechanism, such rights could be enforced through the state-state dispute settlement system, similar to the agreements of the World Trade Organisation (WTO).

Chart 14 Proportion of alleged indirect expropriation breaches found for investor (cases concluded on merits 1997-2011)



The ISDS system, introduced in Chapter 1, is not an international court; it is an international system of arbitration that according to Mann “...remains completely ad hoc, with no coordinating body, no appellate or political oversight mechanisms as exist in the WTO, limited transparency at best, and no legal processes available to correct incorrect decisions” (p.5) [437]. An arbitration panel, or tribunal, is composed of three arbitrators selected primarily from law firms, although they can also be selected from academia or government positions. Generally, each party to the dispute selects one arbitrator, and a third arbitrator is either agreed to by both parties or will be appointed by the institution administering the dispute [48]. Almost all ISDS cases are administered by the International Centre for Settlement of Investment Disputes (ICSID) or the Permanent Court of Arbitration (PCA), under either the ICSID Convention or the ICSID Additional Facility Rules or under the United Nations Commission on International Trade Law (UNCITRAL) [41]. Although tribunals do attempt to support their decisions by making reference to previous arbitral awards, there is no binding precedent in the system, meaning that any new tribunal is not bound by the decisions of previous tribunals, which can result in inconsistent rulings [438]. The lack of binding precedent follows naturally from the fact that the tribunals are arbitrating on different treaties, and

while there may be a fairly standard set of investor rights (*e.g.* FET, expropriation, unreasonable measures), the specific language regarding these provisions can vary between treaties, necessarily leading to various interpretations.

The opportunity for private investors to directly engage in international legal disputes represents a significant departure from international law in general and international trade law instituted within the WTO<sup>24</sup>. This chapter will not critically appraise the ISDS procedural system or its legitimacy, nor will it engage with suggested reforms to this system, as this has all been done elsewhere by those with the necessary qualifications to conduct such evaluations [441–444]. This chapter will instead focus on the substantive law, specifically FET and expropriation, as enforced by the ISDS system, from a health policy perspective. Before turning to the present inquiry, the following section will introduce the intersection between investor-state dispute and domestic health policy, and the rationale for conducting this analysis.

### **7.1.3 Investor Rights, Investor-State Arbitration, and Health**

Attention to the ISDS system and the expansive set of substantive rights it provides for foreign investors is growing, particularly its implications for state sovereignty in key public policy arenas such as health and the environment. As noted by Eberhardt and Olivet:

When companies sue governments in international arbitration tribunals, investment arbitrators have the power to divert taxpayers' money to corporations. They can decide to penalise governments for ensuring people's human rights to health, access to water or electricity as well as the right to a healthy environment. (p.35) [155].

Two recent high profile ISDS cases involving health regulations have demonstrated the need for engagement with IIAs by the health field. The first case involves intellectual property rights (IPRs), specifically trademarks and tobacco control legislation. In 2010 the Australian government announced its plan to introduce tobacco plain packaging: legislation that mandates all aspects of cigarette packaging including the specified position, font, size, and colour of the brand name, and prohibits the use of any trademarks [445]. In 2011 Philip Morris Asia (PMA) notified Australia of

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<sup>24</sup> Private actors have had indirect influence in WTO disputes through lobbying efforts to persuade states to pursue a dispute in the interest of the private actor. For example, the ongoing WTO dispute over Australia's tobacco plain packaging legislation was initiated by Ukraine, a country that has not exported tobacco products to Australia in over fifteen years [439]. Subsequently, it was revealed that British American Tobacco was providing financial support for Ukraine's legal fees. Honduras and the Dominican Republic launched their own cases shortly after, despite their small to non-existent stake in Australia's tobacco market, funded again by British American Tobacco and Philip Morris International, respectively [440].

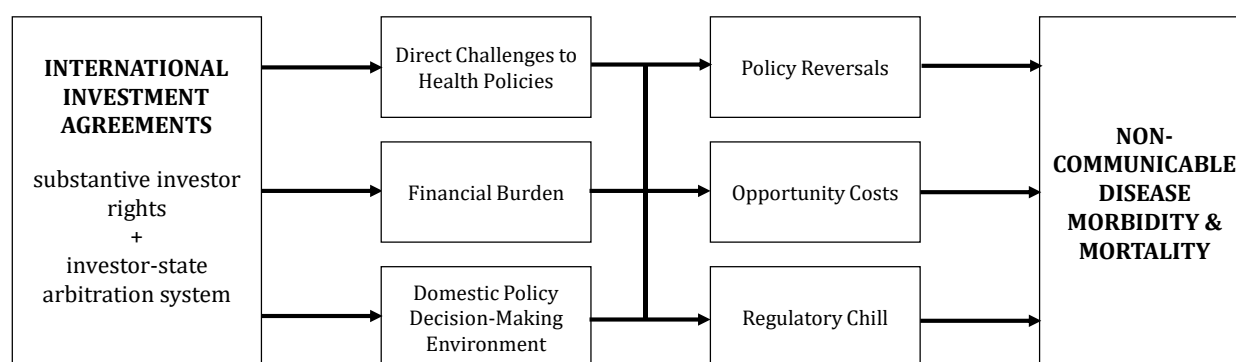
its intention to use a bilateral trade agreement signed between Hong Kong and Australia in 1993 to sue over its plain packaging legislation in international arbitration [8]. PMA did not, however, make its investment into Australia until after the announcement of plain packaging had been made. This case was the very embodiment of concerns about the implications of ISDS for legitimate health regulatory policy. In December 2015 the case was dismissed on jurisdiction on the grounds that "...the commencement of treaty based investor-State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable" (¶585).

The second case involves IPRs and access to medicines. In 2012, pharmaceutical giant Eli Lilly filed a claim against the Canadian government under the ISDS mechanism in the North American Free Trade Agreement (NAFTA) for US\$500 million dollars for revoking its patents on Straterra, a drug used to treat chronic attention-deficit hyperactivity disorder, and Zyprexa, an anti-psychotic drug [9]. Prior to this claim, the Canadian Federal Court of Appeal had ruled that, in the case of Straterra, the 21-person three-week study that was conducted and found a 30% greater reduction of symptoms in half of patients, which was not disclosed in the patent as required, was insufficient to support Lilly's claim that the drug would be an effective long-term treatment [446]. The case is focused on Canada's patent utility standard known as the promise doctrine, which goes beyond international patent standards (novel, not obvious, and useful or capable of industrial application) to require that the promised utility either be demonstrated, or be based on a 'sound prediction' at the time of filing, and that the evidence for the basis of the predicted utility be disclosed in the original patent application [447]. This type of a requirement ensures that a patent is a reward for a successful innovation, rather than a "hunting license" to search for new treatment in an uncompetitive environment, which would threaten innovation. The *Eli Lilly v Canada* case is ongoing. If Eli Lilly is successful in their claim it may discourage countries from enforcing correspondingly high patent standards for fear of similar litigation. The two cases together demonstrate that by challenging tobacco-control measures and affordable access to medicines TNCs are setting the promotion and protection of investment against the promotion and protection of health in the international arbitration system.

Directly challenging health regulatory measures is one of the three ways through which IIAs can influence NCD outcomes introduced in the conceptual framework in Chapter 4 and simplified in

Figure 9 below. The first pathway, direct challenges to health regulations, may contribute to the reversal of important health policies, as was the case when Canada overturned its ban on the neurotoxic chemical methylcyclopentadienyl manganese tricarbonyl (MMT) being added to gasoline after a NAFTA dispute by Ethyl Corp [64]. As of 2013, approximately 20% of all ISDS claims involved health protections (e.g. measures concerning food safety, pharmaceuticals, and tobacco control measures) or environmental protections (e.g. water- and land-use, pollution control, and hazardous waste) [302], which would also have important indirect health implications.

Figure 9 Conceptualisation of international investment agreements and noncommunicable disease outcomes



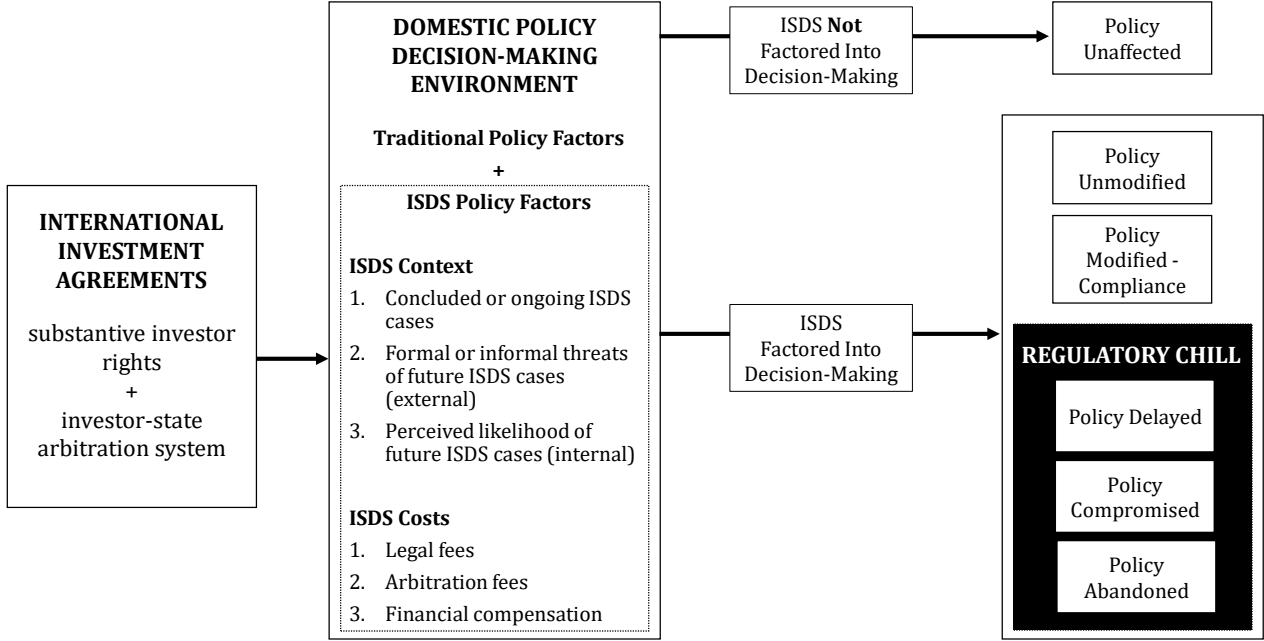
The second pathway is through the financial burden generated by the system resulting in opportunity costs for health. This idea was introduced in Chapter 1 where it was noted that the US\$10 billion states have spent on legal fees, arbitration costs, and financial compensation through the ISDS system to date could have been used to avert over 36 million deaths through childhood vaccination programs [70,72]. Finally, IIAs may influence NCD outcomes through the domestic policy decision-making environment and a phenomenon referred to as regulatory chill, a process explored in greater depth in the following section.

### 7.1.3.1 Regulatory Chill

IIAs have been accused of driving a process referred to as regulatory chill, where public policy is negatively influenced by state concerns of ISDS (see Figure 10). When new legislation is being considered or drafted by states party to such treaties it is speculated that IIAs may introduce novel factors into the decision-making process [309,310]. The precise terms of the IIAs a country has committed to, including the set of substantive rights provided and the available arbitration systems, may inform specific concerns about the interaction between a proposed policy and the IIA. Within the domestic policy decision-making environment contextual factors may be considered, including

any concluded or ongoing ISDS cases, formal or informal threats from investors of a future ISDS case, or policy-makers’ perceptions of the likelihood of a future ISDS case. Decision-makers may also be influenced by the costs associated with an ISDS case, including estimated legal fees, arbitration fees, and potential financial compensation to the investor. The cost of defending an ISDS case, a portion of which may be assigned to the investor in the event that no breaches are found, is estimated at approximately US\$8 million per case [70], although this value has been considerably higher in more recent cases, such as the Australia case noted above which is alleged to have cost the state US\$50 million just for the jurisdiction phase [318].

Figure 10 Conceptualisation of international investment agreements and regulatory chill



The introduction of ISDS factors into the domestic policy decision-making environment will have two possible outcomes: ISDS is either factored into the decision, or it is not. In the first instance where ISDS is not considered, the policy outcome would be unaffected by the existence of IIAs, and subsequently it may or may not be subject to future ISDS challenges. The second is that ISDS is factored into the decision, which itself has three distinct outcomes. The first is that the policy is unmodified based on these considerations, and again, it may or may not be subject to future ISDS challenge. The extent to which this pathway may reflect a lack of good faith commitment to international trade and obligations on the part of state legislators is what forms part of the rationale for the ISDS system. The second is that the policy is modified based on these conditions, but in a

way that brings it into compliance with the terms of the IIA without altering the integrity of the policy. For example, a US policy targeting flavour additives to tobacco to reduce youth smoking did so in a discriminatory manner by banning foreign produced products (*e.g.* clove-flavoured cigarettes) but not similar domestically produced products (*e.g.* menthol-flavoured cigarettes) [448]. A review for compliance may draw attention to possible disguised protectionism contained within a policy. In this case the ban could be extended to both clove- and menthol-flavoured cigarettes, bringing the policy into compliance with terms of an IIA, while maintaining the integrity of policy and potentially even strengthening it in this specific case.

The third outcome is regulatory chill, where the policy is either delayed, compromised, or abandoned as a direct result of the ISDS considerations. For example, while Australia was being sued in international arbitration by PMA for its tobacco plain-packaging policy, New Zealand officially stated it was waiting for a decision in the case before proceeding with its own legislation [307,449]. In this instance an ongoing ISDS case caused a delay of tobacco plain packaging in New Zealand. Threats of future arbitration may also compromise the final policy. After pressure from the US and other trading partners, Thailand amended its policy proposal to mandate front-of-package traffic light labelling for energy, sugar, fat, and sodium, along with a message that “Children Should Take Less” to the message that children “Should consume less, and exercise for better health” without any accompanying traffic light labelling [450]. While pressure was applied over the possibility of a trade dispute for Thailand, this situation is equally plausible for investment disputes. Finally, threats of ISDS cases from investors may result in a policy being abandoned, as it is a widely held belief that Canada abandoned tobacco plain packaging measures in the nineties due to threats of lawsuits from R.J. Reynolds Tobacco [65–67]; and that “Indonesia exempted a number of foreign investors from a ban on open-pit mining in protected forests after receiving threats of arbitration claims in the range of 20-30 billion US dollars” (p.15) [309,451].

It is worth noting that regulatory chill may become a self-fulfilling prophecy, that is, perceptions of a high likelihood of a future ISDS case over health regulatory policy, due in considerable part to the uncertainty contained within the provisions of these agreement and the failings of the arbitral process, may be one of the drivers of regulatory chill, regardless of the legal legitimacy of the underlying concerns. Direct challenges to legitimate public health regulatory policy together with the opportunity costs of the system for health and the possibility of regulatory chill has generated

a need for health-policy makers to increase engagement with the specific text of the agreements and the investor protection standards they provide, as well as the evolving body of case law to study the exact nature of the obligations they impose on states.

#### **7.1.4 Chapter Focus**

Although the study of regulatory chill is still in its infancy and consensus is far from reached on how to measure it or if it even exists [309–311,452,453], this chapter will take as its premise that regulatory chill is a discernible phenomenon influenced by the processes and factors outlined in Figure 10. With this premise in mind then, in the instance where ISDS is being factored into decision-making it is important to understand the surrounding context. Specifically, it is reasonable to presume that policy-maker perceptions of the likelihood of a future ISDS case are informed in part by concluded ISDS cases, as well as their knowledge of the specific investor rights and the obligations they create. Although these perceptions may be influenced by formal or informal threats from foreign investors, that factor is outside of our control. What is possible is to engage with both the substantive rights and the outcomes of concluded cases in a way that can directly resonate with health policy-makers in order to contribute to evidence-informed decision-making.

The primary aim of this chapter is to explore the range of interpretations of investor protections in recent investor-state arbitration awards as they may relate to health policy. Accordingly, this chapter will not be limited to ISDS cases directly challenging health policies, but rather will review cases covering a range of state measures, including measures related to health, the environment, public services, and the economy, for potential insights. This analysis will permit a greater understanding of one of the processes through which TNC interests may be prioritised over state interests by undermining state capacity to execute sovereignty in domestic policy-making. But equally important, it will assist policy-makers in identifying where legitimate health measures still have sufficient policy space, so as not to contribute to a self-fulfilling prophecy of regulatory chill, and where space can be protected. This chapter focuses on key investor rights provided by IIAs, principally FET and expropriation, the most frequent breaches alleged and the ones that have raised the most concern within the health community [32,427,454]. The IIAs referenced in this analysis are primarily bilateral investment treaties (BITs); however, there are several examples of arbitration under NAFTA, an agreement more relevant to the focus on contemporary RTAs in this

dissertation. A further purpose was to generate from that knowledge recommendations to strengthen the right to regulate for public health within future IIAs.

## **7.2 Methods**

### **7.2.1 Case Selection**

We elected to review ISDS cases within the past five years, specifically, those cases where an award was rendered from January 1 2010 through to June 30 2015. Additional inclusion criteria were that the award had been made publicly available and in English. This investigation explored any IIA with concluded investor-state disputes challenging any type of state measure. We searched the case databases of ICSID and the PCA, and the Investment Claims database hosted by Oxford University Press. Our initial search identified 66 cases, 32 of which were retained for analysis, and 34 of which were excluded for one of the following reasons: the case was discontinued, the case was decided on jurisdiction and not merits, or the case was initiated by multiple investors but had later received a joint award in which case only one award was retained for analysis. Furthermore, we decided to identify highly influential case awards which may have fallen outside of the selected inclusion period but may represent important decisions for generating understanding of investor rights for a health policy audience. From the 32 cases retained for analysis we documented all cases used as a reference in the tribunals' reasoning when ruling on an investor claim. Any case that was referenced in at least 25% of the awards was added to the analysis. This resulted in the addition of nine cases (*Azurix v Argentina*, *CMS v Argentina*, *LG&E v Argentina*, *Metalclad v Mexico*, *Pope and Talbot v Canada*, *S.D. Myers v Canada*, *Saluka v Czech Republic*, *Tecmed v Mexico*, and *Waste Management v Mexico*). Consequently, a total of 41 cases were included in the analysis (see Appendix E for a list of included cases).

### **7.2.2 Analysis**

This analysis was structured on the fundamental components of legal analysis which explores the issues, rules, analysis, and conclusion of a legal case, known as the IRAC formula [455]. The first step was to explore the issues of the case, which in our analysis were the state measures allegedly leading to a breach of an investor right. This was followed by an examination of the rule of law being invoked, which in our analysis was the specific treaty text related to the substantive investor protection within the IIA under dispute. The analysis stage reviewed any information the tribunal

provided on the interpretation of the provision, methods for testing the provision, and application of the provision to the facts of the case. Within the conclusion stage we identified the significance of the tribunal ruling on the varying investor claims within the award for the health field, including recommendations for future investor treaty language to strengthen the right to regulate.

In addition to the IRAC analysis we recorded the essential details of each case, including the claimant, the respondent, the treaty invoked, the arbitration rules and institution, the duration of arbitration, the arbitrators, and the damages requested and awarded. We originally analysed the seven most common alleged breaches noted earlier: FET, expropriation, full protection and security, unreasonable/arbitrary measures, the umbrella clause, national treatment, and most-favoured nation; however, only FET and expropriation were retained for full analysis in this chapter to retain quality and feasibility. Appendix F provides a summary of the case details and the IRAC analysis for each of the 41 awards included in the analysis and Appendix G details the lessons for health policy from each of the reviewed awards.

## **7.3 Results**

### **7.3.1 Contextual Findings**

On average a single award addressed either three or four alleged breaches, although it ranged from a minimum of one to a maximum of six. There was no relationship between the number of breaches claimed by the investor and the likelihood of finding in their favour, that is to say, claiming an increased number of breaches does not appear to enhance the chances of the investor winning the case. Eight cases had annulment proceedings<sup>25</sup>, however only two annulments were made, one in favour of the investor, and one in favour of the state.

### **7.3.2 Representativeness of Case Selection**

By the end of 2014 there were 255 ISDS cases with final awards<sup>26</sup>; 71 of which were dismissed on jurisdiction, and 184 of which were decided based on merits [456]. To address the

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<sup>25</sup> Under the ICSID Convention awards rendered are binding and not subject to appeal. The Convention provides disputing parties the option to challenge an award through an annulment proceeding limited to five grounds: (1) that the tribunal was not properly constituted; (2) that the tribunal has manifestly exceeded its powers; (3) that there was corruption on the part of a member of the Tribunal; (4) that there has been a serious departure from a fundamental rule of procedure; or (5) that the award has failed to state the reasons on which it is based [49].

<sup>26</sup> This number only reflects cases that have been made public, and excludes the approximately 26% of all cases that are settled where the outcomes remain largely unknown and the approximately 10% that are discontinued [41].

representativeness of our sample of 41 cases we investigated several variables for comparison, including: the percentage of cases found in favour of the investor, the percentage of alleged FET breaches found in favour of the investor; the percentage of requested damages awarded to the investor, the average duration of the arbitral proceedings, and the development status of the respondent country. Of the 184 awards decided on the merits, a total of 111 (60%) found in favour of the investor. Our sample produced a similar record, with 27 awards (65%) in favour of the investor. According to UNCTAD claims regarding alleged FET breaches have been successful in 45 of 84 (53%) claims; our numbers were quite similar, such that claims regarding alleged FET breaches were successful in 24 of 41 (58%) claims. These numbers are both just slightly higher than our sample of cases between 1997 and 2011 referenced earlier which suggested a success rate of 47%. Alleged FET breaches in NAFTA proceedings have a much lower success rate. Only 4 of 18 (22%) found for the investor, compared to 41 of 66 (62%) for alleged FET breaches in other IIAs [457]. This break-down was closely replicated in our sample, such that 2 of 7 (28%) alleged FET breaches were found for the investor when NAFTA was invoked, and 22 of 34 (64%) alleged FET breaches were found for the investor when another IIA was invoked.

Two studies investigating what percentage of damages claimed by the investor were awarded by tribunals when the case was found in their favour revealed that the amount was somewhere between 35 to 41% [458,459]. Our results were comparable with an average of 33% of the damages claimed being awarded by the tribunals. The average duration of arbitral proceedings has been reported as 3 years 8 months [458]; however, the average duration in our sample was 5 years 6 months. This discrepancy is likely because we excluded cases which were resolved at the jurisdiction phase, which may have shorter durations than cases that proceed to the merits phase, thus reducing the overall mean. Finally, it has been reported that 73% of all claims have been against developing economies or transitional economies [460], our sample produced identical proportions (73% developing and transition economies and 27% developed economies) using the 2012 UN classifications. Overall our sample appears representative of a number of features of the larger body of ISDS awards.

### **7.3.3 'Elite 15' Arbitrators**

We documented the number of arbitrators classified as 'Elite 15' arbitrators by the Corporate Europe Observatory, meaning they are one of the most frequently appointed investment arbitrators

[155], as one mechanism for exploring the role of an identified ‘judicial elite’ within the ISDS industry. There were no clear relationships between the number of Elite 15 on the tribunal and finding in favour of either the state or the investor. This is likely due in part to that fact that they are not a homogenous group and are frequently appointed by states and investors. In our sample an Elite 15 arbitrator was appointed by the state in 10 cases, and by the investor in 15 cases. The only pattern that did emerge was the percentage of damages awarded by the number of Elite 15 on the tribunal, such that on average investors received 22% of their requested damages when there were no Elite 15 arbitrators, 32% if there was one Elite 15 arbitrator, and 54% if two of the arbitrators were Elite 15. This trend should be interpreted with caution as the sample size was small and there may be confounding factors that better explain this relationship.

### **7.3.4 Fair and Equitable Treatment/Minimum Standard of Treatment**

#### *7.3.4.1 Introduction to Fair and Equitable Treatment Provisions*

The most influential form of the FET standard as it relates to its use in contemporary investment dispute can be found in the 1967 Draft Convention on the Protection of Foreign Property produced by the Organisation for Economic Cooperation and Development (OECD) (“the Draft OECD Convention”). Article 1 of the Draft OECD Convention states that “[e]ach Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties.” The broad language is suggestive of FET’s origin as a ‘gap-filling device’ to cover unfair or inequitable treatment of investors or investments not covered under more specific protections of property rights and non-discrimination contained in IIAs [45].

According to UNCTAD, “...based on a plain meaning of the words, ‘fair and equitable’ treatment requires an attitude to governance based on an unbiased set of rules that should be applied with a view to doing justice to all interested parties that may be affected by a State’s decision in question, including the host State’s population at large” (p.7) [457]. The surge in the number of ISDS proceedings beginning in the early 2000s [41] has created concern that the more broad and open-ended the FET provision is in the treaty text, the more likely it will be that decisions are based on the arbitrators’ notions of what is both ‘fair’ and ‘equitable’ [461]. Without sufficient guidance arbitral tribunals have provided varying levels of expansiveness in interpretations, and varying thresholds for breaching the standard. The unpredictable nature of the FET provision has resulted

in uncertainty for regulators. As noted earlier, this is due in part to the variation in wording of investor rights such as FET between the individual treaties; however, even when disputes arise using identical text or even the same treaty the system still lacks binding precedent contributing to that uncertainty. The inclusion of FET has raised concerns about potential imbalances in the protection of public and private interests [457].

The principal source of conflict in interpreting the FET standard is whether the reference for conduct of the state, as outlined in the treaty text, should be measured against: (1) the minimum standard of treatment of aliens under customary international law; (2) all sources of international law; or (3) as an autonomous and self-contained treaty standard [457,461,462].

Some agreements define FET by reference to the minimum standard of treatment under customary international law. The Notes and Comments to Article 1 the Draft OECD Convention indicated that “[t]he standard required conforms in effect to the ‘minimum standard’ which forms part of customary international law” (p.9). More recently, this has been adopted within the 2004 US model BIT, “[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security” (art. 5[1]).

One of the influential cases in developing the minimum standard of treatment under customary international law was the 1926 case of *Paul Neer*, a US national murdered in Mexico whose wife filed a lawsuit against Mexico for a lack of diligence during the investigation. The Commission in the case ruled that “[t]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.” This *Neer* standard set a high threshold for breaching the minimum standard, such that the behaviour would need to be near universally considered ‘egregious’ or ‘outrageous.’ The *Neer* standard has generated considerable influence over time, however as customary international law continues to evolve the utility of the standard today is debated, with some suggesting it is outdated and inconsequential, and others suggesting it is useful but the types of treatment regarded as ‘egregious’ or ‘outrageous’ should evolve over time [463]. It has been suggested that, “[b]y departing from the need to find bad faith, or something equally egregious, this standard [FET] would raise the minimum threshold to a degree where any

governmental act could be found to breach MST [minimum standard of treatment] if an ad hoc tribunal can imagine a more adequate way to treat the investor under the circumstances” (pp. 6-7) [463].

Theoretically, this construction of the FET standard, linked to the minimum standard of treatment under customary international law, should be the most deferential to state sovereignty. This is because customary international law “...is formed through the ‘general and consistent practice of states’ that they follow out of a sense of legal obligation...” [464]. In other words, the standards of protection must follow not only from consistent state practice, but consistent state practice that is enacted out of a clear sense of legal obligation. Demonstrating these two criteria is challenging for investors and has generally resulted in a higher threshold for investors to demonstrate a breach.

The second approach to interpreting FET is to define it by reference to all international law. BITs like the 1996 agreement between Spain and Mexico provides an example of this construction; Article 4(1) states “*[e]ach Contracting Party will guarantee in its territory fair and equitable treatment, according to international law, for the investments made by investors of the other Contracting Party.*” The 1990 BIT between Bahrain and the US used a similar style but provided a combination of protections; Article 2(3)(a) states “*[e]ach Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law.*” Linking all of international law is, on the face of it, a broader approach than just linking FET to the subset of customary international law, as it would take into consideration general principles of international law, modern treaties, and other conventional obligations. This approach introduces new opportunities for uncertainty by not specifying the applicable sources or areas of international law tribunals should give consideration to. This may afford a higher level of protection to investments given the more expansive criteria which can be drawn upon for interpretation [465]. Although if international health treaties are considered in decision-making, such as the Framework Convention on Tobacco Control in the case where tobacco-control measures are under dispute, it is also possible that this approach could provide new sources of protection for states.

Finally, FET has also been written as an ‘unqualified’ or autonomous treaty standard. In the 2009 BIT between the Belgium-Luxembourg Economic Union and Tajikistan, Article 3 states “*[a]ll investments made by investors of one Contracting Party shall enjoy a fair and equitable treatment*

*in the territory of the other Contracting Party.*” The 2009 BIT between China and Switzerland also drafted FET as an unqualified provision but in combination with additional protections, “[i]nvestments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party” (art. 4).

The autonomous treaty standard is the broadest and least certain approach, associated with expansive obligations on the part of the state such as protecting legitimate expectations of the investor, transparency, and providing a stable and predictable legal environment. It is not linked to any objective body of law such as international law or customary international law, and without binding precedent it is the most vulnerable to individual arbitrator’s notions of fair and equitable treatment. It has been suggested, though, that equating the FET standard with either the minimum standard under customary international law or international law in general is problematic. Dolzer and Stevens [466] have argued that:

The fact that parties to BITS have considered it necessary to stipulate this standard as an express obligation rather than rely on a reference to international law and thereby invoke a relatively vague concept such as the minimum standard is probably evidence of a self-contained standard. Further, some treaties refer to international law in addition to the fair and equitable treatment, thus appearing to reaffirm that international law standards are consistent with, but complementary to, the provision of the BIT (p.34).

An UNCTAD report in 1999 [467] came to a similar conclusion, that:

If States and investors believe that the fair and equitable standard is entirely interchangeable with the international minimum standard, they could indicate this clearly in their investment instruments; but most investment instruments do not make an explicit link between the two standards. Therefore, it cannot be readily argued that most States and investors believe fair and equitable treatment is implicitly the same as the international minimum standard (p.13).

Regardless of which approach to FET is adopted by an IIA, FET provides an absolute standard of treatment, rather than a relative standard of treatment such as the national treatment and MFN protections described earlier. Relative standards only protect against treatment less favourable than

suitable comparators; however, in situations where nationals or third-parties are afforded treatment below international thresholds, such standards would offer no recourse to a foreign investor [468]. Consequently, the FET standard, as an absolute standard, is regarded as one of the most essential provisions for foreign investment protection [469]. As demonstrated earlier, FET is the most frequently alleged breach by investors and has the highest chance of being found in their favour, even when all other alleged breaches have failed [40]. One writer on the topic has suggested that “[i]t is both fascinating and astonishing that fair and equitable treatment has developed from an almost vacant expression into an obligation of such potential breadth within a few years” (p. 443) [470].

### 7.3.4.2 Findings on Fair and Equitable Treatment Provisions

#### 7.3.4.2.1 Defining Fair and Equitable Treatment

There was no precise or consistent definition of FET in the reviewed cases, originating both from variations in treaty text and tribunal interpretation, although several elements emerged as highly relevant to the tribunals’ analyses. One of the essential features was to protect the expectations of the investor or the investment; however, the terminology around this altered between protecting expectations based on ‘specific representations’ (*Bosh v Ukraine*), ‘legitimate expectations’ (*Deutsche Bank v Sri Lanka*, *GEA v Ukraine*, *Guaracachi v Bolivia*, *Spyridon v Romania*), ‘reasonable expectations’ (*Deutsche Bank v Sri Lanka*, *Fuchs v Georgia*, *Spyridon v Romania*), and ‘basic expectations’ (*Rompetrol v Romania*).

Several tribunals have attempted to clarify the concept of legitimate expectations, which according to the tribunal in *Saluka v Czech Republic* is the dominant element of FET, and in fact captures other elements of FET including good faith, due process, and non-discrimination. According to the tribunal in *AES v Hungary*, legitimate expectations can only be created at the moment of investment, which had been suggested in previous arbitral decisions. The tribunal in *Un glaube v Costa Rica* suggested that legitimate expectations are the unilateral expectations of a party, and that the onus is on the claimant to “...demonstrate reliance on specific and unambiguous State conduct, through definitive, unambiguous and repeated assurances, and targeted at a specific person or identifiable group” (¶270). This formulation reflects a high threshold for the investor to demonstrate a violation; it requires establishing the legitimate expectations of a particular

investment scenario rather than developing a broad range of universal investor expectations. Not all tribunals formulate such a high threshold, as in the case of *Tecmed v Mexico* discussed later.

Failure to protect legitimate expectations was the key contributing factor to the finding of a breach of FET in *Franck v Moldova*. In this case the investor, Mr. Franck Arif, had secured the exclusive right to operate a duty-free store in Moldova’s main airport. After several organs of the state demonstrated support and explicitly approved the lease for Mr. Arif’s investment, a domestic judicial decision invalidated the lease agreement for the airport store [471]. The tribunal was sympathetic to the problems of legitimate expectations, and determined that they require an exact identification of the origin of the expectation alleged; that not every expectation of an investor is protected, only those recognised and protected in international law; and even made reference to the tribunal in *Saluka v Czech Republic* that they recognise “the host State’s legitimate right subsequently to regulate domestic matters in the public interest” (¶305). The tribunal acknowledged that the lease was subject to Moldovan law and review by the Moldovan courts, but that “...a state cannot rely on its internal law to justify an internationally wrongful act” (¶547c). That is, state organs had endorsed and encouraged the investment of Mr. Arif, thus satisfying the criteria for legitimate expectations according to the tribunal, meaning that even though voiding the lease was legal according to domestic law this fact cannot be used to justify defaulting on international responsibilities, specifically the legitimate expectations protected by FET.

Additional features of FET determined by tribunals in the reviewed cases are presented in Table 11.

*Table 11 Protections afforded by the right to fair and equitable treatment in investor-state arbitral awards*

PROTECTION	TRIBUNALS
<i>THE RIGHT TO DUE PROCESS OR PROTECTION FROM DENIAL OF JUSTICE</i>	<i>Bosh v Ukraine; Deutsche Bank v Sri Lanka; GEA v Ukraine; Rompetrol v Romania; Spyridon v Romania; Waste Management v Mexico</i>
<i>THE RIGHT TO PROTECTION AGAINST BEHAVIOUR THAT WOULD OFFEND JUDICIAL OR PROCEDURAL PROPRIETY</i>	<i>Deutsche Bank v Sri Lanka; Rompetrol v Romania; Spyridon v Romania; Waste Management v Mexico</i>
<i>THE RIGHT TO PROTECTION AGAINST ARBITRARY STATE ACTION</i>	<i>Bosh v Ukraine; Deutsche Bank v Sri Lanka; Spyridon v Romania; Tulip v Turkey; Waste Management v Mexico</i>

<i>THE RIGHT TO PROTECTION AGAINST DISCRIMINATORY BEHAVIOUR</i>	<i>Bosh v Ukraine; Deutsche Bank v Sri Lanka; Waste Management v Mexico</i>
<i>THE RIGHT TO PROTECTION AGAINST INCONSISTENT BEHAVIOUR</i>	<i>Bosh v Ukraine; Deutsche Bank v Sri Lanka; Spyridon v Romania</i>
<i>THE RIGHT TO PROTECTION AGAINST UNFAIR OR IDIOSYNCRATIC BEHAVIOUR</i>	<i>Spyridon v Romania; Waste Management v Mexico</i>
<i>THE RIGHT TO PROTECTION AGAINST UNJUST BEHAVIOUR</i>	<i>Spyridon v Romania; Tulip v Turkey; Waste Management v Mexico</i>
<i>THE RIGHT TO PROTECTION AGAINST BIASED BEHAVIOUR</i>	<i>Tulip v Turkey</i>
<i>THE RIGHT TO PROTECTION AGAINST HARASSMENT</i>	<i>Bosh v Ukraine; Rompetrol v Romania</i>
<i>THE RIGHT TO PROTECTION AGAINST COERCION OR ABUSE OF POWER</i>	<i>Bosh v Ukraine</i>
<i>THE RIGHT TO A STABLE AND PREDICTABLE LEGAL ENVIRONMENT</i>	<i>CMS v Argentina; Tecmed v Mexico</i>
<i>THE RIGHT TO TRANSPARENCY ON THE PART OF THE STATE</i>	<i>Bosh v Ukraine; Deutsche Bank v Sri Lanka; LG&amp;E v Argentina; Rompetrol v Romania; Spyridon v Romania; Tecmed v Mexico</i>
<i>THE RIGHT TO PROTECTION AGAINST BAD FAITH ON THE PART OF THE STATE</i>	<i>Bosh v Ukraine</i>
<i>THE RIGHT TO GOOD FAITH ON THE PART OF THE STATE</i>	<i>Deutsche Bank v Sri Lanka; Rompetrol v Romania; Spyridon v Romania</i>
<i>THE RIGHT TO PROTECTION AGAINST STATE ACTIONS THAT DETER FOREIGN CAPITAL BY PROVIDING DISINCENTIVES TO FOREIGN INVESTORS</i>	<i>Micula v Romania</i>

One case notable for its highly expansive interpretation of FET is *Tecmed v Mexico*. Tecmed had purchased an existing hazardous waste landfill from a Mexican agency and subsequently obtained a one-year renewable permit necessary to operate the landfill from Mexico’s Environmental Protection Agency. Tecmed breached some terms of the permit including exceeding waste limits, operating as a ‘transfer center’ for another facility, and receiving liquid and biological–infectious wastes not approved by the permit. Community groups began protesting the landfill based on these infractions as well as the landfill’s close proximity to a nearby urban center, which was only 8 kilometres away, rather than the requisite 25 kilometre distance enacted after the landfill was

constructed. Subsequently, Tecmed's second application for permit renewal was denied and they were ordered to close the landfill. The tribunal found a violation of FET in large part due to the fact that the Environmental Protection Agency failed to clearly report how the permit infringements affected the renewal of the permit and to give clear signs of its intention to deny the permit. The tribunal expressed concern that the agency was using environmental and health issues as pretexts for a decision that was essentially driven by social and political concerns [472]. In their decision the tribunal identified many of the elements in Table 11 stating that the FET standard:

...requires the Contracting Parties to provide to international investments treatment that does not affect the *basic expectations* that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a *consistent manner, free from ambiguity and totally transparently* in its relations with the foreign investor, *so that it may know beforehand any and all rules and regulations that will govern its investments*, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations... (§154, *our emphasis*).

According to a report in 2007, the tribunal in *Tecmed v Mexico* provided the most expansive conceptualisation of FET to date, and while some subsequent tribunals were dismissive of this sprawling interpretation (*e.g. Saluka v Czech Republic*), others have upheld this lower threshold for establishing a breach of FET (*e.g. Occidental v. Ecuador* and *Azurix v. Argentina*) [473].

An additional feature of FET is that it is not necessarily limited to a single action of the state, the tribunal in *El Paso v Argentina* outlined the concept of 'creeping FET', "...a process extending over time and composed of a succession or accumulation of measures which, taken separately, would not have the effect of dispossessing the investor but, when viewed as a whole, do lead to that result" (§518). This was also reflected in the decision of the tribunal in *Rompetrol v Romania*, although with a further stipulation that the actions must be linked by an underlying pattern or purpose. The arbitrators made it very clear that they did not wish to establish 'creeping FET' as a broad precedent, and that such a decision should be heavily based on the specific facts of the case. Finally, the tribunal in *Vanessa v Venezuela* added an important caveat that in assessing a breach of FET the question is "...not whether the host State legal system is performing as efficiently as it ideally could, but whether it is performing so badly as to violate treaty obligations..." (§227).

Clarifying the scope of FET obligations for states is pertinent to reducing uncertainty for regulators. The fundamental role of legitimate expectations in establishing a breach of FET, as

demonstrated by *Franck v Moldova*, makes defining this component within treaty text a vital part of the process. From a health policy perspective such definitions would ideally adopt the high threshold for an investor to demonstrate a breach used by the tribunal in *Un glaube v Costa Rica*, which required demonstrated reliance on specific and unambiguous State conduct, through definitive, unambiguous and repeated assurances, targeted at a specific person or identifiable group.

#### 7.3.4.2.2 Interactions with Customary International Law and International Law

The tribunal in *Saluka v Czech Republic* proposed that if FET is linked to the minimum standard of treatment under customary international law, it would necessitate a higher threshold of state misconduct to qualify as a breach, while FET as an autonomous standard would provide additional investor protections and lower that threshold. It further noted that in either case the standard should be considered in context of the overall purpose of the agreement to promote economic activity. To do so requires a balance of protections, if state obligations are interpreted too broadly it may discourage states from accepting investment, ultimately reducing economic activity.

It is important to note that just because FET is qualified by something like international law, it may not provide sufficient protection against expansive interpretations. The tribunal in *Azurix v Argentina* was ruling on a 1991 BIT between the US and Argentina that had used treaty text which linked the standard to international law, that investments should be accorded FET “...and shall in no case be accorded treatment less than required by international law.” The tribunal suggested that this language was designed to establish international law as a ‘floor’ and not a ‘ceiling,’ that FET required at minimum the protections afforded by international law, but that FET was to be interpreted as additive to that.

A similar situation occurred under NAFTA as a result of two notable awards in *Pope and Talbot v Canada* and *Metalclad v Mexico*. Pope and Talbot is a US forest-products company with an investment in Canada’s softwood lumber industry. To give effect to the Canada-US Softwood Lumber Agreement, softwood lumber producers operating in Canada were provided with a quota for duty free exports to the US. If their exports exceeded that quota they were required to pay fees on any excess softwood lumber exported to the US. Pope and Talbot believed the duty free quota provided to them was too low, and subsequently they alleged several breaches of NAFTA obligations [474]. NAFTA’s FET provision states that “[e]ach Party shall accord to investments

*of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security”* (Article 1105[1]). Despite submissions from both Canada and the US that interpretation of this provision should be limited to the minimum standard of treatment under customary international law, the tribunal in *Pope and Talbot v Canada* decided that FET required protections more expansive than those provided by the minimum standard of treatment under customary international law. The tribunal reasoned that:

... there is the basic unlikelihood that the Parties to NAFTA would have intended to curb the scope of Article 1105 vis a vis one another when they (at least Canada and the United States) had granted broader rights to other countries that cannot be considered to share the close relationships with the NAFTA parties that those Parties share with one another...the Tribunal interprets Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under the ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be ‘egregious,’ ‘outrageous’ or ‘shocking,’ or otherwise extraordinary (§§115, 118, Phase II).

The tribunal ultimately found a breach of FET, however, only in relation to one relatively insignificant action by Canada: especially aggressive requests from Canada's Softwood Lumber Division for corporate data shortly after Pope and Talbot had filed a notice of arbitration. The tribunal rejected all other claims of FET violations, claims of discrimination and denial of national treatment, claims of performance requirements, and a claim of expropriation [475].

Another notable case around the time of *Pope and Talbot v Canada* was *Metalclad v Mexico*. A Mexican company COTERIN had been issued a permit by the Mexican federal government to build and operate a hazardous waste landfill; subsequently, US company Metalclad, entered into a purchase option for COTERIN subject to approvals being issued. Although the Mexican state government had issued a land use permit for the landfill, rather than an operating or building permit, after meeting with state officials Metalclad believed it had obtained state support and exercised its purchase option. State officials’ support varied after this, and while federal officials said that Metalclad had all the permits required to proceed and would be issued anything else as a matter of course, municipal officials ordered a halt to the project. Metalclad proceeded under federal support and received an environmental impact assessment which approved the project pending a few minor mitigation measures. While the federal government was authorising an expansion of Metalclad’s operation, the municipal government was challenging the federal

agreement which permitted Metalclad to operate through its constitutional court. With continued municipal and state level opposition Metalclad initiated international arbitration, shortly after which the state governor issued an Ecological Decree declaring the area protected property for rare cacti, precluding any use of this land for Metalclad's facility [472].

The assessment of the alleged breach of FET by the tribunal in *Metalclad v Mexico*, like that of *Pope and Talbot v Canada*, issued a ruling that effectively widened the scope of NAFTA's more reserved FET language, and introduced "...a heavy burden on governments to ensure legal certainty relating to the investment for all levels of government within a jurisdiction, including those over which they have no authority" (p.76) [472], adding that "Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment" (§99). In a similar stance to that taken by the tribunal in *Tecmed v Mexico*, the tribunal ruled that the municipality was not exercising its jurisdiction for reasons related to the construction of the landfill, but rather in response to social and environmental concerns related to the site's intended use as a hazardous waste facility [472]. The tribunal noted that because domestic environmental law, including all matters related to hazardous waste, falls under federal jurisdiction, and because the federal environmental agency had approved the project, there was no legal basis for a municipal permit to be denied based on environmental concerns. Moreover, assurances to Metalclad from the federal government that permits would not be required and that the municipal government would not be able to turn them down, also contributed to a lack of transparency according to the tribunal.

In response to the ruling in *Pope and Talbot*, and perhaps *Metalclad* as well, NAFTA parties issued a binding interpretation that the FET standard, "do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." This was a significant step in trying to avoid expansive interpretations by tribunals that the minimum standard was simply a "floor" for the level of protection, and that FET could be considered as additive. The more limited scope of FET supported by NAFTA parties, and the binding interpretation developed after exposure to an expansive interpretation, are likely important factors in the significantly different rates of FET claims being found in favour of the investor between NAFTA and other IIAs reported earlier.

The 1996 BIT between Austria and Ukraine has an unqualified FET statement, “[e]ach Contracting Party shall in its territory promote, as far as possible, investments of investors of the other Contracting Party, admit such investments in accordance with its legislation and in each case accord such investments fair and equitable treatment” (art. 2). The tribunal in *Alpha v Ukraine* decided that the connection between FET and international law was sufficiently established that by not stating any differently in the treaty, both parties could be presumed to have intended this. As noted earlier, binding FET to international law has mixed implications for states and investors based on what content is imported, but in any case this is another example of the inconsistency in interpreting FET which has increased the unpredictability of the provision for regulators.

Another issue as regards customary international law is the extent to which its evolution should be considered by tribunals, and to what extent investor-state case law should contribute to such evolution. Referencing the decision in *Mondev v United States*, the tribunal in *Chemtura v Canada* acknowledged that it must interpret FET with reference to the binding interpretation of NAFTA parties, but concluded that, “[s]uch determination cannot overlook the evolution of customary international law, nor the impact of BITs on this evolution” (¶121). The ruling in *Mondev* that what is unfair or inequitable today does not need to equate with ‘egregious’ or ‘outrageous’ behaviours established by the *Neer* standard, was influential in the rulings of *Chemtura v Canada* and *RDC v Guatemala*. The application of the *Neer* standard and whether IIAs and arbitral awards should contribute to the evolution of customary international law, however, is far from resolved.

Although the tribunal in *Saluka v Czech Republic* asserted that qualifying FET against the minimum standard of treatment under customary international law should necessitate a higher threshold of state misconduct to qualify as a breach, relative to the lower threshold of FET as an autonomous standard, the tribunals in *Pope and Talbot v Canada* and *Metalclad v Mexico* demonstrated that the approach does not always lead to predictable results. Equally, unresolved debates on whether IIAs and expansive tribunal interpretations should form part of the evolution of customary international law may undermine the high threshold generated from this approach, ultimately rendering it less valuable for the protection of legitimate health regulatory policies.

#### 7.3.4.2.3 Stable and Predictable Legal Environments and the Domestic Right to Regulate

Perhaps the most concerning feature of the FET standard, as it pertains to domestic regulatory policy related to health, is the one highlighted by the tribunal in *CMS v Argentina*: that a stable and predictable domestic legal environment is required by FET. A series of measures to privatise government-owned industries and public utilities in Argentina resulted in CMS Gas Transmission Company (CMS), a US company, acquiring approximately 30% of the shares in an Argentinian gas company. After a serious economic crisis Argentina declared a public emergency and previously agreed policies on tariff calculations and adjustments were terminated, devaluing CMS's investment. The tribunal found a breach of FET as a result of Argentina altering the stability and predictability of the investment environment, reasoning that the principal objective of IIAs is to maintain a stable framework for investments and that this meant there could be no doubt that a stable legal and business environment was an essential component of FET [472].

Affording an investor such protection under FET still seems highly contentious and many tribunals have sought to clarify this right in light of a state's sovereign right to regulate within its territory. The tribunal in *CMS v Argentina*, clarified that investors cannot expect that all domestic legal frameworks will be frozen in time, but that they cannot be dispensed with altogether either, particularly if a specific commitment to the contrary has been made. The tribunal in *El Paso v Argentina* agreed that FET requires a stable legal framework, but that it should not be interpreted in such a literal manner as to impose unrealistic obligations on the state. More specifically, the tribunal suggested that investors should have a legitimate expectation that when domestic situations change in minor ways there will be minor changes in the law, but when situations change in drastic ways there will be drastic changes in the law. The tribunal in *Guaracachi v Bolivia* concurred that unless the state makes a specific commitment not to change the legal framework, an investor cannot hold this as a legitimate expectation. The tribunal in *Impregilo v Argentina* asserted that FET "...cannot be designed to ensure the immutability of the legal order, the economic world and the social universe..." (¶290).

The tribunal in *Saluka v Czech Republic* advocated that the state's right to regulate must be considered, and while the tribunal in *Micula v Romania* agreed that states have the right to change their legislation, they further stipulated that any changes must simultaneously protect an investor's legitimate expectations, be non-arbitrary and non-discriminatory, and comply with due process

and fair administration. The tribunal in *Unghlaube v Costa Rica*, while acknowledging many of the fundamental features of FET, argued that if the action by the state was taken “...for the protection of public health, safety, morals or welfare, as well as other functions related to taxation and police powers of states,” (¶246) that states be given considerable deference for the right to regulate domestically. However, they also argued that such deference should not be without limits, and states will be liable if the action is arbitrary or discriminatory.

#### 7.3.4.3 *Conclusions on Fair and Equitable Treatment Provisions*

The analysis above revealed three core considerations regarding the FET provision in terms of protecting health and the right to regulate. The first is that FET requires categorically clearer definitions within IIAs in order to address uncertainty for regulators. A particular focus on outlining the exact basis for the establishment of legitimate expectations is needed given the central role of such expectations in the determination of a breach. Second, explicitly limiting FET to the minimum standard of treatment under customary international law appears advantageous for the right to regulate. This approach, however, has not universally constrained tribunal interpretations of FET obligations. Additional protections should be explored as expansive conceptions of the evolution of customary international law may reduce the utility of this method in protecting the right to regulate.

Finally, one of the most challenging components of FET for the right to regulate is arguably the requirement to provide a stable and predictable legal environment for investors, which represents a clear limitation on domestic regulation. Statements such as those made by the tribunal in *Unghlaube v Costa Rica* that states will be liable if regulatory actions are arbitrary or discriminatory, are effectively saying that states retain the right to regulate pending such regulation complies with key principles of IIAs, including non-arbitrary and non-discriminatory behaviour. Health policy should always be non-arbitrary, that is, the policy should be justifiably related to the desired health outcomes. Whether health policy should always be non-discriminatory is less clear. For example, a health policy on minimum unit pricing on alcohol, which sets a floor price on a unit of alcohol, may inadvertently discriminate against foreign producers exporting cheap spirits, if domestic producers are exclusively producing high-cost alcohol products. Since minimum unit pricing targets low-cost products and leaves high-cost products unaffected it may be perceived as a discriminatory policy vulnerable to ISDS, even though minimum unit pricing has been found to

be the most effective out of a range of policy options in reducing deaths, illnesses, and admissions to hospital due to alcohol consumption [476,477]. Evidence-informed recommendations for strengthening the right to regulate within the FET provision will be explored after the following analysis of investor protection against illegal expropriation.

### **7.3.5 Expropriation**

#### *7.3.5.1 Introduction to Expropriation Provisions*

Expropriation can take several different names based on the legal tradition or translation, but is usually considered interchangeable with ‘taking’, ‘nationalisation’, and ‘dispossession’ of an investment. Providing protection for foreign investors against the uncompensated expropriation of their investment by the host state is one of the fundamental guarantees of an IIA. Unlike FET, the language of the expropriation provision is fairly standard across agreements, although not entirely uniform [478]. Article 1110(1) in NAFTA provides a typical example of the general protections against expropriation:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1)<sup>27</sup>; and (d) on payment of compensation...

If a measure is established by the tribunal as meeting those four criteria, it is a lawful expropriation that may then require compensation. The range of measures that have given rise to expropriation claims is remarkably broad, including: “...formal sector-wide transfers of ownership (nationalizations), outright seizures, the intervention of government-appointed managers, concessions and permit breaches and annulments, prejudice suffered in domestic courts, and varied forms of regulation ranging from decrees protecting endangered cacti and antiquities to bans on gasoline additives” (pp. 607–608) [479].

An expropriation claim may be based on a single state measure or a series of state measures referred to as ‘creeping expropriation’. Creeping expropriation occurs when a series of measures taken by the state over a specified period of time are regarded as a unified action, which if they

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<sup>27</sup> Article 1105(1): *Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.*

have resulted in the destruction or near destruction on the investment value, will be considered expropriation. What can be classified as ‘expropriated’ also depends on how an ‘investment’ is defined in the agreement, which indicates the range of assets that are susceptible to expropriation. A widely used approach is to indicate that expropriation applies to ‘every kind of asset’ which is both comprehensive and vague. Moreover, tribunals have varied in whether an investment must be considered as a whole business or whether it can be divided into its component parts, the threshold for demonstrating expropriation being considerably higher for the former [478].

Expropriation also takes one of two forms. The first is direct expropriation, the seizure of or transfer of title on physical property. The second is indirect expropriation, a measure that does not include a physical taking but permanently destroys the value of the investment or the ability of the investor to manage, use, or control it in a meaningful way. For a direct expropriation to take place the state must actually take possession of and benefit from part of the investment, but in indirect expropriation the state is not required to have financially benefited from the measure in order for it to be considered expropriatory. Cases of direct expropriation are increasingly infrequent and largely irrelevant as regards public health measures, consequently, the essential question is when a regulatory measure compromises the profitability of an investment, what will distinguish whether it is a compensable indirect expropriation or a non-compensable regulatory measure [478].

There are three methods used by tribunals to distinguish between a compensable indirect expropriation and non-compensable regulatory measures. First, some tribunals have made this distinction based exclusively on the economic impacts of the measure, known as the ‘sole effects doctrine’ [40]. In determining if the economic impact of the measure is sufficient to rise to the level of expropriation it must permanently decrease the value of the investment to the point that all or nearly all of the value has been destroyed, or reflects a significant loss of control over the investment or both [478]. If a state measure results in economic impacts that rise to the level of expropriation they require compensation regardless of the intention or purpose of the measure; however, the threshold for expropriation has generally been set quite high. The second method is a test of ‘proportionality’, which involves weighing three criteria: (1) the economic impact of the measure; (2) the extent that the measure interferes with legitimate expectations; and (3) the purpose of the measure. Annexes on indirect expropriation have been created by some states to try to ensure

that tribunals do not use the sole effects doctrine, such as Annex B.13(1) in the 2004 Canadian Model BIT which outlines the need for proportionality:

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

Any measure assessed for proportionality must meet the basic requirements of non-discrimination and due process. Determining the economic impact of the measure uses the same process described earlier. The second criteria addresses the legitimate expectations of the investor, although the use of legitimate expectations here is narrower than with FET and requires direct assurances from state officials. The third criteria relates to the nature of and intention behind the regulation, whether it was created to pursue a legitimate public policy objective, and whether the measure can reasonably be expected to achieve that objective. Using this method, while a regulatory measure may rise to the level of indirect expropriation based on economic impact, if it is deemed a proportional response it will be ruled non-expropriatory [478].

The third method to distinguish compensable indirect expropriations from non-compensable regulatory measures is through what is called a ‘police powers carve-out’ that protects specific classes of regulatory measures [40]. Such a carve-out can be found in many treaties concluded by Canada and the United States [478], as well as in the 2012 ASEAN-Australia-New Zealand free trade agreement:

*Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation of the type referred to in Paragraph 2(b)<sup>1</sup>. (Article 4).*

<sup>1</sup>*[T]he second situation is where an action or series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure” (¶2b)*

If police powers are used, as long as the regulatory measure is legitimate and legally implemented, regardless of any assessment of economic impact or proportionality, it will be deemed non-expropriatory. Treaties may include both criteria for a test of proportionality as well as a police

powers carve-out, potentially because the more comprehensive protection offered by police powers is extended to a more limited set of public policies (e.g. public health and the environment), while proportionality may offer less protection but to a wider range of policies (e.g. financial measures). In the absence of proportionality or police power provisions within the treaty, a tribunal would be able to implement the sole effects doctrine in assessing expropriation.

### 7.3.5.2 Findings on Expropriation Provisions

#### 7.3.5.2.1 Defining Expropriation

Of the 41 cases reviewed in this study, 38 involved expropriation claims. A total of 12 found in favour of the investor, two cases for direct expropriation and ten cases for indirect expropriation. The general language and the approaches to interpretation of the expropriation provision described above was reflected consistently in the reviewed case studies. The high threshold for permanent damage to the economic value of the investment to rise to the level of expropriation was reflected in all cases. The ruling by the tribunal in *Pope and Talbot v Canada* regarding indirect expropriation was the most frequently cited precedent in the reviewed cases, particularly the criteria the tribunal outlined for assessing whether the investor retains control of the investment. As noted earlier, the tribunal ruled that there had been no expropriation of the investor's investment because:

...the Investor remains in control of the Investment, it directs the day-to-day operations of the Investment, and no officers or employees of the Investment have been detained by virtue of the Regime. Canada does not supervise the work of the officers or employees of the Investment, does not take any of the proceeds of company sales (apart from taxation), does not interfere with management or shareholders' activities, does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions ousting the Investor from full ownership and control of the Investment (§ 100).

#### 7.3.5.2.2 Compensable Indirect Expropriations and Non-Compensable Regulatory Measures

The reviewed cases reflected the three methods for identifying compensable regulatory measures. The tribunal in *Metalclad v Mexico* employed the sole effects doctrine when deciding on indirect expropriation, finding in favour of the investor and stating that “[t]he Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree” (§111) in reference to the environmental concerns of operating the hazardous waste facility and the state decision to

declare the area protected land for rare cacti discussed earlier. A similar decision was reached in *Unglaube v Costa Rica*, wherein the investor purchased several plots of land in Costa Rica for ecotourism development. After considerable investment in development, the government of Costa Rica announced the creation of a national park in the surrounding area to protect endangered leatherback turtle nesting grounds, and began interfering with the investor's ongoing development process through permit delays and denials, giving rise to a claim of indirect expropriation [480]. The tribunal in *Unglaube v Costa Rica* stated that:

[w]hile there can be no question concerning the right of the government of Costa Rica to expropriate property for a bona fide public purpose, pursuant to law, and in a manner which is neither arbitrary or discriminatory, the expropriatory measure must be accompanied by compensation for the fair market value of the investment (¶ 205).

The finding of required compensation for regulatory measures in favour of the investor based exclusively on financial damage was also used in *Alpha v Ukraine* and *Gemplus v Mexico*.

A number of cases also implemented the proportionality method, weighing the economic impact of the measure and the legitimate expectations of the investor against the character of the measure and the public objective it is seeking to achieve. This proportional approach was taken in cases such as *Deutsche Bank v Sri Lanka*, *LG&E v Argentina*, and *Tecmed v Mexico*, with mixed results for investors and states. While the tribunal in *Tecmed v Mexico* acknowledged the need to address proportionality given the health and environment concerns of the landfill, they ultimately concluded that:

In this case, there are no similar or comparable circumstances of emergency, no serious social situation, nor any urgency related to such situations, in addition to the fact that the Mexican courts have not identified any crisis. The actions undertaken by the authorities to face these socio-political difficulties, where these difficulties do not have serious emergency or public hardship connotations, or wide-ranging and serious consequences, may not be considered from the standpoint of the Agreement or international law to be sufficient justification to deprive the foreign investor of its investment with no compensation...(¶ 147).

In *Pope and Talbot v Canada*, the tribunal concluded that NAFTA's protection against expropriation "...does cover non-discriminatory regulation that might be said to fall within an exercise of a state's so-called police powers" (¶96); but that "...a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation" (¶99). The tribunal ultimately found in favour of the state on the basis of indirect expropriation, although

due to reasons of economic impact rather than ruling it as a proportional response. Thus, while the proportionality method ensures that more than economic impacts will be considered, as in *Tecmed v Mexico*, there are no guarantees that the arbitrators on the tribunal will agree with all situations within which the state has elected to regulate. The high threshold for economic impact is likely to be the most frequently cited reason for failing to find a breach of expropriation.

The third approach to addressing indirect expropriation claims, through police power carve-outs, is highlighted in two prominent cases, *Saluka v Czech Republic* and *Chemtura v Canada*. In the case of *Saluka v Czech Republic*, Saluka Investments held a 46% stake in a privatised government bank which was then sold by the government for less than one US dollar [481]. The ruling of the tribunal in *Saluka v Czech Republic* stated that “[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare” (§255). Although this approach has not been consistently taken before or after the *Saluka* award, due to a lack of binding precedent in the ISDS system, their ruling outlined their argument in more detail:

In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are “commonly accepted as within the police power of States” forms part of customary international law today. There is ample case law in support of this proposition. As the tribunal in *Methanex Corp. v. USA* said recently in its final award, “[i]t is a principle of customary international law that, where economic injury results from a bona fide regulation within the police powers of a State, compensation is not required”. That being said, international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered “permissible” and “commonly accepted” as falling within the police or regulatory power of States and, thus, noncompensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law. It thus inevitably falls to the adjudicator to determine whether particular conduct by a state “crosses the line” that separates valid regulatory activity from expropriation. Faced with the question of when, how and at what point an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation, international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity (paras. 262-264).

Although the tribunal in *Saluka v Czech Republic* found for the investor based on a breach of FET, there was no finding that an indirect expropriation had occurred.

The police powers carve-out approach was also taken by the tribunal in *Chemtura v Canada*, a case which centered on Canada's ban of lindane, a chemical designated as a possible carcinogen, an environmental contaminant, and associated with various negative health consequences in humans and animals, including death [482]. As a manufacturer of lindane-based pesticide for canola seeds Chemtura sought investment arbitration through NAFTA. The tribunal in this case noted that:

...the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers...the PMRA [Pest Management Regulatory Agency] took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation (¶ 266).

The tribunal ultimately dismissed all of Chemtura's claims at the merits stage.

### 7.3.5.3 *Conclusions on Expropriation Provisions*

Protection against expropriation without compensation, either directly or indirectly, represents a minor constraint on health policy space relative to FET. Even in the event that the sole effects doctrine, arguably the least favourable method for protecting health policy space, is used to test for expropriation, it requires a destruction or near destruction of the investment value in order to qualify as a breach. That said, the absence of consideration of the purpose of the policy measure in such instances where that threshold is surpassed leaves regulatory policy unnecessarily vulnerable, for example in regards to tobacco plain packaging legislation or any measures interfering with the use of registered trademarks. Since trademarks are a type of intellectual property, and intellectual property is considered an investment in most treaties, if a government bans the use of the trademark on packaging, as in the case of tobacco plain packaging legislation, this could be construed as a destruction of the value of the investment through indirect expropriation. The extent of this concern depends on a point introduced earlier in the chapter, that tribunals have varied in whether an investment must be considered as a whole business or whether it can be divided into its component parts [478]. If the tribunal permits the investment to be divided into its component parts, specifically isolating the investment to the trademark, then plain

packaging may very well destroy the entire value of that investment. The *PMA v Australia* case noted earlier did not make it to the merits stage in order to have this argument evaluated by an arbitral tribunal.

Incorporating criteria for an assessment of proportionality into treaty text is, from a policy perspective, a preferable option as it requires the tribunal to at least consider the nature and purpose of the measure; however, it is not a guarantee as demonstrated by the tribunal in *Tecmed v Mexico* which found for the investor solely on a breach of indirect expropriation. Of the options reviewed a police powers carve-outs, such as the one in the ASEAN-Australia-New Zealand free trade agreement, appears to be the strongest protection of the right to regulate, as exemplified by *Saluka v Czech Republic*, but even more importantly by *Chemtura v Canada* a case that centred on legitimate public health policy.

#### 7.4 Discussion

This chapter explored two investor rights most commonly relied on by investors, specifically FET and expropriation, in order to engage with the substantive rights within concluded ISDS cases in a way that can translate to health policy-makers. One of the premises of the analysis above is that ISDS is being factored into domestic policy decision-making by influencing policy-makers' perceptions of the likelihood of a future ISDS challenge to a new measure. As long as countries have treaties with active ISDS mechanisms, ISDS should be an informed element of the decision-making process. As demonstrated in *Frank v Moldova*, international obligations will have legal supremacy over otherwise lawful domestic policies in international arbitration. Health policy-makers require evidence to accurately engage with ISDS factors during decision-making to determine that a policy is either compliant or to modify it for compliance in a way that does not compromise its capacity to achieve its intended goals. This type of evidence-informed decision-making may help reduce the chances of policy being compromised, delayed, or abandoned out of a fear of ISDS, a phenomenon referred to as regulatory chill.

This chapter is situated within the larger theoretical objective of this dissertation of demonstrating how the inclusion of contentious ISDS mechanisms in contemporary RTAs provides an avenue to empower international juridical actors to prioritise the financial interests of TNCs over public policy interests. This is exemplified in cases such as *Metalclad v Mexico* and *Tecmed v Mexico*

which provided financial compensation to large corporations in spite of legitimate concerns from residents regarding hazardous waste facilities in their communities. The diversion of over US\$6.5 billion of tax payers' money to large corporations alone [70] demonstrates the extent of this problem, particularly when contrasted alongside examples of the opportunity costs of that money which could have been used for the provision of public goods and services, such as childhood vaccination programmes. This is not to say that there were no legitimate concerns on the part of investors, many cases included demonstrably problematic behaviour on the part of state actors; but whether international investment arbitration is the appropriate forum to settle disputes between investors and states is debatable, and a discussion outside the scope of this current chapter.

The evidence produced within this chapter focused on understanding arbitral decisions on FET and expropriation from a health policy perspective. The following section will review the lessons about FET and expropriation produced from the analysis and translate them into recommendations for strengthening the right to regulate within new IIA agreements, such as the TPP. As the TPP text is not yet ratified these recommendations may be valuable for policy-makers to consider.

#### *7.4.1.1 Recommendations for Strengthening the Right to Regulate in IIAs*

Three main lessons can be derived from the analysis of FET, the first of which is the need for clear definitions of FET in the treaty text. The investment chapter of the TPP more clearly elucidated the FET standard, stating “(a) *“fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world*” (art. 9.6 ¶2a). Although this is a clear ‘clawing-back’ of many of the obligations that have come to be associated with FET (see Table 11), that FET *includes* protections against the denial of justice and due process does not preclude a tribunal from inferring that it includes additional obligations. Language that FET is *limited* to such obligations may prevent expansive interpretations that undermine the right to regulate, such as the protection of legitimate expectations or the right to a stable and predictable legal environment.

Alternatively, the TPP could instead adopt the language of the CETA text which states that:

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes: (a) Denial of justice in criminal, civil or administrative proceedings; (b) Fundamental breach of due process,

including a fundamental breach of transparency, in judicial and administrative proceedings; (c) Manifest arbitrariness; (d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) Abusive treatment of investors, such as coercion, duress and harassment; or (f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision (art X9 ¶2-3)

The FET standard in the CETA text provides a clearer demarcation of what constitutes a breach of FET, reinforcing state sovereignty to develop the standard rather than tribunal members.

A second but related lesson involves the referent standard that FET is associated with in the treaty text, namely its association with the minimum standard of treatment under customary international law. According to the tribunal in *Saluka v Czech Republic* linking FET to the minimum standard of treatment under customary international law is the preferable approach for protecting the right to regulate. Being a US-led IIA, the TPP adopted this approach stating “[e]ach Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security” (art.9.6 ¶1). Rulings such as those in *Pope and Talbot v Canada* and *Metalclad v Mexico*, however, suggest that this approach is not necessarily preferable as expansive interpretations of FET obligations were made by these tribunals. The distinction between FET as an autonomous standard and as a representation of customary international law has been blurred. To demonstrate this, the tribunal in *Merrill and Ring v Canada* stated that:

In the context of the FTC Interpretation, the Tribunal accepts that it cannot be said that fair and equitable treatment is a free-standing obligation under international law and, as concluded in *Loewen*, its application will be related to a finding that the obligation is part of customary law. As to this latter point, Canada has argued that the existence of the rule must be proven. But against the backdrop of the evolution of the minimum standard of treatment discussed above, the Tribunal is satisfied that fair and equitable treatment has become a part of customary law (¶211).

The tribunal respected the binding interpretation made by NAFTA parties that FET does not require treatment in addition to or beyond that which is required by the minimum standard of treatment under customary international law. The efficacy of such an approach, however, is

nullified if FET as an autonomous standard with developed obligations, such as the protection of legitimate expectations and a stable and predictable legal environment, are considered a part of customary international law. This reinforces the first recommendation of the necessity to define FET, as well as its component parts such as legitimate expectations, within the treaty text. Accordingly, given the relative ubiquity of some form of protection of investor expectations in the determination of a breach of FET it may be valuable for treaties to define the burden of evidence required to demonstrate such expectations. The award in *Unghlaube v Costa Rica* may provide guidance on how to set a high threshold for investors to demonstrate such expectations, specifically placing the onus on the investor to “...demonstrate reliance on specific and unambiguous State conduct, through definitive, unambiguous and repeated assurances, and targeted at a specific person or identifiable group” (§270).

Finally, given expansive interpretations of FET, and the potential inclusion of the evolution of the standard in customary international law, it may be advisable to address the right to a stable and predictable legal environment afforded to investors by some tribunals, for example in *CMS v Argentina*. For recommendations on addressing this component of FET we can refer to the case of *AES v Hungary* where the tribunal dismissed all claims of a British energy company, AES, finding that Hungary had acted reasonably in its measures to curb the profits of companies providing public energy utilities. The tribunal noted that the contract in question had explicitly stated that Hungary would continue to set maximum administrative prices for electricity indefinitely into the future. For that reason, the introduction of such measures could not undermine the stability or predictability of the legal environment for the investor, as such measures were a predictable element of the regulatory environment. It may then be valuable to add a footnote to the FET standard in the TPP and other IIAs that for greater certainty with regards to the FET standard that countries will continue to advance public health measures to reinforce the expectation that public health regulations are a predictable element of the future legal environment. Alternatively, the FET standard may benefit from an annex similar to that on indirect expropriation which would clarify the obligations it introduces for states and provide additional protections for the right to regulate, such as the expectation that countries will continue to advance public health measures, or a police powers carve-out.

Although the TPP includes an annex on indirect expropriation there are additional modifications that would improve its protection of the right to regulate. First, Annex 9-B requires that when evaluating the proportionality of a regulatory measure to assess for indirect expropriation that the tribunal consider “...*the extent to which the government action interferes with distinct, reasonable investment-backed expectations*” (art. 3(a)(ii)). Within a footnote it is clarified that “[f]or greater certainty, whether an investor’s investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.” Again, this is one approach to defining what will be viewed as investor expectations similar to that in *Unghlaube v Costa Rica*. The language, however, that it includes ‘*factors such as,*’ implies that this is not intended to be an exhaustive list and tribunals would be free to consider additional factors.

Second, the annex also requires that “...*the character of the government action*” (art. 3(a)(iii)) is taken into consideration in the test of proportionality. No footnotes are provided, thus additional explanation of what should be assessed within the ‘*character*’ of the government action would be beneficial for reducing uncertainty for both tribunal members and regulators. Additionally, the annex states that “[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances” (art. 3(b)). Thus, the TPP includes a type of police powers carve-out, demonstrated in the cases above to be the most useful of the three options presented in protecting the right to regulate; however, the stipulation of “*except in rare circumstances*”, which is not defined, means this is not a pure police powers carve-out as included in the ASEAN-Australia-New Zealand free trade agreement. The removal of this stipulation in the TPP should be considered. The inclusion of a pure police powers carve-out may also be a useful addition in an annex on FET. In the TPP annex a footnote is included to clarify non-discriminatory regulatory actions designed to protect legitimate public welfare objectives, specifically public health, that “[f]or greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene

*therapies and technologies, health-related aids and appliances and blood and blood-related products.*” The language explicitly states that this is not intended to limit the scope of the measure; however, it reflects a missed opportunity to include regulatory actions of health-harmful products, including tobacco, alcohol, and ultra-processed food products.

A police powers carve-out is not, however, a guarantee for states, as a tribunal must still find that the measure is non-discriminatory, that it is a rational policy option to achieve a public welfare objective, and that the objective itself is legitimate. A stronger form of protection may be excepting public health measures from ISDS procedures, as the TPP did for tobacco control measures. The text states that:

A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure<sup>12</sup> of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed (art. 29.5).

<sup>12</sup> A tobacco control measure means a measure of a Party related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements. For greater certainty, a measure with respect to tobacco leaf that is not in the possession of a manufacturer of tobacco products or that is not part of a manufactured tobacco product is not a tobacco control measure.

Essentially this tobacco exception provides states the right to refuse investor challenges through the international arbitration system in regards to tobacco control measures, although states may still seek arbitration through state-state dispute settlement. The inclusion of this exception indicates that states were not certain that the safeguards currently in place would be sufficient to prevent such challenges. While this protection may be limited by the fact that the TPP will not supersede other agreements such as NAFTA which permit these types of tobacco challenges, this exception does reflect the type of stronger protections that should be extended to more areas of public health, including alcohol and ultra-processed food products, within IIAs and ideally introduced retroactively in previous IIAs when possible.

Increased attention to the intersection of international trade and investment treaties and health has raised concerns about the potential implications of international investment arbitration for state

sovereignty over domestic health policy space and the possibility of regulatory chill out of a fear of ISDS disputes. High profile cases such as *PMA v Australia* and *Eli Lilly v Canada* have created further apprehension. This situation has produced a need for health-policy makers to directly engage with the substantive protections IIAs provide, and ongoing case outcomes in investor-state arbitration to make evidence-informed policy decisions. Increased engagement may also enable improved advocacy for the right to regulate for health in future treaties.

The current chapter demonstrated the range of interpretations of key investment protections including FET and expropriation with a focus on their relevance to health policy. Additionally it reviewed the implications of ISDS for health policy and generated recommendations for strengthening the right to regulate in future IIAs. The next chapter will integrate the findings above with the work of the previous chapters to explore their contribution to the principal aims and theses of this dissertation.

## CHAPTER 8

INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS AND HEALTH: CONCLUSIONS
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“I AM OPPOSING A SOCIAL ORDER IN WHICH IT IS POSSIBLE FOR ONE MAN WHO DOES ABSOLUTELY NOTHING THAT IS USEFUL TO AMASS A FORTUNE OF HUNDREDS OF MILLIONS OF DOLLARS, WHILE MILLIONS OF MEN AND WOMEN WHO WORK ALL THE DAYS OF THEIR LIVES SECURE BARELY ENOUGH FOR A WRETCHED EXISTENCE.”

— Eugene V. Debs

## 8.1 Dissertation Overview

This dissertation began with a quote from Margaret Chan, Director-General of the World Health Organisation (WHO), who stated that “[t]he boundaries of public health have become blurred, extending into other sectors that influence health opportunities and health outcomes. The importance of economic, social, environmental, and political determinants of health has grown” [1]. This dissertation has explored some of those blurred boundaries that may assist in addressing the complex challenge of rising rates of noncommunicable diseases (NCDs) around the world. Using a population health approach this work examined macroeconomic policy as a structural determinant of NCD morbidity and mortality. More specifically, it looked at the influence of international trade and investment policy on environmental factors that shape individual risk factors for developing NCDs, primarily tobacco, alcohol, and ultra-processed food and beverage consumption. The goal was to clarify the pathways through which international trade and investment agreements influence human health, and to explore points along those pathways with the intent of improving the existing evidence base and policy development.

The thesis of the work was comprised of three main arguments. First, that trade and investment policies are a fundamental structural determinant of the socioeconomic and political context within which the social determinants of health inequalities (*e.g.* education, employment, income) and the social determinants of health (*e.g.* material circumstances, individual behaviours, health systems) are conditioned and constrained, which strongly influence one’s health and well-being. Second, that transnational corporations (TNCs) are highly influential actors within the trade and investment policy space that use that influence to guide provisions that are in their interest through participation in the negotiation of new international trade and investment agreements. Finally, that provisions in the interest of TNCs are manifested through two primary channels: provisions that contribute to TNC profitability by facilitating trade and investment in goods and services across borders, including in health-harmful commodity (HHC) markets; and provisions that provide protection from domestic regulation, including regulation of HHCs, enforced through processes of the highly problematic investor-state dispute settlement (ISDS) arbitral system.

Throughout the dissertation there has been a focus on contemporary regional trade and investment agreements (RTAs) and the contentious ‘behind-the-border’ provisions they include, such as

provisions directing the internationalisation of regulation, enhanced intellectual property rights (IPRs), and expansive investor protections alongside ISDS mechanisms, although the subject matter of this work did not directly engage with IPRs in its analytical components. Within RTAs there was an emphasis on the recently negotiated Trans-Pacific Partnership (TPP) agreement, including an analysis of TNC involvement in its negotiation in Chapter 5 and engaging with the Agreement to contextualise the findings of Chapters 5 through 7. Additionally, Chapter 2 and Chapters 4 through 6 used the dominant food system and dietary health outcomes to achieve more detailed analyses of the relationships between trade and investment and NCDs.

There were two primary aims for this dissertation: (1) to make an empirical contribution to the academic literature on international trade and investment agreements and health; and (2) to make a theoretical contribution by advancing a critical investigation of the role of TNCs in the design and implementation of international trade and investment agreements. The thesis of this work was used to develop a series of objectives to address these aims, which subsequently guided the work of the previous chapters. The contributions of this dissertation are reviewed below as they relate to the outlined objectives.

### **8.1.1 Aim 1: Empirical Contributions to International Trade and Investment Agreements and Health**

#### *8.1.1.1 Objective 1A: Apply Novel Investigative Techniques in the Assessment of Relationships between International Trade and Investment Agreements and Health*

At the time that a health impact assessment (HIA) methodology was selected for this dissertation, it was, to the best of our knowledge, the first attempt to conduct an HIA of trade and investment policy. An HIA of the TPP and another of the Trans-Atlantic Trade and Investment Partnership (TTIP), however, were published while this work was being conducted [60,61]. Although this may no longer be the first HIA of trade and investment policy, the use of this methodological approach remains novel and thus its application here retains the capacity to make an empirical contribution to the use of HIA in the foreign policy context. Chapter 3 reviewed the stages of an HIA, including the preliminary steps of identifying the values, goals, and objectives of the policies and policy process under examination; the main stages of screening, scoping, appraisal, reporting, and modification; followed by monitoring and evaluation upon completion.

HIA provides a structure for exploring the relationships between trade and investment agreements and health that may prove more valuable in a policy context than an academic one, which already has fixed processes for conducting and reporting research. HIA has also been demonstrated to be useful in reaching a wider audience, such that the HIA on the TPP conducted in Australia had been referenced in 50 newspaper articles from Australia, New Zealand, the USA, Malaysia and Venezuela in the first two months after it was released [483]. Arguably, HIAs like the Australian example that cover a broad range of issues at a higher-level, thus conforming to a health impact review methodology, may have a greater reception by a wider audience than an HIA such as this dissertation, which employed a health impact analysis and examined only a few issues in depth. Equally, health impact analyses will strengthen the quality of future health impact reviews, and health impact appraisals, by improving the evidence base for the relationships between international trade and investment and health.

The HIA methodology also holds value in its associated principles, which are complementary to a population health approach and in operationalising a ‘health-in-all-policies’ strategy. HIA tries to identify how the policy under examination can maximise positive, and minimise negative, externalities for health. Moreover, it encourages values such as a democratic process and having the public engage in the policies that impact their lives; examinations of equity and sustainability including exploring distributional effects of the policy, particularly among vulnerable groups, and the long term impacts of policy; and ethical use of evidence and a variety of methods to develop a better understanding of complex health problems. These attributes provide utility to the use of HIA in addition to its structural guidance. We began this HIA without any previously developed screening tool to guide the scoping and appraisal components of this work. The development of a conceptual framework in Chapter 4, along with a review of the evidence we undertook based upon this framework, provides a contribution to the use of this methodology in future HIAs of trade and investment policy.

The inability to conduct randomised controlled trials to study the effects of trade and investment policy on population health outcomes requires exploration of novel investigative techniques to build an evidence-base. The use of a natural experiment methodology in Chapter 6 made constructive use of naturally occurring conditions in Vietnam and the Philippines to help estimate such effects, yielding valuable evidence. The application here demonstrated the strength of this

approach; however, it also highlighted opportunities to improve its use in future analyses, including a wider range of falsification tests or the use of a synthetic control (a composite of multiple regions), rather than a single control country. It also noted some of the challenges for future analyses to consider, such as the difficulty in obtaining quality data, how to better isolate the effects of these agreements from other variables in a model, how to better attribute outcomes to trade and investment agreements given the long-term implementation periods, and deciding when to introduce the time of intervention. The use of natural experiments for policy scenarios should continue to be developed as it is a promising tool for evaluating policy outcomes.

#### *8.1.1.2 Objective 1B: Develop a Conceptual Framework for Understanding the Relationships between Trade and Investment Agreements and Health*

In commencing the HIA we identified the lack of a comprehensive framework on the pathways between trade and investment agreements and health. For that reason, Chapter 4 presented the development of a framework focused on trade and investment pathways to NCDs through HHCs (tobacco, alcohol, ultra-processed food and beverages) and access to medicines. The framework was developed to explain the influence of trade and investment provisions on environmental influences of behavioural risk factors and health outcomes. Consistent with a population health approach the framework also contains key social determinants of health, including income and social status, employment and working conditions, and access to health and social services. The framework was developed iteratively with a realist review of available evidence that supported proposed pathways and contributed to the inclusion of new pathways under the guidance of a team of experts in the area. The evidence reviewed focused on RTAs, particularly on the North American Free Trade Agreement (NAFTA), but included evidence from unilateral liberalisation and multilateral liberalisation through the World Trade Organisation (WTO). A substantial portion of the evidence came from Latin America and Pacific Island Countries (PICs).

The framework introduced direct and indirect health impacts of trade and investment provisions on NCDs through three main pathways: (1) facilitation of trade in goods; (2) facilitation of trade in services and investment; and (3) domestic policy space and governance. A review of the first pathway provided support for the proposition that the reduction or elimination of tariff and non-tariff barriers may result in a higher volume of cheaper imports flowing across borders, increasing their availability and affordability in the consumer environment. This was noted as presenting a

challenge to health when the effects apply to HHCs. Similarly, there was support of indirect health impacts through potential reductions in tariff revenues for public services, alterations to domestic economies and the quality and quantity of employment, and variations in economic growth. Exploration of the pathway through trade in services and investment also supported the proposition that trade and investment provisions increase FDI into the production, processing, retailing, and marketing and advertising of HHCs, as well as the market for pharmaceuticals, vaccines, medical devices, and health technologies. Increased FDI, in turn, can affect the availability, accessibility, affordability, and acceptability of these products. Although it seemed reasonable to suggest that provisions affecting trade in services, IPRs, and investment would promote trade in services and FDI inflows, evidence for the influence of those specific provisions was lacking. FDI was thus better understood as a consequence of the complete set of changes brought about by a trade and investment agreement as investigated in Chapter 6. Many of the indirect health impacts of this pathway were indistinguishable from the effects of the facilitation of trade in goods, such as implications for the sectoral composition of the domestic labour market and the quantity and quality of employment. Evidence is still needed to substantiate the influence of services liberalisation from trade and investment agreements on national provision of health services and health insurance and subsequent effects for out-of-pocket expenditures on these services. Very little empirical evidence was discovered for the domestic policy space and governance pathway; but, the causal connections proposed, though largely conceptual with limited empirical validation, are based on the premise that trade and investment provisions that influence the policy-making process, set international standards, and restrict policy-space may alter a state's propensity for policy-making and the efficacy of those policies. The work in Chapters 5 and 7 developed some support for this section of the framework.

Overall, assessing the health impacts of international trade and investment agreements is a complex process as the pathways in the framework are interconnected, context-dependent, and occur over extended periods of time. It was clear from the reviewed evidence that more research is needed in all areas, particularly as the outcomes became more distal, and as they move farther away from traditional provisions of tariff reductions in the trade in goods pathway into more contemporary trade and investment provisions in the services and investment and domestic policy space and governance pathways. It also became clear that there is a need for more robust evidence.

Future studies should explore the outcomes of trade and investment agreements in direct relation to changes to the current domestic policy landscape, and differentiate between new commitments that contribute to liberalisation from commitments to ‘lock-in’ existing domestic policies. These distinct scenarios may have varying effects and underlying mechanisms, that is, the creation of new opportunities for investors in foreign markets may result in greater and more widespread change along the reviewed pathways relative to increased commitment of the current domestic landscape which may only enhance the credibility of investments. The conceptual framework and the body of evidence to support the pathways within it should both be developed further to advance the research area of trade and investment agreements and health.

## **8.1.2 Aim 2: Theoretical Contributions to International Trade and Investment Agreements and Health**

### *8.1.2.1 Objective 2A: Develop a Theoretical Framework for Understanding Provisions within Contemporary Regional Trade and Investment Agreements*

Chapter 2 was intended to be complementary to Chapter 4, balancing the development of causal pathways to explore empirical relationships between trade and investment agreements and health with theoretical development to explain the inclusion of contentious provisions within contemporary trade and investment agreements, such as the internationalisation of regulation, enhanced IPRs, and expansive investor rights paired with ISDS. Chapter 2 used the *3-i* framework to explore the ideas, institutions, and interests behind the development of international trade and investment policy. Using a neo-Gramscian approach it examined the set of neoliberal policy preferences, manifested as the Washington Consensus, that have been shaped by neoliberal ideas as described by Harvey [110] and entrenched at a transnational level through a process referred to by Gill as the new constitutionalism [83]. The new constitutionalism is understood as the evolution of constitutionalism within states to constitutionalism between states, a phenomenon reflective of increasingly integrated global economies.

Conventional economic theories grounded in neoliberal ideology suggest that such market protections are necessary for investors to develop confidence and create economic growth. Alternatively, critical theories have explored this move to entrench neoliberal policy preferences through the new constitutionalism from the perspective of actor interests. The theoretical

framework in this dissertation drew on additional critical theory including Robinson's transnational capitalist class of elite political, economic, and judicial actors as well as Hirschl's theory of hegemonic preservation [84,85,484]. It was suggested in Chapter 2 that growing contestations regarding health and environmental implications of TNC activity may have these elite economic actors feeling threatened and searching for instruments, such as trade and investment agreements, to secure the current neoliberal policy preferences under which they have benefited substantially. The motivations of elite judicial actors were suggested to be similarly related to financial benefits, in that such actors have profited from the ISDS system developed to arbitrate disputes between private foreign investors and states, a system explored in depth in Chapter 7. It was more complex to ascertain the motivations of the political elite, although it was proposed here that viable options include a genuine belief in neoliberal ideology, a desire to remain competitive with other countries, or a blurred distinction between political and economic elites, a concept touched upon in Chapter 5.

To develop support for the theoretical framework, and to better develop the pathways in the conceptual framework, points of interaction between TNCs and international trade and investment agreements were explored in the three analytical components of this dissertation. TNC access to and influence on treaty negotiations was explored in Chapter 5; financial incentives from international trade and investment such as increased sales in global HHC markets was the topic of Chapter 6; and the ISDS system influenced by the judicial elite and designed to protect the interests of the economic elite against state regulatory action was investigated in Chapter 7. The theoretical framework was critical in the development of the analytical approaches taken in Chapters 5 through 7, specifically it drove the emphasis on neoliberal ideology that promotes economic growth, irrespective of its equitable distribution in society, through increased trade and investment liberalisation in the interest of elite transnational actors, including TNCs, and how this has had impacts on human health. These analyses corresponded to the three remaining objectives of this theoretical contribution aim, discussed below.

#### *8.1.2.2 Objective 2B: Explore the Role of Transnational Corporations in Contemporary Regional Trade and Investment Agreement Negotiations*

Chapter 5 was the first of three investigative components and was primarily concerned with the influence of industry during the TPP negotiations, and the extent to which provisions in the final

TPP text reflected the stated intentions of industry. This chapter explored options for engagement with ‘Big Food’ including voluntary self-regulation, partnering with industry, and public health-informed regulation. Although there have been successful efforts under voluntary self-regulation, win-win scenarios are few and far between and voluntary self-regulation may be an ineffective strategy for both participating companies and public health. Partnerships with industry are not uncommon, however they do create potential conflicts of interest, particularly within the policy-making arena where TNCs may have latitude to influence the rules that regulate their industry. Public health-informed state regulation may be the most effective form of minimising health risks associated with the proliferation of ultra-processed food and beverage products; however, participation of ‘Big Food’ in the TPP negotiations may encroach upon the viability of this approach.

Chapter 5 highlighted evidence of ‘Big Food’ developing political influence, contributing to the blurred boundaries between political and economic actors addressed in Chapter 2, such as that food and beverage companies spent over US\$265 million on lobbying the US government during the period of TPP negotiations. Chief among these contributors were the Coca-Cola Company and PepsiCo, whose profitability in soft drink markets associated with trade and investment provisions was explored in Chapter 6. The potential influence of ‘Big Food’ on the terms of the TPP raised important concerns about the implications for dietary health and subsequent rates of NCDs.

A review of Canadian food industry submissions to the state’s trade negotiators, alongside a comparison with US food industry submissions, revealed three central requests that could be explored for inclusion in the final TPP text: improved market access; increased regulatory coherence; and science-based rules. Other themes in the submissions addressed the importance of Canada joining the TPP and a loss of competitiveness for Canadian agricultural sectors if they did not – both of which were satisfied by Canada signing the agreement – as well as concerns over the protection supply management, for which only small concessions were made in the deal.

Assessing industry requests for market access in the TPP was challenging given the complexity of tariff schedules and the lack of any publicly available analyses. It is reasonable to believe that the TPP provided new market access, however, thorough economic impact assessments of projected changes due to tariff reductions in the TPP relative to current applied tariff rates in the participating countries are needed.

As outlined in the domestic policy space and governance pathway in Chapter 4, regulatory coherence provisions play a guiding role in the internationalisation of regulation. The TPP has attempted to incorporate industry requests for internationally coherent regulation through the inclusion of a Regulatory Coherence Chapter. Several provisions within this Chapter may alter the burden on domestic regulatory systems based on the extent to which these procedures deviate from current state practice. Equally, some provisions in the Regulatory Coherence Chapter and the Technical Barriers to Trade (TBT) Chapter may provide avenues for private actor involvement in domestic regulatory processes. TNCs may have an advantageous position for participation given that industry generally has clear ‘asks’ and a relatively cohesive agenda, relative to many public interest groups, as well as the financial and administrative resources to maintain consistent and comprehensive involvement. The TBT Chapter is enforceable through dispute settlement, however, the Regulatory Coherence Chapter lacks recourse to dispute settlement procedures making its implications harder to forecast.

Finally, in regards to requests for science-based rules, it is reasonable to believe that that the TPP’s Sanitary and Phytosanitary Standards (SPS) Chapter has qualitatively ‘raised the bar’ for the burden of scientific evidence required to introduce domestic food safety protections that exceed international standards. Oddly, the only provisions on food products of modern biotechnology were located in the TPP Chapter on National Treatment and Market Access for Goods rather than in the SPS Chapter, the purpose of which is to address such matter; this perhaps reflects an attempt to frame biotechnology as a market access issue rather than as a food safety issue. The TPP also seeks to create a Working Group to further address issues such as low-level presence (LLP) policies for genetically modified organisms (GMO) and maximum residue levels (MRLs) for pesticide-treated foods. It is not inconceivable to suggest that companies like DuPont, Cargill, and Dow Agro-Sciences, which benefit financially from the development and distribution of biotechnology in agriculture, may provide representation on such committees given their role as private corporate advisers to the US during negotiations. Industry may have been favourable to the idea of a Working Group in order to shift these issues to less transparent forums than the TPP agreement, that is, while the TPP text is now public, the outputs of a Working Group may maintain a lower profile, which is likely to minimise potential public opposition.

The analysis in Chapter 5 demonstrated that the publicly presented interests of Canadian food industry, as well as food industries in the US, Australia, and New Zealand [63], were largely reflected in the final text of the TPP. These findings lend support to the argument that TNCs, as highly influential actors within the trade and investment policy space, may have been able to use their privileged access to the TPP negotiations to influence the provisions of the treaty. When trade and investment agreements reflect TNC interests by facilitating the spread of profitable HHCs and sheltering them from new public health regulation, further trade and investment liberalisation may exacerbate the global burden of NCDs. International trade and investment agreements relationships with TNC profits and protections were addressed by the following two objectives.

#### *8.1.2.3 Objective 2C: Explore the Role of Trade and Investment Agreements in Facilitating the Spread of Health-Harmful Commodities by Transnational Companies*

Chapter 5 emphasised TNC interest in achieving the internationalisation of regulation through regulatory coherence provisions that facilitate the movement of goods across borders. Chapter 6 explored how trade and investment agreements in their entirety facilitate affected markets for HHCs, drawing on the causal pathways developed in Chapter 4 to connect trade and investment provisions to consumptions of ultra-processed food and beverage products. Sugar-sweetened carbonated beverages (SSCBs) were selected as the specific product for investigation as rising consumption has been linked to obesity, type II diabetes, and cardiovascular diseases [87,391,392].

We used a natural experiment design, noted in the first objective, to test whether Vietnam's accession to the WTO in 2007, alongside parallel commitments introduced in a bilateral trade and investment agreement with the United States (US), resulted in changes to its domestic SSCB market and, more specifically, foreign concentration within that market as a result of TNC investment. Furthermore, we explored these changes as a potential consequence of fluctuations to FDI inflows and imports and exports. Our analysis revealed two main findings. First, after Vietnam's accession to the WTO and ratification of the bilateral treaty with the US, there was a significant increase in sales of SSCBs that was not seen in the control country, the Philippines, or in other food sectors we would expect to be unaffected, for example unprocessed foods. Second, the main beneficiaries of this growth were foreign beverage companies, namely Coca-Cola and PepsiCo, while domestic beverage companies lost market share.

Additional analyses of SSCB imports and exports suggested that tariff reductions may be contributing to increased volumes of imports of SSCBs into both Vietnam and the Philippines. Moreover, Vietnam experienced increased FDI inflows during the period under study, unmatched in the Philippines, which may be due in part to Vietnam's investor-friendly climate comprised of expansive investor rights enforced through ISDS systems. Increased FDI inflows may also have been influenced by Vietnam's continued commitment to comprehensive economic integration, as demonstrated by its participation in the TPP, its emerging market not yet saturated with profitable products such as HHCs, and other widespread changes to its trade and investment policy. Increased investment from companies such as Coca-Cola and PepsiCo are contributing to increased SSCB production in Vietnam, ultimately driving the growth in its domestic SSCB market, as well as its rising volume of SSCB exports. These findings support the assertion that provisions of trade and investment agreements are likely to facilitate markets for profitable products such as HHCs dominated by a small group of TNCs.

Concerns that trade and investment agreements may influence the viability of introducing new regulations to control increased volumes of ultra-processed food and beverages, explored in Chapter 7, are particularly concerning for countries such as Vietnam, which is both resource-constrained and a key growth market for such products. An analysis of the investment chapter in the TPP demonstrated that its high standards go beyond the majority of international investment agreements (IIAs) previously concluded by TPP members, thus future analyses may find that Vietnam will experience new vulnerabilities for investor disputes under the TPP [429], relative to provisions in their current bilateral investment treaty with the US. The last objective explores the manifestation of TNC interests in trade and investment agreements that may provide enhanced protection for the investments discussed in Chapter 6.

#### *8.1.2.4 Objective 2D: Explore the Implications of Expansive Investor Rights and Investor-State Dispute Settlement for Health Policy*

Chapter 7 was the third and final piece exploring points of interaction between TNCs and international trade and investment agreements and addressed the argument that international trade and investment agreements are empowering TNCs through an expansive set of rights enforced by the highly problematic ISDS arbitral system. Investor rights and ISDS are contentious provisions of contemporary RTAs at the core of the new constitutionalism. The work in this chapter proposed

that international investment policies impact NCDs through direct challenges to and potential reversals of health policies, the financial burden and opportunity costs of ISDS litigation fees and financial penalties, and influences on the policy decision-making environment which may result in regulatory chill outcomes, that is, where a policy is delayed, compromised, or abandoned to avoid the risk of an ISDS claim. The analysis in this chapter explored key investor rights through an examination of 41 arbitral awards using a form of legal analysis referred to as the IRAC formula which examines the Issues, Rules, Analysis, and Conclusions in the case. It focused on two key investor rights that are highly relevant for health-related policy, fair and equitable treatment (FET) and indirect expropriation, in order to engage with the substantive rights within concluded ISDS cases in a way that can be meaningfully translate to health policy-makers.

The analysis demonstrated that the principal source of conflict in interpreting the FET standard is whether it is referenced against the minimum standard of treatment of aliens under customary international law, all sources of international law, or as an autonomous and self-contained treaty standard, which has historically been the most dangerous version of this standard for states given the expansive obligations it has created. It was determined that it is essential to clarify the scope of FET obligations in the treaty text in order to reduce uncertainty for regulators, including some of its essential components such as legitimate expectations, with a view to establishing a high threshold for a breach of FET to be demonstrated. Although it has been asserted that qualifying FET against the minimum standard of treatment under customary international law should necessitate a higher threshold of state misconduct to qualify as a breach relative to the lower threshold of FET as an autonomous standard, this approach has not always been reliable. Equally, it is susceptible to evolutions of customary international law such as the incorporation of the FET standard (inclusive of its comprehensive obligations) into customary international law as determined by some tribunals.

The exploration of indirect expropriation revealed that its high threshold for economic destruction of the investment is likely to prevent most state regulatory measures from qualifying as compensable indirect expropriation. Of the three methods reviewed for how a tribunal may determine whether a compensable expropriation has occurred, including the sole effects doctrine, a test of proportionality, and a police powers carve-outs, the latter was determined to be the strongest protection of the right to regulate.

One of the premises of the analysis was that ISDS is being factored into domestic policy decision-making, a process that is possibly influenced by policy-makers' perceptions of the likelihood of a future ISDS challenge to a new measure. Health policy-makers require evidence to accurately engage with ISDS factors during decision-making to determine if a policy is either compliant or how to modify it for compliance in a way that does not compromise its capacity to achieve its intended goals. This type of evidence-informed decision-making may help reduce the chances of regulatory chill outcomes. To assist policy-makers Chapter 7 reviewed the implications of ISDS for health policy and generated recommendations for strengthening the right to regulate in future IIAs that may be incorporated before ratification of the TPP.

Overall, each of these chapters made either an empirical or a theoretical, or in some cases both an empirical and a theoretical, contribution to the development of the international trade and investment and health literature. Moreover, the work in the chapters provided support for the thesis of this dissertation: that trade and investment policies are a fundamental structural determinant of health and well-being that are highly influenced by TNCs, which guide such policies in the interest of maximising their profits and protections often to the detriment of public policy and population health. The work of this dissertation, however, was not exclusively intended to build the academic literature, but to also provide real-world policy lessons from the findings on how to minimise potential negative externalities for health from contemporary RTAs, such as the TPP. Some high-level findings are reviewed next.

### **8.1.3 Lessons for the Trans-Pacific Partnership**

It is the opinion of this author that the essential question that must be answered before the recently signed TPP is ratified is why; that is, what is the rationale behind signatory states' decisions to participate? The theoretical framework in Chapter 2 developed a critical response to this question. As addressed earlier, it is suggested here that economic elites, such as TNCs, are using trade and investment agreements to 'lock-in' current neoliberal policy preferences that promote and protect their profitability in an economically integrated global economy. These economic elites act in concert with judicial elites, the lawyers and arbitrators profiting from the ISDS system, and political elites, who maintain the power to sign and negotiate the terms of these treaties. Equally, political elites retain the power to terminate these treaties, for example NAFTA allows parties to withdrawal "*...six months after it provides written notice of withdrawal to the other Parties*"

(art.2205). It is also political elites who are responsible to the public that they govern and clarifying their motivations in a transparent and accessible forum is essential to the legitimacy of that governance process. In the event that political elites are signing these treaties in a ‘race to the bottom’ to compete with other states, or due to the influence of economic elites, then there are complex challenges to be addressed such as apathy, cynicism, and political capture among elected representatives. If, however, political elites are operating under a genuine belief in neoliberal economic policy as the path to economic growth and prosperity for all, then robust empirical evidence must be presented to support such claims that trade and investment agreements will bring equitable and sustainable economic growth. Chapter 4 presented evidence that would challenge such an argument.

This flows into the second lesson from this work, that in general there is a lack of robust evidence on the outcomes of trade and investment policy. As noted in Chapter 4, the reviewed evidence demonstrated the level of nuance required to assess the implications of trade and investment agreements on the economy, labour markets, and health, particularly that the direction and magnitude of effects may vary across countries in the agreement, within individual countries in the agreement, and within and between various sections of the population. This complexity, however, does not imply that states should not attempt empirical assessments. Instead it demonstrates the extent of the need for systematic and exhaustive impact assessments. States should not ratify such comprehensive treaties with long-term and potentially irreversible consequences without impact assessments on the economy, labour markets, health, the environment, and regulation, modelled for example on the values of the HIA methodology presented in Chapter 3.

Applying the HIA methodology would incorporate principles of democracy, equity, sustainability, and ethical research into the policy-making process. An evaluation of whether current processes for negotiating and ratifying trade and investment agreements are supportive of democracy is an important point for consideration, for example, by questioning whether TNCs should have privileged access to treaty negotiations relative to the public and its elected representatives as explored in Chapter 5. Moreover, as the TPP moves through domestic ratification procedures it is worth exploring whether current domestic procedures for such ratification have adapted to the changing nature of the content contained in such agreements. The inclusion of expansive content

in contemporary RTAs that move further ‘behind-the-border’ into areas of public policy, well beyond concerns with tariff reductions alone, demands that more opportunities for public and legislative debate over such provisions during and after treaty negotiations are created. In countries such as Canada where the executive branch retains full power to ratify a treaty, regardless of the vote of the country’s elected federal representatives, domestic processes do not appear to be sufficiently supportive of democratic governance.

Chapter 6 provided lessons for the impacts of agreements like the TPP on the spread of HHCs in emerging economies. At a time when public health has labelled NCDs one of the largest threats to social and economic development in the 21st century [12], policies should be controlling and regulating major risk factors such as ultra-processed food and beverage products, not promoting and protecting their accelerated distribution around the globe. Developed TPP economies with saturated markets for such products are unlikely to experience significant changes in the availability, affordability, accessibility, and acceptability of HHCs; however, emerging economies such as Vietnam may undergo substantial alteration with negative effects for population health outcomes. Arguably, though, countries like Vietnam may already be on this trajectory with or without the TPP.

Both developed and developing countries alike will be affected by TPP provisions that entrench and enforce current regulatory systems, which may make it more challenging to introduce regulation to combat drivers of NCDs. As addressed in Chapter 5 the TPP facilitates the internationalisation of regulation through provisions in the SPS, TBT, and Regulatory Coherence Chapters, which may alter domestic policy-making processes in ways that make new regulatory action less likely or in ways that increase the burden of evidence to introduce defensible regulation. Moreover, the inclusion of expansive investor rights and ISDS explored in Chapter 7 may also contribute to potential regulatory chill outcomes. As the TPP has been demonstrated to deviate from existing IIAs among TPP member countries the vulnerabilities to future ISDS suits may vary if the TPP is ratified.

One could argue that the TPP has been progressive in protecting public health with the inclusion of a voluntary exception for tobacco control measures from ISDS. As noted in Chapter 7 though, the inclusion of such an exception is in many ways an admission that public health measures are vulnerable to dispute in the absence of additional protections. Consequently, while future

regulation of tobacco products may be better shielded, legitimate regulations on alcohol and ultra-processed food and beverage products remain exposed to investor-state arbitration. Additionally, the TPP only allows this voluntary exception from the ISDS system, meaning tobacco regulatory measures may still face challenge from state-state dispute settlement (SSDS), which was demonstrated earlier to be susceptible to influence from the tobacco industry.

Moreover, even though the TPP offers tobacco product regulations an exception from the ISDS mechanism, the TPP does not replace previous agreements such as NAFTA which the tobacco industry could still use to initiate litigation against new tobacco regulations. More specifically, in the event that Canada implements tobacco plain packaging legislation and avails itself of this exception in the TPP, while US tobacco companies would not be able to initiate a claim under the TPP they would still be able to initiate a claim under NAFTA. This highlights a larger issue in the international trade and investment treaty-making process, that is, even if increased public health engagement with trade and investment policy results in new health protections such as the tobacco exception in the TPP, and even if all of the recommendations for strengthening the right to regulate within the TPP's Investment Chapter presented in Chapter 7 were adopted, these improvements would be restricted to the TPP. The complex web of over 2,500 IIAs currently in force makes it excessively difficult not only to develop an understanding of current state obligations, but also to make course-corrections in such treaties as improvements are not applied retroactively to previous agreements. Although states generally retain the right to withdraw from treaties or to renegotiate their terms, such processes are challenging and rarely used.

The expansive reach of IIAs with ISDS mechanisms around the globe, such that 129 countries have been a respondent in an investor-state dispute to date [41], may make it worth considering revisiting the idea of a multilateral agreement on investment (MAI). If an MAI could provide states with one source of investor rights that could translate into one set of potentially binding case law, it may assist in reducing the considerable amount of complexity and uncertainty for domestic regulators currently trying to navigate the system. Additionally, an MAI could be designed to replace earlier agreements that contain broader language more favourable to investors with stronger protections for a states' right to regulate, as informed by the abuses of investors over a period of intensified arbitration beginning in the early 2000s. Likewise, the existence of a single agreement might be able to facilitate future modifications as it would at least limit amendments to

one text, or equally could elicit binding interpretations such as those used by NAFTA parties when new vulnerabilities for state regulation develop. In the absence of dismantling the current ISDS and investor rights system altogether, which may be advisable, an MAI could be a valuable option to explore.

Overall, key lessons for the TPP produced by this work are that considerable research is still required to make evidence-informed policy decisions on trade and investment agreements in general, and how they relate to health more specifically; that opportunities exist to strengthen the right to regulate within the TPP treaty text before it is ratified; and that TPP countries should be having transparent public dialogues on the value and purpose of further trade and investment liberalisation provided by contemporary RTAs. The following section will conclude the findings of this dissertation with a brief discussion of how this work is embedded in the larger conversation on inequity and global governance for health.

#### **8.1.4 International Trade and Investment Agreements, Inequity and Global Governance for Health**

We live in a time of unprecedented inequality. As of 2016 the top 1% of the world's population are richer than the rest of the world combined and in North America alone 73 individuals have the same amount of wealth as half of the people living on the continent [485]. While we face an increasing obesity epidemic, one in nine people do not have enough food to eat, and almost half of all under 5 mortality is attributable to malnutrition [486]. The work of the University of Oslo Commission on Global Governance for Health, henceforth the Commission, has situated inequality as a failure of global governance.

Global governance has been defined as: “[t]he complex of formal and informal institutions, mechanisms, relationships, and processes between and among states, markets, citizens, and organisations, both intergovernmental and non-governmental, through which collective interests on the global plane are articulated, rights and obligations are established, and differences are mediated” [487] (p.233). Global governance has been further specified by particular policy areas, such as global health governance, wherein governance mechanism are narrowed to the review of actors and institutions whose primary purpose is directly related to health [488]. This has subsequently been reframed as global governance for health, such that it captures all governance

areas that have the capacity to affect health, including economic governance principles enshrined in trade and investment agreements, while making the normative claim that health equity should be an objective for all sectors [489].

This dissertation has positioned international trade and investment agreements as formal institutions that establish rights and obligations that prioritise the interests of powerful market actors, specifically TNCs, on the global plane, while providing the mechanisms for which differences between states, often acting on behalf of citizens, and investors are mediated through ISDS and other dispute settlement procedures. International trade and investment agreements then are an important global governance mechanism, one which has empowered TNCs. Furthermore, since trade and investment agreements have numerous pathways through which they influence health, they are more specifically a part of the global governance for health landscape. Consequently, if this period of unprecedented inequality, much of which is also inequitable<sup>28</sup>, is attributable to a failure of global governance, and trade and investment agreements are an essential element of that global governance structure, then it is reasonable to suggest that trade and investment policy has been a contributing structural factor to this inequality. Likewise, we might conclude that the trade and investment system as currently designed has largely failed in what it set out to do, which was: "...raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development..." [20].

The work in this dissertation is complementary to the work of the Commission and its analyses of seven policy scenarios where global governance has failed to protect health and health equity: (1) the impact of the global financial crisis and austerity measures on health in Greece; (2) IPRs and the high cost of new drugs; (3) investment treaties and challenges to tobacco control measures; (4) the double burden of obesity with hunger and undernutrition; (5) the conduct of TNCs globally, including the dumping of toxic waste in communities in Côte d'Ivoire; (6) irregular migration and failure to protect the health of migrants; and (7) patterns of armed violence and the effects on health. These policy scenarios correlate with many of the topics in the present work, including:

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<sup>28</sup> Inequality is simply the state of two outcomes not being equal. Inequity, however, is a subset of inequalities that are "...unfair, avoidable differences arising from poor governance, corruption or cultural exclusion..." [490].

neoliberal ideas associated with austerity policy; neoliberal policy preferences protected by trade and investment agreement such as enhanced IPRs, the obesogenic food system, and investor rights and ISDS; and the global conduct of TNCs. International trade and investment agreements are thus intertwined with many of the failures of global governance for health.

One of the fundamental arguments of this dissertation is that the current trade and investment system reflects the institutionalised values of an elite group of actors, and any reform to the system necessarily requires challenging these vested interests. Similarly, the Commission has highlighted the role of TNCs in contemporary global governance. In a commanding display of the power imbalance between states and TNCs they note that the combined capital of the five largest tobacco corporations, over US\$400 billion, the five largest food and beverage corporations, over US\$600 billion, and the five largest pharmaceutical corporations, over US\$800 billion, dwarfs the 124 states with a GDP of less than US\$100 billion [489]. The tobacco, food, and pharmaceutical industries are thus powerful actors in the global governance for health landscape that most national public health departments are ill-equipped to oppose.

In conclusion, discussions on how to improve the health and health equity outcomes of trade and investment policy is best embedded in the larger conversation on reforming global governance for health. The next step in this body of work should focus on developing a better understanding of how to build institutional structures at the transnational level, to better govern global markets in the public interest and to garner enough civil society momentum and political will to do so [491]. Creating real change will require replacing the neoliberal values that currently underpin our institutions with the values of democracy, equity, sustainability, and ethical behaviour. Some of these values are explicit or implicit in the new Sustainable Development Goals, agreed upon in late 2015 by all of the world's governments; suggesting there is growing normative support for them. It will require institutions and policies that prioritise equitable and sustainable development over economic growth. Most importantly, real change will require tackling the vested interests that entrench neoliberal values and policy preferences by demanding a world that is governed for the 99% not the 1%. As former Associate Justice of the Supreme Court of the United States, Louis Brandeis is credited as saying, "[w]e must make our choice. We may have democracy, or we may have wealth concentrated in the hands of a few, but we can't have both."

## Appendix A: Trans-Pacific Partnership Agreement Chapter Structure and Corresponding World Trade Organisation Agreements

TPP CHAPTER	WTO CORRELATE
1: INITIAL PROVISIONS AND GENERAL DEFINITIONS	Contained in provisions in multiple WTO Agreements
2: NATIONAL TREATMENT AND MARKET ACCESS*	General Agreement on Tariffs and Trade (GATT)
3: RULES OF ORIGIN AND ORIGIN PROCEDURES*	Agreement on Rules of Origin (ROO)
4: TEXTILES AND APPAREL	Agreement on Textiles and Clothing (terminated)
5: CUSTOMS ADMINISTRATION AND TRADE FACILITATION	Agreement on Implementation of Customs Valuation
6: TRADE REMEDIES*	Agreement on Implementation of Anti-Dumping & Agreement on Subsidies and Countervailing Measures (SCM)
7: SANITARY AND PHYTOSANITARY MEASURES*	Agreement on Sanitary and Phytosanitary Standards (SPS)
8: TECHNICAL BARRIERS TO TRADE*	Agreement on Technical Barriers to Trade (TBT)
9: INVESTMENT*	Trade-Related Investment Measures (TRIMs – goods only) & General Agreement on Trade in Services (GATS – mode 3)
10: CROSS-BORDER TRADE IN SERVICES*	General Agreement on Trade in Services (GATS)
11: FINANCIAL SERVICES	General Agreement on Trade in Services (GATS)
12: TEMPORARY ENTRY FOR BUSINESS PERSONS	None
13: TELECOMMUNICATIONS	General Agreement on Trade in Services (GATS)
14: ELECTRONIC COMMERCE	Since 1998, WTO members have agreed not to impose customs duties on electronic transmissions
15: GOVERNMENT PROCUREMENT*	Agreement on Government Procurement <sup>+</sup>
16: COMPETITION	None
17: STATE-OWNED ENTERPRISES	GATT Art. XVII

18: INTELLECTUAL PROPERTY*	Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
19: LABOUR	None
20: ENVIRONMENT	Environmental protections from GATT Art. XX, GATS Art. XIV, SPS Art. 2.2, TBT Art. 2.2
21: COOPERATION AND CAPACITY BUILDING	None
22: COMPETITIVENESS AND BUSINESS FACILITATION	None
23: DEVELOPMENT	Contained in special and differential treatment provisions in multiple WTO Agreements
24: SMALL AND MEDIUM-SIZED ENTERPRISES	None
25: REGULATORY COHERENCE*	None
26: TRANSPARENCY AND ANTI-CORRUPTION	Provisions on transparency in multiple WTO Agreements
27: ADMINISTRATIVE AND INSTITUTIONAL PROVISIONS	Contained in provisions in multiple WTO Agreements
28: DISPUTE SETTLEMENT*	Understanding on Dispute Settlement
29: EXCEPTIONS	See GATT Art. XX and GATS Art. XIV
30: FINAL PROVISIONS	Contained in provisions in multiple WTO Agreements
* INCLUDED IN THIS FRAMEWORK + PLURILATERAL AGREEMENT (SUBSET OF WTO MEMBERS)	

## Appendix B: Health Impact Assessment Outputs

CHAPTER	OUTPUTS
CHAPTER 1: INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS AND HEALTH: AN INTRODUCTION	No intended outputs to date.
CHAPTER 2: NEOLIBERALISM, NEW CONSTITUTIONALISM, AND THE TRANSNATIONAL CAPITALIST CLASS: DEVELOPMENT OF A THEORETICAL FRAMEWORK FOR CONTEMPORARY TRADE AND INVESTMENT AGREEMENTS	Draft manuscript intended for publication in special issue on trade and investment and health with emerging Trade and Health Network based in Norway. Journal to be decided. Draft manuscript presented to Network in Trondheim, Norway on 31 May, 2016.
CHAPTER 3: HEALTH IMPACT ASSESSMENT: APPLICATION OF THE METHODOLOGY TO THE EXAMINATION OF INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS	Intended for publication in September 2017 special issue of <i>Impact Assessment and Project Appraisal</i>
CHAPTER 4: PATHWAYS BETWEEN INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS AND HEALTH: DEVELOPMENT OF A CONCEPTUAL FRAMEWORK AND A REALIST REVIEW OF EXISTING EVIDENCE	Draft manuscript intended for publication in <i>The Milbank Quarterly</i> .
CHAPTER 5: TRANSNATIONAL CORPORATIONS AND THE NEGOTIATION OF TRADE AND INVESTMENT AGREEMENTS: AN EXPLORATION OF CANADIAN FOOD INDUSTRY IN THE TRANS-PACIFIC PARTNERSHIP NEGOTIATIONS	<p>Content of chapter has contributed to multiple outputs:</p> <p><u>Peer-Reviewed Publications</u></p> <p>Labonté, R., Schram, A., &amp; Ruckert, A. (In Press). The Trans-Pacific Partnership: Is it everything we feared for health? <i>International Journal of Health Policy and Management</i>. Available Online from 17 April 2016.</p> <p>Friel, S., Ponnampereuma, S., Schram, A., Gleeson, D., Kay, A., &amp; Labonté, R. (2016). Shaping the discourse: What has the food industry been lobbying for in the Trans Pacific Partnership Agreement and what are the implications for dietary health? <i>Critical Public Health</i>, 1-12.</p> <p>Labonté, R., Schram, A., &amp; Ruckert, A. (2016). The Trans-Pacific Partnership agreement and health: few gains, some losses, many risks. <i>Globalization and Health</i>, 12:25.</p>

CHAPTER 6: TRANSNATIONAL CORPORATIONS AND THE SPREAD OF HEALTH-HARMFUL COMMODITIES THROUGH INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS: AN EXPLORATION OF SUGAR-SWEETENED CARBONATED BEVERAGES MARKETS IN VIETNAM AND PHILIPPINES

Presentations

Labonté, R., Schram, A., and Ruckert, A. "The Trans-Pacific Partnership Agreement: 21st Century Agreement or Public Health Washout?" May 3, 2016; Southgate Institute Policy Forum, Adelaide South Australia.

Schram, A., Labonté, R. (April, 2016). The Trans-Pacific Partnership agreement and health: few gains, some losses, many risks. Making Sense of the Trans-Pacific Partnership Forum, Ottawa, University of Ottawa.

Schram, A., Labonté, R., Friel, S., Ponnampereuma, S., Gleeson, D., Thow, A-M., Kay, A. (June, 2015). Canadian food industry positions on the Trans-Pacific Partnership negotiations: implications for national food policy. Paper presented at the Canadian Association for Food Studies 2015 Conference: Capital Ideas: Nourishing Debates, Minds and Bodies, Ottawa, Canada.

Schram, A., Labonté, R., Friel, S., Ponnampereuma, S., Gleeson, D., Thow, A-M., Kay, A. (May, 2015). An examination of what the Canadian food industry wants from the Trans-Pacific Partnership agreement and what it means for trade and health policy. Paper presented at: Connecting for change: Student Conference in Population Health, Health Population Research Institute, Ottawa, Canada.

Content of chapter has contributed to multiple outputs:

Peer-Reviewed Publications

Baker, P., Friel, S., Schram, A., Labonté, R., & Stucker, D. (2016). Trade and investment liberalisation, food systems change and ultra-processed food consumption: a natural experiment contrasting the soft drinks markets of Peru and Bolivia. *Globalization and Health*, 12:24.

Schram, A., Labonté, R., Baker, P., Friel, S., Reeves, A., & Stuckler, D. (2015). The role of trade and investment liberalization in the sugar-sweetened carbonated beverages market: a quasi-natural experiment contrasting Vietnam and the Philippines. *Globalization and Health*, 11:41.

Presentations

Schram, A., Labonté, R., Baker, P., Friel, S., Reeves, A., Stuckler, D. (November, 2015). Trade and investment liberalisation as a driver of the sweetened carbonated beverages market in developing countries: a natural experiment in

<p>CHAPTER 7: TRANSNATIONAL CORPORATIONS, INVESTOR RIGHTS, AND INVESTOR-STATE DISPUTE SETTLEMENT: AN EXPLORATION OF TRIBUNAL AWARDS IN INVESTOR-STATE ARBITRATION AND THE IMPLICATIONS FOR DOMESTIC HEALTH POLICY</p>	<p>Vietnam. Paper presented at the Canadian Conference on Global Health 2015: Capacity building for global health: research and practice, Montreal, Quebec.</p> <p>Intended for multiple publications. Journals to be decided.</p> <p>Content of chapter has contributed to multiple outputs:</p> <p><u>Blogs and Media</u></p> <p>Schram, A., Labonté, R., Ruckert, A. (2016). Philip Morris v Australia: A crushing blow to Big Tobacco or a deferral of sentencing for plain packaging. Healthy Policies, February 03, 2016. <a href="http://www.healthypolicies.com/2016/02/philip-morris-v-australia-a-crushing-blow-to-big-tobacco-or-a-deferral-of-sentencing-for-plain-packaging/">http://www.healthypolicies.com/2016/02/philip-morris-v-australia-a-crushing-blow-to-big-tobacco-or-a-deferral-of-sentencing-for-plain-packaging/</a></p> <p><u>Presentations</u></p> <p>Schram, A., Labonté, R., VanDuzer, A. (April 2016). International investment arbitration and public health policy: growing demands for new competencies. Paper presented at the CIHR Sparking Population Health Solutions: Research for a healthier future. Ottawa, Ontario.</p> <p>Schram, A. (November, 2015). Something old, something new: challenges to public health from industry influence and investor-state dispute settlement in trade agreements. Lecture given at SYP Global Health Summit, Montreal, University of Montreal.</p>
<p>CHAPTER 8: INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS AND HEALTH: CONCLUSIONS</p>	<p>No intended outputs to date.</p>
<p>RELATED OUTPUTS</p>	<p><u>Peer-Reviewed Publications</u></p> <p>Schram, A., Ruckert, A., Labonté, R., &amp; Miller, B. (In Press). Media and neoliberal hegemony: Canadian newspaper coverage of the Trans-Pacific Partnership Agreement. <i>Studies in Political Economy</i>.</p> <p>Ruckert, A., Schram, A., Labonté, R., Miller, B., Friel, S., Gleeson, D., Thow, A-M. (2016). Policy Coherence, Health, and the Sustainable Development Goals: What's Trade Got to Do with It? <i>Critical Public Health</i>.</p>

Ruckert, A., Schram, A., & Labonté, R. (2015). The Trans-Pacific Partnership: Trading Away Our Health? Accepted for publication in the Canadian Journal of Public Health, 106 (4), e249-251.

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## **Appendix C: Food Industry Submissions Included in Chapter 5 Analysis**

1. Alberta Canola Producers Commission
2. Canada Pork International
3. Canadian Agri-Food Trade Alliance
4. Canadian Meat Council
5. Canadian Canola Growers Association
6. Canadian Cattlemen's Association
7. Canadian Federation of Agriculture
8. Canadian Pork Council
9. Canadian Restaurant and Foodservices Association
10. Canadian Seed Trade Association
11. Canadian Sugar Institute
12. Canadian Wheat Board
13. Canola Council of Canada
14. Dairy Farmers of Canada
15. Dairy Processor Association of Canada
16. Egg Farmers of Canada
17. Food and Consumer Products of Canada
18. Food Processors of Canada
19. Grain Farmers of Canada
20. Grain Farmers of Ontario
21. Malting Industry Association of Canada
22. Maple Leaf Foods
23. Pulse Canada

## Appendix D: Food Industry Submissions Included in Chapter 5 Analysis

STAKEHOLDER	THEME	SUPPORT
CANADA PORK INTERNATIONAL	Science-based regulations	<p>"CPI does share U.S. concerns about Australian requirements which limit pork imports to cooked and boneless cuts. There is no scientific basis for these requirements" (p.292).</p> <p>"Both Canada and the USA will benefit from removal of New Zealand regulations which limit imports of pork to cooked and boneless cuts. There is no scientific basis for these restrictions" (p.292).</p>
	Competitiveness of Canadian agriculture	"...Canadian pork exporters cannot allow U.S. competitors to secure a tariff (or quota) advantage over us in the high value Japanese market" (p.291).
CANADIAN SUGAR INSTITUTE	Market access	"The TPP has the potential to...eliminating all tariffs, tariff rate quotas...potential to address prohibitive sugar market access barriers, particularly for refined sugar, a value-added commodity, as well as many processed sugar-containing products" (p.407).
MAPLE LEAF FOODS	Market access	"Canada's participation in the TPP is particularly important to secure and grow our chilled and frozen pork exports to Asian markets" (p.109).
	Regulatory Coherence/Science-based regulations	"We would also hope that a TPP agreement would bring greater discipline to technical trade barriers such as the sanitary restrictions that limit us to exporting boneless product to Australia and require that product shipped to New Zealand be fully cooked by processors" (p.110).
CANADIAN MEAT COUNCIL	Compliance with regulations	"Canada should insist that all TPP partners be in compliance with the World Organization for Animal Health (OIE Office International des Epizooties) Bovine Spongiform Encephalopathy (BSE) chapter and the guidelines for international trade in beef" (p.394). They note that this will have implications for Australia, Peru, Japan and Mexico who do not currently fully comply.

FOOD PROCESSORS OF CANADA	Competitiveness of Canadian agriculture	"Should Canada not gain access to the TPP negotiations but Japan succeeds, Canada will lose this significant market for meat. Should other members of the TPP like the United States of America get preferential access to Japan they will achieve a tariff (or quota) advantage over us in the very valuable Japanese market for pork, beef and horse meat" (p.396).
	Unsatisfactory trade relations	Submission largely highlights areas where competition is unfair between Canada and the US, <i>e.g.</i> US sugar program, US treatment of Canadian imports, USFDA Food Safety Modernization Act, predatory labelling, restrictive market and superior export 'weapons'. List issues with the USFD Food Safety Modernization Act, "Politics, not science, often governs the border practices" (p.487). They seek to remove tariff and non-tariff barriers to trade with the US for processed food products
DAIRY PROCESSOR ASSOCIATION OF CANADA	Supply management	<p>"Like dairy farmers, processors must be concerned about any new threats to the existing system... Processors as well as producers will be impacted negatively when [the ending of "export subsidies"] occurs as it could trigger a further decline of 6-8% of milk production in Canada and a likely decrease in domestic processing capacity and jobs" (p.462).</p> <p>"Producers/processors and governments must find ways to modernize the system and encourage new investment and job creation...there is a need to eliminate the chronic storage of milk in Canada in order to permit growth and some opportunities for export" (p.463).</p>
MALTING INDUSTRY ASSOCIATION OF CANADA	Rules of origin	"Exports of malt need to be made from malting barley originating in the country of processing and not from imported barley that is processed and re-exported as malt" (p.107).
	Market access	"The removal of all tariff and non-tariff trade barriers (such as import licenses) and import quota's will provide our industry the opportunity to consider exports into certain TPP markets that we have not been able to successfully compete in on a regular basis" (pg. 107).

	Competitiveness of Canadian agriculture	"Exclusion of Canada's participation within the TPP negotiations could have the potential of allowing existing trade volumes to be negatively impacted in future years" (p.107).
ALBERTA CANOLA PRODUCERS COMMISSION	Market access	"Eliminating tariffs on canola imports, ensuring similar treatment to competing oils, and eliminating tariff escalation that discourages the Canadian industry from value-added production are priorities for the canola industry...the TPP offers the potential for tariff reduction and alignment on the rules governing trade as a multilateral deal" (p.276).
	Competitiveness of Canadian agriculture	"A deal that does not include Canada could put the industry at a disadvantage, especially because the major competing exporters such as the U.S., Australia and Malaysia are already party to the agreement..." (p.276).
	Biotechnology approvals/Low-level presence GMOs	"The TPP is an ideal forum to advance solutions that minimize technical barriers to trade such a biotechnology approvals and the low-level presence of genetically modified material" (p.276).
	Regulatory coherence	"The U.S. and Australia are natural allies on these issues and achieving regulatory coherence through the TPP would represent a significant benefit to Canada" (p.277).
	Biotechnology approvals/Low-level presence GMOs /Maximum residue limits/Rules of origin	All elements of the nine priorities listed.
CANADIAN AGRI-FOOD TRADE ALLIANCE	Market access	"The competitiveness of Canadian agri-food exporters is limited by market access restrictions including tariffs and quotas, trade distorting domestic support, export subsidies, differential export taxes, tariff escalation, and non-tariff barriers" (p.302-3).
	Competitiveness of Canadian agriculture	"If we are unsuccessful in securing TPP membership, Canada will undoubtedly lose trade markets and will be in a 'take it or leave it' position down the road as the TPP initiative expands to include more Pacific-rim partners" (p.303).

CANADIAN CANOLA  
GROWERS  
ASSOCIATION

Rules of origin	"Improved market access combined with a regional approach to Rules of Origin could liberalize the trade in sugar and sugar containing products across the TPP region" (p.307).
Biotechnology approvals/Low-level presence GMOs	"The TPP could also provide an ideal forum to advance solutions that minimize technical barriers to trade such as biotechnology approvals and the low-level presence of genetically modified material" (p.306).
Regulatory coherence	"A regional trade deal like the TPP could provide opportunities to ensure better cooperation in the development and enforcement of regulatory systems and requirements including greater transparency and regional consultation on the development of regulations" (p.308).
Science-based regulations	"Disparate regulatory standards, different approval and inspection systems, regulations that are not grounded in science and inconsistent adherence to policies developed by international bodies such as the OIE and Codex are a growing issue for food exporters" (p.309).
Market access	"The TPP could provide an important vehicle for addressing key issues impacting Canada's canola sector including removal of tariffs...tariff escalation that discriminates against imports of higher processed products...and tariff discrimination against other oil products" (p.313).
Competitiveness of Canadian agriculture	"As the US is already a member of TPP, if Canada fails to pursue an opportunity to join, we again risk the possibility of US products obtaining preferential treatment to Canadian ones in those countries already party to the TPP" (p.313-4).
Biotechnology approvals/Low-level presence GMOs /Maximum residue limits/Rules of origin	All elements of the seven priorities listed

CANADIAN CATTLEMEN'S ASSOCIATION	Market access/Inclusion of Japan	"CCA sees very little to be gained through negotiations with the existing member countries alone...of the current 9 TPP countries, 8 of them already provide duty free access to Canadian beef or offer littler market potential for Canadian beef." However, the joining of Japan would be a "game changer."
	Compliance with regulations	"...Canada should strive to ensure that any country joining the TPP agreement make a commitment to bring itself into conformity with international animal health guidelines established under the OIE" (p.320).
	Rules of origin	"...but we believe it may be feasible to conclude the WTO's harmonized rule of origin initiative amongst a smaller grouping of countries such as TPP...would also seek to establish the principle in the TPP agreement that country of origin labelling of beef to consumers should be voluntary (p.320)."
	Science-based regulations/TPP as new standard	"Unfortunately over the past several years, Codex has shown disregard for its own scientific recommendations. Rather, product approvals by Codex have been subject to public opinion and political majorities. Consequently many scientifically validated safe products have failed to achieve Codex approval for unscientific reasons. We would like to see TPP create a vehicle to set its own standards that would be in effect in the TPP region in situations where Codex has either failed to act or the Codex process is unduly slow" (p.320).
CANADIAN FEDERATION OF AGRICULTURE	Market Access/Inclusion of Japan	"With Japan expressing interest in joining these negotiations the TPP represents significant market opportunities for Canadian farmers" (p.343).
	Supply management	"...the CFA opposes any provisions that weaken the pillars of supply management..." (p.343).

CANADIAN PORK COUNCIL	Competitiveness of Canadian agriculture	<p>"With constantly changing conditions of export competition - exchange rates, agricultural policy and technical barriers...- Canada's pork producers are extremely concerned that Canada not fall behind the US and other competitors in terms of access acquired through regional trade agreements. (p.397).</p> <p>"The sooner Canada becomes a [TPP] participant, the greater is its ability to help shape and to prevent it taking on characteristics that later on make it less favourable to Canada's interests" (p.398-399).</p>
CANADIAN RESTAURANT AND FOODSERVICES ASSOCIATION	Market access	<p>"Current border controls effectively shield Canada's chicken and dairy industries from forces that encourage greater competitiveness, efficiency and market responsiveness and add stiff tariffs that artificially inflate the price of both imported and domestically produced products" (p.400).</p>
	Supply management	<p>"The complex pricing system for supply managed commodities in Canada create an unlevel playing field for those buying the products" (p.400).</p>
	Supply management/Market access	<p>"In past trade negotiations, Canada has chosen to use its political capital to protect supply management and has harmed other agricultural sectors by reducing our ability to negotiate market access abroad" (p.400).</p>
CANADIAN SEED TRADE ASSOCIATION	Market access	<p>"Seed generally trades with zero or very low tariffs...however, to ensure that Canada is part of the TPP, those tariffs that do remain are eliminated on implementation" (p.401).</p>
	Science-based regulations/Biotechnology approvals/Low-level presence GMOs	<p>Believes the TPP should address non-tariff barriers including "seek mutual recognition of science based approval systems for seed related technologies, encourage synchronous approvals of products of biotechnology and seed treatments..., and pursue a science based low level presence policy to facilitate the trade of seed" (p.402).</p>
	Intellectual property rights	<p>"Unless Canada brings its Plant Breeders Rights legislation into compliance with UPOV 1991, it is hard to imagine that trade of new seed</p>

		innovations will increase in a Trans-Pacific Partnership” (p.403).
CANADIAN WHEAT BOARD	Market access/Inclusion of Japan	"Japan's membership in the TPP could place Canada at a severe commercial disadvantage...resulting in lost market share and diminished sales returns” (p.418-9).
CANOLA COUNCIL OF CANADA	Biotechnology approvals/Low-level presence GMOs /Maximum residue limits/Rules of origin	All elements of the nine priorities listed
DAIRY FARMERS OF CANADA	Supply management/Domestic subsidies	"There is no doubt that these subsidies confer to the U.S. dairy industry an incredible advantage and explain why the U.S. dairy stakeholders were all calling for increased access from Canada as part of the U.S. consultation exercise...”(p.459).
EGG FARMERS OF CANADA	Supply management	"...we expect that as in previous FTAs negotiated by the government egg, dairy, and poultry products subject to tariff rate quota (TRQ) will be excluded from the TPP negotiations. More specifically supply managed products must be excluded from any market access provisions related to tariff reductions or TRQ expansion. This is consistent with the Government position of 0-0 (zero reductions on over-quota tariffs and zero increases in minimum market access)” (p.472).
FOOD AND CONSUMER PRODUCTS OF CANADA	Market access/Rules-based trade	"The TPP has the potential to help our member companies grow and create even more jobs for Canadians across the country. Moreover, through the TPP Canada could further advance its interests to ensure rules-based trade” (p.482).
GRAIN FARMERS OF ONTARIO	Inclusion of Japan	"It is critical to Ontario's farmers, as you can see from the statistics above, that Japan be an integral part of the TPP” (p.89)
GRAIN FARMERS OF CANADA	Biotechnology approvals/GMOs	"Canada needs to see improved rules for the regulatory approval of new genetically modified events. The lack of consistent application, often combined with needlessly long approval processes, often result in non-tariff trade barriers to Canadian exports” (p.91)

	Low-level presence GMOs	"A large multi-lateral agreement on low level presence, such as TPP, could provide the framework for other trade agreements and possibly the WTO" (p.92).
	Maximum residue limits	"We also suggest that CODEX be utilized as it was originally intended as an acceptable international vehicle for MRL [maximum residue levels] information" (p.92).
PULSE CANADA	Market access	"Canada must work to achieve quota and duty free access for pulse flours and fractions will all members of the TPP" (p.126).
	Maximum residue limits	"...the TPP can capitalize on progress made on maximum residue limit (MRL) harmonization between Canada and the US within NAFTA" (p.127).
	Regulatory coherence	"Harmonized regulatory requirement between Canada and its trading partners are important as Canada seeks to grow and efficient, sustainable export industry" (p.127).
	Science-based regulations	"...it is critical that sustainability requirements be driven by commercial opportunities and that the emerging set of science-based measurements of sustainability is used as the basis of sustainability metrics" (p.127).

## **Appendix E: Investor-State Dispute Settlement Awards Included in Chapter 7 Analysis**

1. Achmea v. Slovakia
2. AES v Hungary
3. Alpha v Ukraine
4. Apotex v USA
5. Azurix v. Argentina
6. Bosh v Ukraine
7. Chemtura v Canada
8. CMS v Argentina
9. Deutsche Bank v Sri Lanka
10. EDF v. Argentina
11. El Paso v Argentina
12. Franck v Moldova
13. Fuchs v Georgia
14. GEA v Ukraine
15. Gemplus v Mexico
16. Gold Reserve v Venezuela
17. Grand River v USA
18. Guaracachi v Bolivia
19. Gustav v Ghana
20. Impregilo v Argentina
21. LG&E v Argentina
22. Metalclad v Mexico
23. Micula v Romania
24. Mobil v Venezuela
25. Occidental v Ecuador
26. Pope v Canada
27. RDC v Guatemala
28. Rompetrol v Romania
29. SD Meyers v Canada
30. Saluka v Czech Republic
31. Sempra v Argentina
32. Spyridon v Romania
33. Swisslion v Macedonia

34. Tecmed v Mexico
35. Toto v Lebanon
36. Tulip v Turkey
37. Unglaube v Costa Rica
38. Vannessa v Venezuela
39. Vivendi v Argentina
40. Waste Management v Mexico
41. Yukos v Russia

## Appendix F: IRAC Analyses for Chapter 7

<b>Case Title (Full):</b> Achmea B.V. and the Slovak Republic	
<b>Case Title (Shorthand):</b> Achmea v. Slovakia	
<b>Investor/Claimant:</b> Achmea B.V. (formerly Eureko)	<b>State/Respondent:</b> The Slovak Republic (HIC)
<b>Treaty:</b> Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and The Czech and Slovak Federal Republic	
<b>Court:</b> PCA (UNCITRAL Arbitration Rules)	<b>Duration:</b> 4 years and 2 months
<b>Number of Elite 15:</b> 1	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 92.95 million + taxes + interest	<b>Damages Awarded:</b> USD 28.73 million + taxes + interest
<b>Issue</b>	Legislative measures introduced by Respondent after a change in government in July 2006 constituted a systematic reversal of the 2004 liberalisation of the Slovak health insurance market.
<b>Fair and Equitable Treatment (Decided in favour of: Investor )</b>	
Article 3(1): Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.	
Application of Provision to Facts	The Tribunal considers that the removal of the right to generate profits, coupled with a ban on the transfer of the portfolio, effectively deprived Claimant of access to the commercial value of its investment. The investment could neither be maintained so as to generate profits nor be sold. There was no way in which Claimant could recover the commercial value of its investment. The ability to make profit and distribute it was a key reason for Eureko's investment. While they could have reasonably expected significant reforms, they could not have expected reforms as significant as the complete ban on profit. Calling something an investment means that the owner has a right to return on that investment if the enterprise proves profitable.
<b>Indirect Expropriation (Decided in favour of: State )</b>	
Article 5: Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments, unless the following conditions are complied with: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory; (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in any freely convertible currency accepted by the claimants.	
Definition of Provision	There is an important distinction between (i) a 'deprivation' for what is from the outset intended to be a limited (and relatively short) period, and (ii) a 'deprivation' that is intended at the time of its adoption to be permanent but which, in the event, is in fact reversed after a relatively short period of time. Deprivations of the former kind would not ordinarily amount to an expropriation, although they may amount to

	interferences with the property-owner’s rights that violate other protections under a treaty, such as a provisions protecting against discriminatory treatment or against treatment that is not fair and equitable.
Methods for Testing Provision	Was the deprivation permanent or temporary?
Application of Provision to Facts	In the present case the ban on profits, if maintained, would have violated Article 5. But the ban was declared unconstitutional by the Constitutional Court of the Slovak Republic. The Tribunal must take the facts as they exist at the time of the hearing. If the hearing had been prior to the Court ruling, it may well have ruled that there was a permanent deprivation.
<b>Full Protection and Security (Decided in favour of: Investor)</b>	
Application of Provision to Facts	The ruling on FET settles this claim as well, since the complaint is about being protected against a government policy so if the government policy is unfair and inequitable that settles this case as well.
<b>Importance/Relevance to Analysis/Lessons for Health-High</b>	
Remuneration is required if privatisation of health insurance services is reversed. Many countries privatised health insurance services under GATS agreement, unlikely to be protected from exemptions as most countries allow some commercial or competitive provision of virtually all public services.	

<b>Case Title (Full):</b> AES Summit Generation Limited (British), AES-Tisza Erömü Kft. (Hungarian)	
<b>Case Title (Shorthand):</b> AES v Hungary	
<b>Investor/Claimant:</b> AES Summit Generation; AES-Tisza Erömü Kft.	<b>State/Respondent:</b> Hungary (HIC)
<b>Treaty:</b> Energy Charter Treaty of 1994	<b>Initiator of Annulment:</b> Investor
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 3 years 1 month
<b>Number of Elite 15:</b> Award: 1 Annulment: 1	<b>Party Awarded:</b> Award: State; Annulment: State
<b>Damages Requested:</b> USD 8.8 million (Counter-legal 5.5 million)	<b>Damages Awarded:</b> Award: Each to pay own legal fees and costs; Annulment: Investor to pay all legal fees and costs
<b>Issue</b>	Republic of Hungary reintroduced administrative pricing for electricity, claimed profits of the company were “unjustifiable high” and suggested that the profits should be capped at a maximum of 7.1%. Claimants allege that they have suffered a price cut of approximately 43% (under the 2006 Price Decree) and 35% (under the 2007 Price Decree).
<b>AWARD</b>	
<b>Fair and Equitable Treatment (Decided in favour of: State)</b>	
Article 10(1): Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.	
<i>Definition of Provision</i>	The rule that legitimate expectations can only be created at the moment of the investment, has been supported by several ICSID tribunals (Duke Energy v Ecuador, Tecmed v Mexico and LG&E Energy Corp. v Argentina).
<i>Methods for Testing Provision</i>	This Tribunal has to determine whether Claimants’ investment(s) was/were decided and made in 1996, at the time AES Summit purchased the outstanding shares of (now AES Tisza), and/or in 2001, at the time AES Tisza actually began to invest in (spend money on) the Retrofit of the Tisza II plant. The enquiry then turns to whether: (a) there were government representations and assurances made or given to Claimants at that time, and upon which they relied, of the sort alleged; and (b) Hungary acted in a manner contrary to such representations and assurances.
<i>Application of Provision to Facts</i>	Dealing first with the 1996 PPA, there is no question that AES Summit made an investment in Hungary at that time. Accordingly, it is proper to consider whether legitimate expectations at that time, with which Hungary has wrongfully interfered. The Tribunal concludes that AES Summit can have had no legitimate expectation at that time regarding the conduct of Hungary about which it now complains. The

	<p>relevant investment agreements were explicit that Hungary would continue to set maximum administrative prices for electricity sales indefinitely into the future. The Tribunal concludes that Hungary made no representations/gave no assurances of a nature that go to the heart of Claimants' complaint – i.e., that following the termination of price administration on 31 December 2003, regulated pricing would not again be introduced. To determine the scope of the stable conditions that a state has to encourage and create is a complex task given that it will always depend on the specific circumstances that surrounds the investor's decision to invest and the measures taken by the state in the public interest. In this case the Tribunal observes that no specific commitments were made by Hungary that could limit its sovereign right to change its law (such as a stability clause) or that could legitimately have made the investor believe that no change in the law would occur. The Tribunal therefore concludes that no breach of the fair and equitable treatment standard took place based on Hungary's alleged failure to provide a stable legal and business framework.</p>
<p><b>Indirect Expropriation (Decided in favour of: State)</b></p>	
<p>Article 13(1): Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.</p>	
<p><i>Definition of Provision</i></p>	<p>A state's act that has a negative effect on an investment cannot automatically be considered an expropriation. For an expropriation to occur, it is necessary for the investor to be deprived, in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value.</p>
<p><i>Application of Provision to Facts</i></p>	<p>In this case, the amendment of the 2001 Electricity Act and the issuance of the Price Decrees did not interfere with the ownership or use of Claimants' property. Claimants retained at all times the control of the AES Tisza II plant, thus there was no deprivation of Claimants' ownership or control of their investment. Claimants continued to receive substantial revenues from their investments during 2006 and 2007, which proves that the value of their investment was not substantially diminished and that they were not deprived of the whole or a significant part of the value of their investments. In these circumstances, the Tribunal concludes that the effects of the reintroduction of the Price Decrees do not amount to an expropriation of Claimants' investment(s).</p>
<p><b>Full Protection and Security (Decided in favour of: State)</b></p>	
<p>Article 10(1): Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.</p>	
<p><i>Definition of Provision</i></p>	<p>In the Tribunal's view, the duty to provide most constant protection and security to investments is a state's obligation to take reasonable steps to protect its investors (or to enable its investors to protect themselves) against harassment by third parties and/or state actors. But the standard is certainly not one of strict liability.</p>

	And while it can, in appropriate circumstances, extend beyond a protection of physical security, it certainly does not protect against a state’s right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant’s investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals. In the words of Brownlie, the duty is no more than to provide “a reasonable measure of prevention which a well-administered government could be expected to exercise under similar circumstances.” To conclude that the right to constant protection and security implies that no change in law that affects the investor’s rights could take place, would be practically the same as to recognizing the existence of a non-existent stability agreement as a consequence of the full protection and security standard.
<i>Application of Provision to Facts</i>	The Tribunal finds that there can have been no breach of the obligation to provide constant protection and security as a result of Hungary’s reintroduction of regulated pricing in 2006-2007, such reintroduction being based on rational public policy grounds.
<b>Most-Favoured Nation (Decided in favour of: State)</b>	
Article 10(7) obliges each signatory party to accord: Treatment no less favorable than that which it accords to Investments of its own Investors or for the Investors of any other Contracting Party or any third state and their related activities.	
<i>Application of Provision to Facts</i>	The alleged breach of the most favoured nation treatment obligation is based on the same facts that Claimants alleged amounted to a discriminatory measure, where the Tribunal found that no discriminatory measure was taken by the government – i.e., that each generator’s price was determined based on the application of a uniform methodology. This being the case, there can be no suggestion that AES was treated “less favourably” than any other similarly positioned investor. The Tribunal finds that Hungary did not breach its ECT obligation to provide most favoured nation treatment to AES Tisza.
<b>National Treatment (Decided in favour of: State)</b>	
Article 10(7) obliges each signatory party to accord: Treatment no less favorable than that which it accords to Investments of its own Investors or for the Investors of any other Contracting Party or any third state and their related activities.	
<i>Application of Provision to Facts</i>	The alleged breach of the obligation to provide national treatment is based on the same facts that Claimants alleged amounted to a discriminatory measure, where the Tribunal found that no discriminatory measure was taken by the government. Indeed, Claimants’ admitted that the generator with the highest capacity fee was, like itself, foreign. The Tribunal finds that Hungary did not breach its ECT obligation to provide national treatment to AES Tisza.
<b>Unreasonable Measures (Decided in favour of: State)</b>	
Article 10(1): No Contracting Party shall in any way impair by unreasonable or discriminatory measure their [investment’s] management, maintenance, use, enjoyment or disposal.	
<i>Methods for Testing Provision</i>	An analysis of the nature of a state’s measures, in order to determine if they are unreasonable or discriminatory, is only necessary when an impairment of the investment took place. There are two elements that require to be analyzed to

	determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy. A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.
<i>Application of Provision to Facts</i>	The Tribunal finds that it cannot be considered a reasonable measure for a state to use its governmental powers to force a private party to change or give up its contractual rights. If the state has the conviction that its contractual obligations to its investors should no longer be observed (even if it is a commercial contract, which is the case), the state would have to end such contracts and assume the contractual consequences of such early termination. This does not mean that the state cannot exercise its governmental powers, including its legislative function, with the consequence that private interests – such as the investor's contractual rights – are affected. But that effect would have to be a consequence of a measure based on public policy that was not aimed only at those contractual rights. Were it to be otherwise, a state could justify the breach of commercial commitments by relying on arguments that such breach was occasioned by an act of the state performed in its public character. In fact, it is normal and common that a public policy matter becomes a political issue; that is the arena where such matters are discussed and made public. The majority of the Tribunal has concluded that Hungary's decision to reintroduce administrative pricing was not based on the EC Commission's investigation. Nor, however, was it made with the intention of affecting Claimants' contractual rights. Having concluded that Hungary was principally motivated by the politics surrounding so-called luxury profits, the Tribunal nevertheless is of the view that it is a perfectly valid and rational policy objective for a government to address luxury profits. And while such price regimes may not be seen as desirable in certain quarters, this does not mean that such a policy is irrational. One need only recall recent wide-spread concerns about the profitability level of banks to understand that so-called excessive profits may well give rise to legitimate reasons for governments to regulate or re-regulate. As to the need for a reasonable correlation between the state's policy objective and the measures adopted to achieve it, the Tribunal notes that before the amendment of the 2001 Electricity Act, Hungary had approached the generators to renegotiate the PPAs. Given that no agreement was reached, and in the absence of a specific commitment to the Claimants that administrative pricing was never going to be reintroduced, the Hungarian parliament voted for the reintroduction of administrative pricing, which parliament considered to be the best option at the moment. The Tribunal finds that both the 2006 Electricity Act and the implementing Price Decrees were reasonable, proportionate and consistent with the public policy expressed by the parliament.
<b>ANNULMENT</b>	
<b>Tribunal Manifestly Exceeded its Power</b>	
<i>Definition of Provision</i>	Must avoid an approach which would result in the qualification of a tribunal's reasoning as deficient, superficial, sub-standard, wrong, bad or otherwise faulty, in other words, a re-assessment of the merits which is typical for an appeal. The

	<p>ordinary meaning of a manifest excess of power is either an obvious transgression of a tribunal’s mandate or its obvious non-execution; concerning the meaning of “manifest”, the Committee shares the view that the term relates to the ease with which an excess of powers is perceived, rather than its gravity, and that such an excess must be able to “be discerned with little effort and without deeper analysis”. Such an approach is consistent with a manifest excess being one which is at once “textually obvious and substantively serious”. The Committee is mindful of the criticism that has been levelled against certain ad hoc committees for overstepping the line between annulment and appeal. The Committee therefore notes that in order to annul the Award for a manifest excess of the Tribunal’s powers something more than a “serious error” is required.</p>
<i>Application of Provision to Facts</i>	<p>The Committee considers that annulment for non-application of the applicable law is only sustainable where there has been a failure to apply the proper law <i>in toto</i>. Applicants’ contentions under this heading therefore fall short of proving a manifest excess of the Tribunal’s powers, and must accordingly be rejected.</p>
<b>Serious Departure from Fundamental Rule of Procedure</b>	
<i>Application of Provision to Facts</i>	<p>Determination of the legal test for legitimate expectations was within the Tribunal’s discretion. Having determined that the reference to “absolute certainty” was not the creation of a new legal standard, the Committee does not, in principle, have to address AES’s claim that the Tribunal did not apply the proper law. Whilst the Committee is mindful that in exceptional circumstances an error of law may be so egregious as to merit annulment, it does not consider this to be the case with respect to the Tribunal’s reference to an “absolute certainty standard”.</p>
<b>Award Failed to State Reasons</b>	
<i>Definition of Provision</i>	<p>The ordinary meaning of a failure to state the reasons on which the decision is based is the absence of reasons or a presentation which is unintelligible in relation to the decision thus equating a lack of reasons. The duty to state reasons refers only to a minimum requirement. It does not call for tribunals to strain every sinew in an attempt to convince the losing party that the decision was the right one. The Committee also takes the view that the giving of frivolous reasons will almost never amount to a failure to state reasons within the meaning of Article 52(1)(e), since this would impermissibly encroach into appellate territory. The better approach is to recognise that reasons which are sufficiently frivolous or absurd in nature would in effect amount to no reasons at all.</p>
<i>Application of Provision to Facts</i>	<p>On the basis of the Tribunal’s reasoning as described above, under the prevailing legal standards the Committee considers it impossible to conclude that Claimants’ complaint that the Tribunal’s reasoning on due process was frivolous or contradictory is well founded. The Committee also finds that the Tribunal did not fail to state reasons.</p>
<b>Importance/Relevance to Analysis/Lessons for Health-High</b>	
<p>Health policies, particularly those aimed at tobacco, alcohol, and diet, are highly likely to deprive investors of at least part of the value of their investment. However that is not sufficient to find indirect expropriation, they must be deprived, “in whole or significant part, of the property in or effective control of its investment; or for its investment to be deprived, in whole or significant part, of its value.” The finding that</p>	

because investors continued to receive substantial revenues from their investments it could not amount to indirect expropriation is an important consideration to deter regulatory chill of these products. Important case in establishing the right to regulate, stating that an FPS provisions does not protect against a state's right to "legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals." The case also provides guidance for what can be claimed as unreasonable measures, policies that are neither rational nor reasonable. "A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented." Finally, this case supports regulation for political reasons: "In fact, it is normal and common that a public policy matter becomes a political issue; that is the arena where such matters are discussed and made public. Having concluded that Hungary was principally motivated by the politics surrounding so-called luxury profits, the Tribunal nevertheless is of the view that it is a perfectly valid and rational policy objective for a government to address luxury profits."

<b>Case Title (Full):</b> Alpha Projektholding GmbH (Austrian) v Ukraine	
<b>Case Title (Shorthand):</b> Alpha v Ukraine	
<b>Investor/Claimant:</b> Alpha Projektholding GmbH (Austrian)	<b>State/Respondent:</b> Ukraine (LMIC)
<b>Treaty:</b> BIT Ukraine - Austria 1996	
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 3 years 3 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 11.4 million	<b>Damages Awarded:</b> USD 5,250,782 + 30,000 of Claimant's legal costs
<b>Issue</b>	This dispute arises out of a failed hotel renovation deal. The events giving rise to this arbitration center on a series of commercial arrangements involving Claimant, the Hotel Dnipro, and other parties regarding the reconstruction and renovation of several floors of the Hotel.
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
Article 2: Each Contracting Party shall in its territory promote, as far as possible, investments of investors of the other Contracting Party, admit such investments in accordance with its legislation and in each case accord such investments fair and equitable treatment.	
<i>Definition of Provision</i>	The fair and equitable treatment standard is an "an objective standard." ( <i>Vivendi</i> ). The principle of fair and equitable treatment includes the obligation not to upset an investor's legitimate expectations and the obligation to avoid arbitrary government action, regardless of whether there is any discriminatory element involved.
<i>Methods for Testing Provision</i>	Governments must avoid arbitrarily changing the rules of the game in a manner that undermines the legitimate expectations of, or the representations made to, an investor.
<i>Application of Provision to Facts</i>	In effectively negating the agreements, Ukraine, and in particular the SAA, acted well beyond its authority as stated in the Hotel Charters and directly interfered with the day-to-day management of the Hotel. It thereby undermined Claimant's legitimate expectations in violation of Article 2(1) of the UABIT. While, in certain cases, discriminatory treatment may give rise to a violation of fair and equitable treatment, in most cases discriminatory government actions are more properly judged against the requirements of national treatment and most-favored nation treatment, which appear in Article 3 of the UABIT. Furthermore, the principle of fair and equitable treatment is well-established in international law, and there is no evidence that the Parties to the UABIT intended to deviate from that principle in drafting Article 2. The Claimant possessed a legitimate expectation that the government would not interfere with the contractual relationship between Claimant and the Hotel, and that the agreements would be honored, albeit with the reformation to the payment terms necessitated by the Ukrainian law on joint activities as discussed below.
<b>Indirect Expropriation (Decided in favour of: Investor)</b>	
Article 4(1): Investments of investors of either Contracting Party shall not be expropriated in the territory of the other Contracting Party except for a purpose which is in the public interest, by the due process of law and against the payment of adequate compensation.	

<i>Definition of Provision</i>	A government action need not amount to an outright seizure or transfer of title in order to amount to an expropriation under international law.
<i>Application of Provision to Facts</i>	<p>Given that Claimant’s investment has been substantially deprived of value, that such deprivation is effectively permanent, and that the deprivation was the result of government action, the Tribunal finds that Claimant’s rights under the JAAs have been expropriated in violation of Article 4(1) of the UABIT.</p> <p>The Tribunal questions whether any distinction between “sovereign” and “commercial” actions is relevant to the question of whether Ukraine’s actions expropriated Claimant’s investment. However, even assuming a distinction is relevant, the Tribunal nevertheless concludes that Ukraine expropriated Claimant’s investment.</p>
<b>National Treatment (Decided in favour of: State)</b>	
Article 3(1): Each Contracting Party shall accord to investors of the other Contracting Party and their investments treatment no less favourable than that which it accords to its own investors and their investments or to investors in third States and their investments.	
<i>Method for Testing Provision</i>	In order to prove a national treatment violation, it is necessary first and foremost to establish that a government action or inaction has discriminated between domestic and foreign investors, i.e., that it has accorded “less favourable” treatment to foreign as opposed to domestic investors. Such discrimination could arise de jure if there is a government measure such as a law or regulation that explicitly discriminates between domestic and foreign investors, or de facto if the measure is not explicitly or inherently discriminatory but discriminates between domestic and foreign investors in the way in which it is applied.
<i>Application of Provision to Facts</i>	Unlike national treatment provisions in many other investment agreements, the UABIT does not expressly state that discrimination must be between investors that are “like” or otherwise similarly situated. The Tribunal need not resolve the question of whether Article 3(1) of the UABIT should be interpreted to include such a limitation, as Claimant has not proven a national treatment violation of any sort, whether limited to investors in “like circumstances” or not so limited. Consequently, there is no basis for finding that Ukraine breached its obligations under Article 3(1) of the UABIT and Article 7 of FIL. Claimant has not sustained its burden of proving violations of Ukrainian domestic law. Claimant has simply failed to show any government action that discriminated against its investment as compared to the investments of domestic investors.
<b>Umbrella Clause (Decided in favour of: State)</b>	
Article 8(2): Each Contracting Party shall observe any contractual obligations which it may have assumed with respect to an investor of the other Contracting Party regarding investments approved by it in its territory.	
<i>Application of Provision to Facts</i>	The Tribunal agrees with Respondent that the contracts were between Claimant and the Hotel, not between Claimant and Respondent. The Tribunal further concludes that the Hotel was not acting as an organ of the State when it entered into the contracts. Consequently, Respondent “assumed” no contractual obligations with respect to Claimant and did not violate Article 8(2) of the UABIT.
<b>Importance/Relevance to Analysis/Lessons for Health-Medium</b>	

Although a reference to international law was not made in the treaty the tribunal felt that this was commonplace enough to assume that, by not stating differently, the parties did not intend to deviate from this. It is important in treaty design to think about what is not being said that may be inferred by a tribunal, make exclusions such as these explicit. Indirect expropriation only occurs when there is a substantial deprivation of value, that is effectively permanent, and that was the result of government action. Health policies that reduce value without substantially depriving should not be threatened by indirect expropriation claims.

<b>Case Title (Full):</b> Apotex Holdings Inc., Apotex Inc. and United States of America	
<b>Case Title (Shorthand):</b> Apotex v. USA	
<b>Investor/Claimant:</b> Apotex Holdings Inc., Apotex Inc.	<b>State/Respondent:</b> USA (HIC)
<b>Treaty:</b> NAFTA	
<b>Court:</b> ICSID (ICSID Additional Facility - Arbitration Rules)	<b>Duration:</b> 2 years and 5 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> State
<b>Damages Requested:</b> USD 1-1.5 billion + interest + costs	<b>Damages Awarded:</b> Investor to pay 75% of arbitration costs and all of state's legal costs
<b>Issue</b>	After a number of inspections and a warning letter, the FDA amended import alert 66-40 to include all finished form drugs from Apotex Inc. at the Signet and Etobicoke facilities. They were removed on the 15 <sup>th</sup> of June 2011.
<b>National Treatment (Decided in favour of: State )</b>	
Article 1102(1): Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. Article 1102(2): Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.	
Definition of Provision	The Parties also accept that it is appropriate in the identification of comparators which are in "like circumstances" to look at, inter alia, whether those which are said to be comparators: (i) are in the same economic of business sector; (ii) have invested in, or are businesses that compete with the investor or its investments in terms of goods or services; or (iii) are subject to a comparable legal regime or regulatory requirements. To be treated less favorably means to be treated worse than comparators where that treatment complained of must have some not-insignificant practical negative impact.
Methods for Testing Provision	<ol style="list-style-type: none"> <li>1. Do the measures under question constitute "treatment" of the investor/investment?</li> <li>2. What are the relevant comparators, i.e. companies in like circumstances (a highly fact-specific inquiry)?</li> <li>3. Did the measure treat the claimant less favourably than those relevant comparators?</li> </ol> <p>All circumstances, including the regulatory regime applicable to the investor, must be taken into account.</p>
Application of Provision to Facts	The Tribunal concludes that the Import Alert qualifies as "treatment". The Tribunal decides that none of the three domestic comparators proposed by the Claimants is "in like circumstances" to the Claimants or their investments for the purpose of NAFTA Article 1102.
<b>Most Favored Nation (Decided in favour of: State )</b>	

<p>Article 1103(1): Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. Article 1103 (2): Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.</p>	
<p>Definition of Provision</p>	<p>Same as above.</p>
<p>Application of Provision to Facts</p>	<p>The Tribunal determines that the Respondent has proven that Teva and Sandoz (with their respective foreign-based facilities and foreign products) were not in like circumstances to the Claimants and the Etobicoke and Signet facilities and their products, within the meaning of NAFTA Article 1103</p> <p>the Tribunal concludes that the evidence adduced in this arbitration proves that the FDA's different treatment of Teva was materially influenced by the FDA's genuine concerns over shortages of essential drugs manufactured at Teva's Jerusalem facility intended for shipment and sale in the USA. In the Tribunal's view, there was a change of policy in early 2009 under the Respondent's new political administration intended to resume stricter and swifter enforcement practices by the FDA, not limited to the Claimants. Under NAFTA Article 1103, there is no general bar to such a change in policy in regulatory practice made in good faith and in a non-arbitrary manner (as this was).</p>
<p><b>Minimum Standard of Treatment (Decided in favour of: State )</b></p>	
<p>Article 1105(1): Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.</p> <p>NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001): Clause 2 of the Commission's Notes of Interpretation provides as follows: (1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. (2) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).</p>	
<p>Definition of Provision</p>	<p>According to Glamis Gold "to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards"</p> <p>According to Waste Management, the minimum standard was infringed by "a lack of due process leading to an outcome which offends judicial propriety - as might be the</p>

	case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”
Methods for Testing Provision	While the State’s conduct must be measured against international law, it has a large regulatory space, especially with regard to matters of public interest such as morals and health. The Tribunal is not entitled to second-guess government policy. Assuming some element of due process figures into customary minimum standard, does the claimant’s allegation meet the “high threshold of severity and gravity” required to establish a violation.
Application of Provision to Facts	In the Tribunal’s view, the state practice available to the Tribunal in the specific context presented here, namely the regulation of imported drug products, weighs heavily against the assertion that the claimed protections (essentially a full and just court proceeding) are required by customary international law. The investor did not take advantage of any of the administrative avenues of appeal available to them.
<b>Importance/Relevance to Analysis/Lessons for Health-High</b>	
Affirms that while the State’s conduct must be measured against international law, it has a large regulatory space, especially with regard to matters of public interest such as morals and health, and that the Tribunal is not entitled to second-guess government policy.	

<b>Case Title (Full):</b> Azurix Corp. and The Argentine Republic	
<b>Case Title (Shorthand):</b> Azurix v. Argentina	
<b>Investor/Claimant:</b> Azurix Corp. (ABA)	<b>State/Respondent:</b> Argentina (HIC)
<b>Treaty:</b> Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America	
<b>Court:</b> ICSID (1984 arbitration rules)	<b>Duration:</b> 4 years and 9 months
<b>Number of Elite 15:</b> 1	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> --	<b>Damages Awarded:</b> USD 165,240,753 + interest
<b>Issue</b>	The non-application of the tariff regime of the Concession for political reasons; that the Province did not complete certain works that were to remedy historical problems and were to be transferred to the Concessionaire upon completion; that the lack of support for the concession regime prevented ABA from obtaining financing for its Five Year Plan; that in 2001, the Province denied that the canon was recoverable through tariffs; and that “political concerns were always privileged over the financial integrity of the Concession”, and “with no hope of recovering its investments in the politicized regulatory scheme, ABA gave notice of termination of the Concession and was forced to file for bankruptcy”.
<b>Fair and Equitable Treatment (Decided in favour of: Investor )</b>	
Article II(2)(a): Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law.	
Definition of Provision	It follows from the ordinary meaning of the terms fair and equitable and the purpose and object of the BIT that fair and equitable should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. The treaty text consists of three full statements, each listing in sequence a standard of treatment to be accorded to investments: fair and equitable, full protection and security, not less than required by international law. Fair and equitable treatment is listed separately. The last sentence ensures that, whichever content is attributed to the other two standards, the treatment accorded to investment will be no less than required by international law. The clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law. The purpose of the third sentence is to set a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law. While this conclusion results from the textual analysis of this provision, the Tribunal does not consider that it is of material significance for its application of the standard of fair and equitable treatment to the facts of the case.
Application of Provision to Facts	ABA had requested to terminate it in agreement with the Province. The Province refused what was a reasonable request in light of the previous behavior of the Province and its agencies. The refusal by the Province to accept that notice of termination and its insistence on terminating it by itself on account of abandonment of the Concession is a clear case of a breach of the fair and equitable treatment standard. It is evident from the facts before this Tribunal that the Concession was not abandoned. Finally, the repeated calls of the Provincial governor and other

	officials for non-payment of bills by customers verges on bad faith in the case of the Bahía Blanca incident when the Province itself had not completed the works that would have helped to avoid the problem in the first place.
<b>Indirect Expropriation (Decided in favour of: State )</b>	
Article IV(1): Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation-') except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.	
Definition of Provision	A government act is not precluded from being an expropriation because it is a <i>bona fide</i> regulation, since this would lead to the contradictory finding that expropriation taken for a public purpose is not an expropriation. For the Tribunal, the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim. In the exercise of their public policy function, governments take all sorts of measures that may affect the economic value of investments without such measures giving rise to a need to compensate. The parties agree that cumulative steps which individually may not qualify as an expropriating measure may have the effect equivalent to an outright expropriation. This depends on the duration of the cumulative effect, although there is no mathematical formula to determine this. Contract rights may be expropriated, however contract breaches by a state or state-instrument are not often expropriations. A contract breach can only become an expropriation if it happens through the exercise of sovereign power.
Application of Provision to Facts	The Tribunal disagrees with the claimant's understanding of the law affecting the concession and so disagrees over the extent of the material impact of the changes to the law. If the changes fundamentally affected the financial viability of the enterprise the Tribunal would find in claimant's favour, but as it is, they disagree with the interpretation of the law. At no time did claimant lose any attributes of ownership. While it did affect the management of the company, it did not affect it significantly enough to be considered expropriation
<b>Full Protection and Security (Decided in favour of: Investor )</b>	
Article II (2)(a): Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.	
Definition of Provision	The interconnection between the standards of FET and FPS, as stated by a number of cases, means that FPS can be breached even if no physical violence or damage occurs. This holds particularly true because Occidental, a case that offered a more expansive understanding of FPS was ruling on a provision that was worded precisely the same way as the one before the Tribunal.

Application of Provision to Facts	The Tribunal having found that the state breached FET also finds that the state breached FPS.
<b>Unreasonable Measures (Decided in favour of: Investor )</b>	
Article II (2)(b): Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.	
Definition of Provision	The Tribunal agrees with the interpretation of the Claimant that a measure needs only to be arbitrary to constitute a breach of the BIT. In its ordinary meaning, “arbitrary” means “derived from mere opinion”, “capricious”, “unrestrained”, or “despotic.”
Methods for Testing Provision	The question for the Tribunal is whether the measures taken by the Province can be considered to be arbitrary and have impaired “the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal” of the investment of Azurix in Argentina.
Application of Provision to Facts	The Tribunal finds that the actions of the provincial authorities calling for non-payment of bills even before the regulatory authority had made a decision, threatening the members of the ORAB because it had allowed ABA to resume billing, requiring ABA not to apply the new tariff resulting from the review of the construction variations and affirming that zone coefficients apply in contradiction with the information provided to the bidders at the time of bidding for the Concession, restraining ABA from collecting payment from its customers for services rendered before March 15, 2002, and denying to ABA access to the documentation on the basis of which ABA was sanctioned are arbitrary actions without base on the Law or the Concession Agreement and impaired the operation of Azurix’s investment.
<b>Umbrella Clause (Decided in favour of: State )</b>	
Article II(2)(c): Each party shall observe any obligation it may have entered into with regard to investments.	
Application of Provision to Facts	The Tribunal found that there was no relevant contract between Azurix and Argentina, and that while Azurix may submit a claim under the BIT for breaches by Argentina, there was no undertaking to be honoured by Argentina to Azurix other than the obligations under the BIT, and that accordingly there was no breach of the umbrella clause in the BIT.
<b>Importance/Relevance to Analysis/Lessons for Health-High</b>	
Tribunal interpreted the FET standard as setting a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law. Treatment of food safety standards in SPS agreements is treated in reverse, that countries will not exceed international standards. This is a double-standard worth exploration. In regards to indirect expropriation the Tribunal stated that the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim. High standard of deprivation generally required to find indirect expropriation led the tribunal to find that compensation was not owed, but an open comment for future tribunals. That the Tribunal referred to an expansive understanding on the FPS provision in the Occidental case, a treaty which used the same language, to justify their own relatively ‘less’ expansive interpretation, shows that	

single cases can be used by a tribunal to justify expansive interpretations of provisions in favour of the investor.

<b>Case Title (Full):</b> Bosh International, Inc. (U.S.), B&P, Ltd. Foreign Investments Enterprise (Ukrainian) v Ukraine	
<b>Case Title (Shorthand):</b> Bosh v Ukraine	
<b>Investor/Claimant:</b> Bosh International, Inc. (U.S.), B&P, Ltd. Foreign Investments Enterprise (Ukrainian)	<b>State/Respondent:</b> Ukraine (LMIC)
<b>Treaty:</b> BIT Ukraine - United States of America 1994	
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 4 years 2 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> State
<b>Damages Requested:</b> USD 1,421,340	<b>Damages Awarded:</b> Investor to pay 1/6 of states additional costs due to delays
<b>Issue</b>	The claimants, Bosh, a US corporation owned by a Ukrainian national, and B&P, a Ukrainian corporation, 94.5% owned by Bosh. In 2003, B&P contracted with the Taras Shevchenko National University of Kiev for the renovation and operation of a part of the University's property into a Science-Hotel Complex. This dispute arises from the University's decision to terminate the contract following an internal audit by the Control and Revision Office (CRO), concluding that the building was being used for commercial purposes as opposed to educational, thereby in breach of the contract. B&P was subsequently evicted from the Science-Hotel Complex. The Claimants submit that the Respondent has, through the conduct of these entities, breached its obligations under the BIT, and that this has caused the Claimants to suffer loss.
<b>Fair and Equitable Treatment (Decided in favour of: State)</b>	
Article II(3)(a): Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.	
<i>Methods for Testing Provision</i>	The Tribunal is in agreement with the observations of the ICSID tribunal in Joseph Charles Lemire v Ukraine, which observed that in order to establish a breach of the obligation under Article II(3)(a) of the BIT, '[i]t requires an action or omission by the State which violates a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm.' The tribunal in that case set out relevant factors, including 'whether the State made specific representations to the investor'; 'whether due process has been denied to the investor'; 'whether there is an absence of transparency in the legal procedure or in the actions of the State'; 'whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State'; and 'whether any of the actions of the State can be labelled as arbitrary, discriminatory or inconsistent.' Although the Tribunal does not consider itself bound by past decisions of other arbitral tribunals, it recognises that it should pay due regard to the conclusions of such tribunals. In this respect, the Tribunal agrees with the views of the ICSID tribunal in Bayindir v Pakistan, which stated that, 'unless there are compelling reasons to the contrary', tribunals 'ought to follow solutions established in a series of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case.'
<i>Application of Provision to Facts</i>	The CRO's Audit constituted a routine review of the University's use and management of State funds, and there is no evidence demonstrating that B&P was targeted as a

	foreign investor. Had B&P elected to bring proceedings before the Ukrainian courts, there is no evidence to establish that the Ukrainian courts would not have afforded B&P a fair hearing. The Tribunal rejects the Claimants’ claim that the conduct of the CRO constituted a breach of the obligation to accord fair and equitable treatment under Article II(3)(a) of the BIT.
<b>Indirect Expropriation (Decided in favour of: State)</b>	
Article III(1): Investments shall not be expropriated or nationalised either directly or indirectly through measures tantamount to expropriation or nationalisation (“expropriation”) except: for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate, such as LIBOR plus an appropriate margin, from the date of expropriation; be fully realisable; and be freely transferable.	
<i>Method for Testing Provision</i>	In the context of a claim for expropriation contrary to Article 1110 of NAFTA: ‘While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been “taken” from the owner. Under international law, expropriation requires a “substantial deprivation” (Pope & Talbot, Inc. v Canada). In order to amount to an expropriation, the Claimants must establish that the effect of the CRO’s conduct was an interference that caused a substantial deprivation of the Claimants’ rights
<i>Application of Provision to Facts</i>	The CRO carried out its functions in accordance with applicable Ukrainian law and regulations, and the final decision concerning termination was made by the University. Accordingly, the Tribunal rejects the Claimants’ claim that the conduct of the CRO constituted a breach of the obligation not to expropriate investments contrary to Article III of the BIT the 2003 Contract.
<b>Umbrella Clause (Decided in favour of: State)</b>	
Article II(3)(c): Each Party shall observe any obligation it may have entered into with regard to investments.	
<i>Application of Provision to Facts</i>	It is undisputed that Ukraine did not enter into the 2003 Contract with B&P, but that it was the University that entered into this contract. Nevertheless, the Tribunal considers it necessary to determine whether the term ‘Party’ in Article II(3)(c) is limited to the two States parties to the BIT or whether it also extends to entities that are controlled by ‘each Party.’ Although the University is ‘owned, or controlled’ by a Party, a State enterprise is not included within the meaning of the term ‘Party’ for the purpose of the BIT (the Tribunal also noting that the preamble defines the term ‘Parties’ as referring to ‘the United States of America and Ukraine’)… the BIT draws a distinction between the term ‘Party’ as a legal entity, and the term ‘State enterprise’ as a legal entity. This leads the Tribunal to conclude that the University and the State should be regarded as separate entities. In order to present a contractual claim under the umbrella clause in the BIT, the Claimants (here B&P) are required to have their rights and obligations under the 2003 Contract determined by the applicable dispute settlement forum, i.e., in accordance with Article 13(1) of the 2003 Contract, which refers the parties to dispute settlement ‘in accordance to the Ukrainian legislation’.

	The Tribunal agrees, and concludes that where a contractual claim is asserted under an umbrella clause, the claimant in question must comply with any dispute settlement provision included in that contract. The Tribunal would reject the Claimants' claim for breach of Article II(3)(c)
<b>Importance/Relevance to Analysis/Lessons for Health-Medium</b>	
Case provides set of criteria that may provide a high threshold for breaching FET. Distinction between a Party and a State enterprise can avoid the umbrella clause applying to contracts entered into by entities 'owned, or controlled' by the State, such as a University in this case. However this could potentially apply to hospitals in future cases.	

<b>Case Title (Full):</b> Chemtura Corporation v. Government of Canada	
<b>Case Title (Shorthand):</b> Chemtura v. Canada	
<b>Investor/Claimant:</b> Chemtura Corporation	<b>State/Respondent:</b> Canada (HIC)
<b>Treaty:</b> North American Free Trade Agreement	
<b>Court:</b> PCA (UNCITRAL Rules)	<b>Duration:</b> 5 years and 6 months
<b>Number of Elite 15:</b> 2	<b>Party Awarded:</b> State
<b>Damages Requested:</b> USD 100 million	<b>Damages Awarded:</b> Investor to pay 100% of arbitration costs and 50% of State's legal fees
<b>Issue</b>	Canada conducted an allegedly flawed review of its lindane registrations and allegedly thwarted claimant's attempts at having such review re-evaluated in accordance with the law, prohibited the planting of lindane treated seed after 1 July 2001 despite the alleged assurance previously given in the context of the Withdrawal Agreement, in not granting the treatment agreed for the registration process of the replacement product Gaucho CS FL, and in proceeding to the cancellation of its lindane registrations, including for use on canola.
<b>Indirect Expropriation (Decided in favour of: State)</b>	
Article 1110(1): No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.	
Definition of Provision	For a measure to constitute expropriation under NAFTA, it is common ground that: bad faith is not required, and the measure must amount to a substantial deprivation.
Methods for Testing Provision	"Substantial" deprivation is a matter of degree and of kind, and the factors that will be considered are those articulated in Pope & Talbot. 1) Was there an investment that could be expropriated? 2) was it expropriated? 3) If it was expropriated, did the expropriation meet the standards set out in the treaty (i.e. public purpose, due process, compensation)?
Application of Provision to Facts	The Claimant's challenge fails on step 2. Even if the Tribunal concluded that there was a substantial deprivation of the Claimant's investment, there was still no expropriation because the Pest Management Regulatory Agency of Canada's (PMRA) decision to phase out all agricultural applications of lindane was a valid exercise of Canada's police powers to protect public health and the environment. The decision of the PMRA to de-register lindane meets the tests of this doctrine because (i) it was not made in an arbitrary manner since it respected due process and was based on valid science; (ii) it was non-discriminatory; (iii) it was not excessive and (iv) it was made in good faith to combat the serious occupational exposure risks posed by lindane.
<b>Most-Favoured Nation (Decided in favour of: State )</b>	
Article 1103(1): Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the	

<p>establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. Article 1103 (2): Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.</p>	
<p>Application of Provision to Facts</p>	<p>The allegation that the Claimant’s investment was discriminated (against) in any form has no factual basis in the light of the evidence on record. NAFTA parties have interpreted against importing clauses from other agreements, but even if they didn’t the facts would remain the same.</p>
<p><b>Minimum Standard of Treatment (Decided in favour of: State )</b></p>	
<p>Article 1105(1): Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.</p> <p>NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001): Clause 2 of the Commission’s Notes of Interpretation provides as follows: (1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. (2) The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).</p>	
<p>Definition of Provision</p>	<p>Tribunal notes that it is not disputed that the scope of Article 1105 of NAFTA must be determined by reference to customary international law. Such determination cannot overlook the evolution of customary international law, nor the impact of BITs on this evolution.</p>
<p>Methods for Testing Provision</p>	<p>In line with Mondev, the Tribunal will take account of the evolution of international customary law in ascertaining the content of the international minimum standard. Such inquiry will be conducted, as necessary, in analyzing each specific measure allegedly in breach of Article 1105 of NAFTA.</p> <p>Must be done in light of all of the facts. It is not the Tribunal’s task to assess whether certain uses of lindane are dangerous, the role of the tribunal is not to second guess domestic regulators.</p>
<p>Application of Provision to Facts</p>	<p>In response to claimant’s argument that the review was motivated by a trade irritant and not a health concern the Tribunal’s view is that the evidence does not show that PMRA acted in bad faith or disingenuous conduct. Quite the contrary, the review was conducted within its mandate and so as to meet international obligations, i.e. Aarhus Protocol.</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health-High</b></p>	
<p>Deferent to health policy space such that the Tribunal concludes that a valid exercise of police powers to protect public health and the environment cannot be expropriation. Add that it is not the Tribunal’s task to assess whether certain uses of lindane are dangerous, the role of the tribunal is not to second guess domestic regulators. Also highlights the importance of international commitments (such as the Aarhus</p>	

Protocol in this case), for providing legitimacy and justification for conducting reviews, can support a decision that such a review was not taken in bad faith.

<b>Case Title (Full):</b> CMS Gas Transmission Company v the Argentine Republic	
<b>Case Title (Shorthand):</b> CMS v Argentina	
<b>Investor/Claimant:</b> CMS Gas Transmission Company	<b>State/Respondent:</b> Argentina (HIC)
<b>Treaty:</b> Argentina-United States BIT	<b>Initiator of Annulment:</b> State
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 7 years
<b>Number of Elite 15:</b> Award: 2; Annulment: 0	<b>Party Awarded:</b> Award: Investor; Annulment: Investor
<b>Damages Requested:</b> USD 261.1 million + interest + costs	<b>Damages Awarded:</b> Award: USD 133.2 million + compound interest; Annulment: Each bears own legal fees + one half of the costs
<b>Issue</b>	CMS, a US investor, brought a claim against Argentina alleging that measures taken by Argentina in response to its economic crisis that began in the late 1990s violated CMS's rights under the 1991 U.S.-Argentine BIT.
<b>AWARD</b>	
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
Article II(2)(a): Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law.	
<i>Definition of Provision</i>	The Treaty Preamble – one principal objective of the FET is “to maintain a stable framework for investments and maximum effective use of economic resources.” There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.
<i>Methods for Testing Provision</i>	Significant number of treaties, both bilateral and multilateral, that have dealt with this standard also unequivocally shows that FET is inseparable from stability and predictability. It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The Tribunal believes this is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard.
<i>Application of Provision to Facts</i>	The measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made. The tariff regime and its relationship with a dollar standard and adjustment mechanisms unequivocally shows that these elements are no longer present in the regime governing the business operations of the Claimant. It has also been established that the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision. While the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal

	is not persuaded that it is relevant in this case. The Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment is not different from the international law minimum standard and its evolution under customary law. The measures adopted resulted in the objective breach of the standard laid down in Article II(2)(a) of the Treaty.
<b>Indirect Expropriation (Decided in favour of: State)</b>	
Article IV(1): Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2).	
<i>Definition of Provision</i>	The concept of indirect (or "de facto", or "creeping") expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralized the enjoyment of the property ( <i>Lauder case</i> )
<i>Method for Testing Provision</i>	The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized.
<i>Application of Provision to Facts</i>	The Government of Argentina has convincingly argued that the list of issues to be taken into account for reaching a determination on substantial deprivation, as discussed in ( <i>Pope &amp; Talbot</i> ), is not present in this dispute. The Respondent has explained, the investor is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment. The Tribunal agrees that this is the case in this dispute and holds that the Government of Argentina has not breached the standard of protection laid down in Article IV(1) of the Treaty.
<b>Umbrella Clause (Decided in favour of: Investor)</b>	
Article II(2)(c): [E]ach party "shall observe any obligation it may have entered into with regard to investments."	
<i>Method for Testing Provision</i>	The standard of protection of the treaty will be engaged only when there is a specific breach of treaty rights and obligations or a violation of contract rights protected under the treaty. Purely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor.
<i>Application of Provision to Facts</i>	<ul style="list-style-type: none"> <li>•The Tribunal agrees with Respondent in arguing that not all contract breaches result in breaches of the Treaty.</li> <li>•There are two stabilization clauses contained in the License that have significant effect when it comes to the protection extended to them under the umbrella clause: 1) The obligation undertaken not to freeze the tariff regime or subject it to price controls. 2) The obligation not to alter the basic rules governing the License without TGN's written consent.</li> <li>•The Tribunal must therefore conclude that the obligation under the umbrella clause of Article II(2)(c) of the Treaty has not been observed by the Respondent to the extent that legal and contractual obligations pertinent to the investment have been</li> </ul>

	breached and have resulted in the violation of the standards of protection under the Treaty.
<b>Unreasonable Measures (Decided in favour of: State)</b>	
Article II(2)(b): Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investment.	
<i>Definition of Provision</i>	In the Lauder case, an equivalent provision of the pertinent investment treaty was explained in accordance with the definition of “arbitrary” in Black’s Law Dictionary, which states that an arbitrary decision is one “depending on individual discretion;...founded on prejudice or preference rather than on reason or fact.”
<i>Methods for Testing Provision</i>	The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment. The standard is next related to impairment: the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the investment must be impaired by the measures adopted.
<i>Application of Provision to Facts</i>	This Tribunal is not persuaded by the Claimant’s view about arbitrariness because there has been no impairment. Some adverse effects can be noted, such as the use, expansion or disposal of the investment, which since the measures were adopted have been greatly limited. To the extent that such effects might endure, the test applied in the Lauder case becomes relevant and could result in a factor reinforcing the related finding of a breach of fair and equitable treatment. The Respondent’s argument about discrimination existing only in similarly situated groups or categories of people is correct, and no discrimination can be discerned in this respect. The fact is that to the extent that the measures persisted beyond the crisis, the differentiation between various categories or groups of businesses becomes more difficult to explain. The longer the differentiation is kept the more evident the issue becomes, thus eventually again reinforcing the related finding about the breach of fair and equitable treatment. The Tribunal, therefore, cannot hold that arbitrariness and discrimination are present in the context of the crisis noted, and to the extent that some effects become evident they will relate rather to the breach of fair and equitable treatment than to the breach of separate standards under the Treaty.
<b>ANNULMENT</b>	
<b>Tribunal Manifestly Exceeded its Power</b>	
<i>Definition of Provision</i>	The ground of manifest excess of powers is not limited to jurisdictional error. A complete failure to apply the law to which a Tribunal is directed by Article 42(1) of the ICSID Convention can also constitute a manifest excess of powers.
<i>Application of Provision to Facts</i>	FET - In the Committee’s view, this part of the Award is adequately founded on the applicable law and the relevant facts. The Tribunal proceeded to a detailed analysis of the rights of the Claimant, of the “reality of the Argentine economy” at the time of the crisis, of the measures then taken and of their consequences, before concluding that the fair and equitable standard had been violated. Contrary to what Argentina contends, the Tribunal evaluated the legality of the challenged measures in the light of all the circumstances of the case and did not transform Article II(2)(a) into a strict liability clause. The Committee has no jurisdiction to control the interpretation thus

	given by the Tribunal to that Article, still less to reconsider its evaluation of the facts. It is sufficient for the Committee to hold that the Tribunal did not manifestly exceed its powers.
<b>Award Failed to State Reasons</b>	
<i>Definition of Provision</i>	Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of this Article.
<i>Application of Provision to Facts</i>	Umbrella Clause - The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the parties to the obligation (i.e., the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause. It is unclear how the Tribunal arrived at its conclusion that CMS could enforce the obligations of Argentina to TGN. It could have done so by its interpretation of Article II(2)(c), but in that case one would have expected a discussion of the issues of interpretation. Or it could have decided that CMS had an Argentine law right to compliance with the obligations, yet CMS claims no such right; and Argentine law appears not to recognize it. In these circumstances there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point. It is not the case that answers to the question raised “can be reasonably inferred from the terms used in the decision”; they cannot. Accordingly, the Tribunal’s finding on Article II(2)(c) must be annulled for failure to state reasons. The Tribunal itself noted that “the umbrella clauses invoked by the Claimant do not add anything different to the overall Treaty obligations which the Respondent must meet if the plea of necessity fails.” Thus the Committee’s finding on the umbrella clause does not entail the annulment of the Award as a whole. It entails only annulment of the provisions of paragraph 1 of the operative part of the Award under which the Tribunal decided that “[t]he Respondent breached its obligations... to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty.”
<b>Importance/Relevance to Analysis/Lessons for Health-Low</b>	
An example of a more comprehensive interpretation of FET by the Tribunal, i.e., providing an expectation of stability and predictability. May reinforce the need to explore public health carve-outs from legitimate expectations of a stable and predictable environment in FET provisions.	

<b>Case Title (Full):</b> Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka	
<b>Case Title (Shorthand):</b> Deutsche Bank v. Sri Lanka	
<b>Investor/Claimant:</b> Deutsche Bank AG	<b>State/Respondent:</b> Sri Lanka (LMIC)
<b>Treaty:</b> Treaty between the Federal Republic of Germany and the Democratic Socialist Republic of Sri Lanka concerning the Promotion and Reciprocal Protection of Investments	

<b>Court:</b> ICSID (the Convention on the Settlement of Investment Disputes between States and Nationals of Other States)		<b>Duration:</b> 3 years and 7 months
<b>Number of Elite 15:</b> 1		<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 60,368,993		<b>Damages Awarded:</b> USD 60,368,993
<b>Issue</b>	Deutsche Bank made a hedging agreement with Sri Lanka. Sri Lanka did not pay Deutsche Bank the full sum to which they were entitled under the agreement. An empty investigation was undertaken by the government and the Supreme Court ruled that the investor's rights were terminated.	
<b>Fair and Equitable Treatment (Decided in favour of: Investor )</b>		
Article 2(1): [Each Contracting State] shall in any case accord such investments fair and equitable treatment		
Definition of Provision	The Tribunal notes that the standard has been rightly – although not exhaustively – defined in the Waste Management II case. Accordingly, its components may be distilled as follows: protection of legitimate and reasonable expectations which have been relied upon by the investor to make the investment; good faith conduct although bad faith on the part of the State is not required for its violation; conduct that is transparent, consistent and not discriminatory, that is, not based on unjustifiable distinctions or arbitrary; conduct that does not offend judicial propriety, that complies with due process and the right to be heard.	
Application of Provision to Facts	The actions of the Central Bank and Supreme Court violated FET, because they: were improperly motivated (i.e. no reason besides political unpopularity); conducted in bad faith (the results were determined before any regulatory investigation took place); lacked transparency and due process (in what should have been a massive investigation, only two short written documents were produced; in what should have been a complex court case, the banks were given no opportunity to speak).	
<b>Indirect Expropriation (Decided in favour of: Investor )</b>		
Article 4(2): Investments by nationals or companies of either Contracting State shall not be expropriated, nationalized or directly or indirectly subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting State except for the public interest and against compensation.		
Definition of Provision	De facto or indirect expropriation, that is, an expropriation resulting from a series of acts which are attributable to the State over a period of time and culminate in the expropriatory taking of the relevant property. Many tribunals in other cases have tested governmental conduct in the context of indirect expropriation claims by reference to the effect of relevant acts, rather than the intention behind them. In general terms, a substantial deprivation of rights, for at least a meaningful period of time, is required.  Equally, whilst accepting that effects of a certain severity must be shown to qualify an act as expropriatory, there is nothing to require that such effects be economic in nature. A distinction must be drawn between (a) interference with rights and (b)	

	economic loss. Contractual rights may be expropriated, a position that has been accepted by numerous investment arbitration tribunals
Methods for Testing Provision	(Proportionality)-Are measures taken against an investor justified by a public purpose?
Application of Provision to Facts	The present case is a not typical case of regulatory action: the entire value of Deutsche Bank's investment was expropriated for the benefit of Sri Lanka itself. They involved excess of powers and improper motive as well as serious breaches of due process, transparency and indeed a lack of good faith. Claimant had a legitimate expectation that a validly concluded hedging agreement with CPC would be in force in Sri Lanka and that its contractual rights would not be later interfered by a regulator which was essentially an interested party to the transaction.
<b>Full Protection and Security (Decided in favour of: N/A )</b>	
Application of Provision to Facts	Given its decisive findings above, it is unnecessary for the Tribunal to further determine whether Sri Lanka has breached the full protection and security provision.
<b>Umbrella Clause (Decided in favour of: N/A )</b>	
Application of Provision to Facts	The Tribunal considers that, given its findings above that Sri Lanka acted in breach of Articles 2 and 4(2) of the Treaty, it is unnecessary for the Tribunal to determine whether Article 8 of the Treaty has also been breached.
<b>Importance/Relevance to Analysis/Lessons for Health-Low</b>	
Deprivation does not need to be economic in nature, can have interference of rights or economic loss. Utilised a proportionality test, whether the measures taken against the investor were justified by a public purpose, which is deferential to policy space and sovereignty.	

<b>Case Title (Full):</b> EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic	
<b>Case Title (Shorthand):</b> EDF v. Argentina	
<b>Investor/Claimant:</b> EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A.	<b>State/Respondent:</b> Argentine Republic (HIC)
<b>Treaty:</b> the Agreement between the Government of the French Republic and the Government of the Argentine Republic on the Encouragement and Reciprocal Protection of Investments	
<b>Court:</b> ICSID (ICSID Convention-Arbitration II)	<b>Duration:</b> 8 years and 10 months
<b>Number of Elite 15:</b> 2	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 254.3-275.9 million	<b>Damages Awarded:</b> USD 136,138,430 + interest
<b>Issue</b>	The Government of Mendoza had reformed the regulatory framework governing distribution of electricity.
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
Article 3: Each of the Contracting Parties undertakes within its territory and its maritime zone to grant Fair and Equitable Treatment according to the principles of International Law to the investments made by the investors of the other Party, and to do so in such a way that the exercise of the right thus granted is not impaired de facto or de jure.	
Definition of Provision	Regardless of whether FET establishes a standard independent of MST, failure to abide by express commitments without re-establishing economic balance in a reasonable period of time constitutes inequitable conduct. Even if such specific commitments might be temporarily suspended during a state of emergency, fairness requires the host state to repair the economic balance within a reasonable time after the state of emergency has ended. The economic crisis is relevant to the interpretation of FET.
Application of Provision to Facts	The failure of the Province to raise tariffs in a timely manner, so as to restore balance when rates were set in U.S. dollars, constituted unfair and inequitable treatment in and of itself. The Tribunal has made its determination in the present case on an independent finding of Respondent's breach of the specific commitments embodied in the Currency Clause followed by its failure to restore EDEMSA's financial equilibrium in a timely fashion and not based on a general entitlement to legal and business stability.
<b>Indirect Expropriation (Decided in favour of: State )</b>	
Article 5(2): The Contracting Parties shall abstain from directly or indirectly adopting measures of expropriation or nationalization or any other equivalent measure having a similar effect of dispossession, except for causes of public utility and provided such measures are not discriminatory or contrary to a specific commitment. Such measures as may be adopted shall result in the payment of prompt and adequate compensation, the amount of which, calculated on the genuine value of the relevant investments, shall be valued in terms of a normal economic situation prior to any threat of dispossession. The amount and terms of payment of such compensation shall be established by the time of dispossession at the latest.	

Such compensation shall be effectively realizable, paid without delay, and freely transferable. It shall accrue interest calculated at an appropriate rate up to the date of payment.	
Definition of Provision	Since under both investor and state definitions of indirect expropriation none exists, the Tribunal does not define it.
Application of Provision to Facts	The Tribunal rejects Claimants' assertions with respect to indirect expropriation. No evidence has been presented to persuade us that Claimants were –substantially deprived of their investment by operation of the Emergency Measures. To the contrary, they continued to own and operate EDEMSA and later sold the company, albeit at an unfavorable price
<b>Full Protection and Security (Decided in favour of: N/A )</b>	
Article 5(1): The investments made by investors of either of the Contracting Parties shall enjoy protection and full security in the territory and in the maritime zone of the other Contracting Party in application of the principle of Fair and Equitable Treatment discussed in Article 3 of this Agreement.	
Application of Provision to Facts	Would not change damages
<b>Most-Favoured Nation (Decided in favour of: Investor )</b>	
Article 4: Each Contracting Party shall provide to the investors of the other Party, with respect to their investments and activities associated with such investments, –a treatment no less favorable than that accorded to . . . investors of the most favored Nation.  Each of the Contracting Parties shall respect at all times the commitments it has undertaken with respect to investors of the other Party. Each Contracting Party shall comply with any other commitment undertaken in connection with the investments made by nationals or companies from the other Contracting Party in the former's territory.	
Definition of Provision	The Tribunal concludes that the MFN clause does in fact permit recourse to the umbrella clauses of third-country treaties, which leads to arbitration rather than the administrative courts of the City of Mendoza. To interpret the Treaty otherwise would effectively read out the MFN clause. The umbrella clauses   in question are broadly worded. A clear and ordinary reading of these dispositions covers commitments undertaken with respect to investors, or undertaken in connection with investments. The Tribunal notes that Article 10(2) of the Argentina-Luxemburg BIT covers commitments –undertaken with respect to investors while Article 7(2) of the German BIT, even broader in scope, covers commitment undertaken in connection with the investments. Concession agreements granted to foreign investors for specific investments, such as those at issue in this arbitration, fall within the protection of an umbrella clause.
Methods for Testing Provision	This does not mean that all contractual breaches necessarily rise to the level of treaty violation. However, the serious repudiation of concessions obligations implicated by failure to respect the currency clause (Concession Anexo II, Subanexo 2) must clearly be seen as a violation
Application of Provision to Facts	The present case clearly implicates governmental acts. The regulatory changes implemented by the Republic of Argentina and the Province of Mendoza include the freeze of tariff rates, change in operative exchange rates, and regulation of the

	<p>distribution of electricity. The Umbrella clauses clearly require the state to hold by its concession agreements. The Tribunal finds that the very purpose and effect of the Currency and Cost-Adjustment Clauses were to protect the actual value of the tariffs from the likelihood of devaluation or depreciation of the local currency. Essentially, the state took on these risks for the investor. The Tribunal is convinced that the pesification and freeze of tariffs pursuant to the Emergency Measures breached Respondent's obligation to respect its contractual commitments.</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health-Medium</b></p>	
<p>Example of a case where the MFN clause was used to bring in more "favourable" provisions for investors contained in agreements States have signed with third party countries, specifically here to include an umbrella clause and an unreasonable measures provision. Demonstrates that an MFN clause needs to be constructed carefully to avoid this; otherwise addressing the language of provisions in new treaties will be inadequate if other, more favourable, treaty language can be incorporated in place of it. Additionally, one of the cases that highlights that economic crises are relevant to the economic measures taken in interpreting FET. Introduces the question of whether health crises will be treated in a similar manner, and whether non-infectious disease crises will rise to this level.</p>	

<b>Case Title (Full):</b> El Paso Energy International Company and The Argentine Republic	
<b>Case Title (Shorthand):</b> El Paso v Argentina	
<b>Investor/Claimant:</b> El Paso	<b>State/Respondent:</b> Argentina (HIC)
<b>Treaty:</b> Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Republic of Argentina and the United States of America	<b>Annulment Initiated By:</b> State
<b>Court:</b> ICSID (ICSID, 6(1)(a) and 7(a) of Institution rules)	<b>Duration:</b> 8 years and 11 months
<b>Number of Elite 15:</b> Award:1; Annulment: 0	<b>Party Awarded:</b> Award: Investor; Annulment: Investor
<b>Damages Requested:</b> All damages + interest + costs	<b>Damages Awarded:</b> Award: USD 43.03 million; Annulment: each to pay own legal fees, State to cover arbitration costs
<b>Issue</b>	A first measure consisted in freezing bank deposits and introducing foreign exchange controls. This was achieved by a government decree followed by the Public Emergency Law. The Public Emergency Law: (i) abolished the parity of the US dollar and the peso; (ii) converted US dollar obligations into pesos at the rate of 1:1, a measure known as “pesification”; (iii) effected the conversion, on that basis, of dollar-denominated tariffs into pesos; (iv) eliminated adjustment clauses established in US dollars or other foreign currencies as well as indexation clauses or mechanisms for public service contracts, including tariffs for the distribution of electricity and natural gas; (v) required electricity and gas companies to continue to perform their public contracts; and (vi) authorised the GOA to impose withholdings on hydrocarbon exports.
<b>AWARD</b>	
<b>Fair and Equitable Treatment (Decided in favour of: Investor )</b>	
Article II(2)(a): Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.	
Definition of Provision	This Tribunal believes that, while FET requires the general thrust of “ensuring the stability of the business and legal framework” interpreting this too literally would impose inappropriate and unrealistic obligations on the state. It is futile to try to interpret FET in terms of its relationship to MST, since both are vague standards. The overwhelming trend is to understand FET in terms of legitimate expectations, which is derived from the obligation of good faith (referring to any representations made by the State to the investor). The Tribunal considers that FET is linked to the objective reasonable legitimate expectations of the investors and that these have to be evaluated considering all circumstances. As a consequence, the legitimate expectations of a foreign investor can only be examined by having due regard to the general proposition that the State should not unreasonably modify the legal framework or modify it in contradiction with a specific commitment not to do so. It is this Tribunal’s view that, if the circumstances change completely, any reasonable investor should expect that the law also would drastically change. It is reasonable to

	foresee that a small change in circumstances might entail minor changes in the law, while a complete change might entail major changes in the law. The Tribunal considers that, in the same way as one can speak of creeping expropriation, there can also be creeping violations of the FET standard. According to the case-law, a creeping expropriation is a process extending over time and composed of a succession or accumulation of measures which, taken separately, would not have the effect of dispossessing the investor but, when viewed as a whole, do lead to that result. A creeping violation of the FET standard could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.
Methods for Testing Provision	<ol style="list-style-type: none"> <li>1. Was there a reasonable justification for the change? –OR—</li> <li>2. Has a specific commitment made to the investor been violated? <ol style="list-style-type: none"> <li>a. A reasonable general regulation can be considered a violation of the FET standard if it violates a specific commitment towards the investor.</li> <li>b. In the Tribunal’s view, no general definition of what constitutes a specific commitment can be given, as all depends on the circumstances. However, it seems that two types of commitments might be considered “specific”: <ol style="list-style-type: none"> <li>i. Those specific as to their addressee; and</li> <li>ii. Those specific regarding their object and purpose.</li> </ol> </li> </ol> </li> </ol>
Application of Provision to Facts	While none of the specific policies violates the FET standard in itself as there was no specific agreement that any of the particular measures would not change, it cannot be denied that the cumulative effect of the measures was a total alteration of the entire legal setup for foreign investments, and that all the different elements and guarantees just mentioned can be analysed as a special commitment of Argentina that such a total alteration would not take place. Cumulatively, they amount to a “creeping” FET violation and did contribute to the sale of El Paso’s assets.
<b>Indirect Expropriation (Decided in favour of: State )</b>	
Article IV(1): Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (“expropriation”) except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2).	
Definition of Provision	Some general regulations can amount to indirect expropriation, but as a matter of principle, general regulations do not amount to indirect expropriation. By exception, unreasonable general regulations can amount to indirect expropriation. A necessary condition for expropriation is the neutralisation of the use of the investment. This means that at least one of the essential components of the property rights must have disappeared. This means also, <i>a contrario</i> , that a mere loss in value of the investment, even an important one, is not an indirect expropriation.
Methods for Testing Provision	<p>The Tribunal has thus to examine the question of whether the sale (of El Paso’s assets at a considerably reduced price) was “freely” entered into or whether it was effectively “compulsory,” intrinsically linked to Argentina’s measures, in such a way that it was the only possible consequence of these measures.</p> <p>that this disappearance of benefits had to be the result of a loss of control or access to the property rather than of a change in the assets’ value</p>

Application of Provision to Facts	Argentina's measures are just one factor among many that explain El Paso's sale. Argentina's tax measure fell well within their police powers and Argentina did not confiscate the Claimant's shareholdings in the Argentinian companies. It is therefore the Tribunal's conclusion that El Paso did not suffer any major interference with its property rights, as is evidenced by the fact that it decided to sell its shares; thus the Tribunal cannot find that there was an indirect expropriation.
<b>Full Protection and Security (Decided in favour of: State )</b>	
Article II(2)(a): Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.	
Definition of Provision	The Tribunal considers that the full protection and security standard is no more than the traditional obligation to protect aliens under international customary law and that it is a residual obligation provided for those cases in which the acts challenged may not in themselves be attributed to the Government, but to a third party
Application of Provision to Facts	However, El Paso does not complain about a violation by Argentina of an obligation of prevention or repression. The conclusion is that there is no trace of a violation of the full protection and security standard by any of the GOA's measures impugned by the Claimant.
<b>Unreasonable Measures (Decided in favour of: State )</b>	
Article II(2)(b): Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party.	
Definition of Provision	The State can treat economic actors in different sectors differently as long as the differential treatment applies equally to domestic and foreign investors.
Methods for Testing Provision	<ol style="list-style-type: none"> <li>1. Was the measure adopted arbitrary with respect to accomplishing its stated goal?</li> <li>2. Was there de jure discrimination?</li> <li>3. Was there de facto discrimination?</li> </ol>
Application of Provision to Facts	None of the impugned measures adopted to face the economic crisis differentiated in legal terms between Argentinian nationals or companies, on the one hand, and foreigners or foreign or foreign-owned companies, on the other. Although the claimant argued that the primarily domestically owned banking system enjoyed an advantage over the primarily foreign-owned oil and gas sector, the facts show that the pesification also disadvantaged the banking sector. It appears to the Tribunal that the measures adopted in the context of the crisis were not arbitrary but reasonable and consistent with the aim pursued. They were intended to face the extremely serious crisis that Argentina was going through and emanated from the police power regularly exercised by governments.
<b>Umbrella Clause (Decided in favour of: State )</b>	
Article II(2)(c): Each Party shall observe any obligation it may have entered into with regard to investments.	

Definition of Provision	Umbrella clause does not elevate every contract claim to the level of a treaty claim. Only those contracts made with the state.
Application of Provision to Facts	That there is no investment agreement entered into by El Paso. It is evident that the Tribunal cannot find any violation of a right pertaining to El Paso under the so-called umbrella clause, for the reason that the so-called umbrella clause cannot not elevate any contract claims to the status of treaty claims as El Paso cannot claim a contractual right of its own in this case.
<b>ANNULMENT</b>	
<b>Manifestly Exceeded its Power</b>	
The “creeping FET” is not a new standard but an interpretation of the Treaty as applied to the facts, besides which, it was not the main reason for the Panel’s finding.	
<b>Serious Departure from Procedure</b>	
The appeal to jurisprudence and the use of the concept of “creeping expropriation” was simply a way for the Tribunal to state its reasoning and did not harm the respondent in any material way during the proceedings.	
<b>Failed to State Reasons</b>	
Argentina’s argument here is confusing since it charges the Tribunal with jeopardizing legal certainty through its “judicial creation”, but this is the opposite of failing to state reasons, since case law is created through the statement of reasons.	
<b>Importance/Relevance to Analysis/Lessons for Health-High</b>	
The Tribunal concluded that the State can treat economic actors in different sectors differently as long as the differential treatment applies equally to domestic and foreign investors. Although the claimant argued that the primarily domestically owned banking system enjoyed an advantage over the primarily foreign-owned oil and gas sector, the facts showed that the pesification also disadvantaged the banking sector. Related concerns have been raised in health policy that regulations which apply to sectors with higher foreign concentration, i.e. processed food sector, may be vulnerable to investment disputes. This case suggests this argument is not guaranteed to be accepted in litigation. Also, introduces the idea of that creeping FET, acts over time that accumulate to produce similar effects, may violate FET, and thus may need to consider health policies as a whole. Finally, argues, unlike in other cases, that an investment is not expropriated simply because the investor has lost economic benefits, i.e. profits. Rather, the loss of economic benefits is only evidence of expropriation if it results from a loss of economic rights due to a State’s action.	

<b>Case Title (Full):</b> Mr. Franck Charles Arif and Republic of Moldova	
<b>Case Title (Shorthand):</b> Franck v Moldova	
<b>Investor/Claimant:</b> Mr. Franck Charles Arif	<b>State/Respondent:</b> Republic of Moldova (LMIC)
<b>Treaty:</b> Agreement between the Government of the Republic of France and the Government of the Republic of Moldova on the Reciprocal Promotion and Protection of Investments	
<b>Court:</b> ICSID (Arbitration Rules)	<b>Duration:</b> 1 year and 8 months
<b>Number of Elite 15:</b> 1	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 10,545,598	<b>Damages Awarded:</b> USD 518,668-3,294,435
<b>Issue</b>	The dispute relates to the delayed or prevented opening of several duty free stores, and to the breach of an exclusivity undertaking.
<b>Fair and Equitable Treatment (Decided in favour of: Investor )</b>	
Article 3: Each Contracting Party binds itself to ensure, on its territory and maritime zone, in accordance with Public International Law principles, fair and equitable treatment to the investments of the nationals and companies of the other Contracting Party, and to guarantee that the exercise of the recognized right to fair and equitable treatment will not be impaired either by statute or de facto. Particularly, although not exclusively, are considered as statutory or de facto obstacles to fair and equitable treatment any restriction to the purchase or the transportation of raw materials and of auxiliary materials, or energy and fuel, as well as means of production and exploitation of any kind, any obstacles to the sale and transportation of the products within the state and abroad, as well as any other measure having similar effects. The Contracting Parties shall consider in good faith, in accordance with their internal legislation, the requests for entry and authorization to reside, employment and travel, made by the nationals of a Contracting Party, pursuant to any investment made in the territory or the maritime area of the other Contracting Party.	
<b>Definition of Provision</b>	The Tribunal holds that the State can be held responsible for an unfair and inequitable treatment of a foreign indirect investor if and when the judiciary breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions. The Tribunal concurs with Jan de Nul where the tribunal held: "The Tribunal considers that the respondent State must be put in a position to redress the wrongdoings of its judiciary." One must be able to attribute an act to the state to find the state liable under ISDS. Legitimate expectations as a basis for the analysis of whether a State has failed to accord an investment fair and equitable treatment are now an established feature of investment arbitration, but remain problematic. They are susceptible to a certain easy circularity of argument; investors normally have expectations in relation to a wide range of contingencies, great and small, and it is often relatively easy for a claimant to postulate an expectation to condemn the very conduct that it complains of in the case before it. Not every expectation of an investor is protected; rather it must be an expectation recognised and protected in international law. Some expectations may simply be too minor for this end. Expectations may relate to matters that the investor has expressly or impliedly agreed will be subject to determination by a State organ, and therefore exist on the domestic but not the international plane. An investor's legitimate expectations might be breached not only by a substantive change in

	<p>policy, but also by the treatment of the investor during the process of the change of policy. The connection of legitimate expectations to domestic law is important, since an act can be illegal domestically and not rise to the international level (<i>e.g.</i> contract breach); and a measure can be legal domestically and constitute an illegal act internationally.</p>
<p>Methods for Testing Provision</p>	<p>The Tribunal will therefore turn to the two sets of court actions which were each time initiated by local competitors against Le Bridge, and it will determine whether the judiciary denied Le Bridge justice through the misapplication or disrespect of certain legal procedures and thereby breached the fair and equitable treatment standard to which Mr. Arif is entitled. A claim based on legitimate expectations must proceed from the exact identification of the origin of the expectation alleged, so that its scope can be formulated with precision.</p>
<p>Application of Provision to Facts</p>	<p>The Tribunal finds therefore that the final and binding decision of the judiciary to invalidate the Lease Agreement does not as such amount to a denial of justice. In the present case, the judiciary invalidated the Tender results and the subsequent July 1, 2008 Agreement, but not the lease contracts themselves. Not only do these contracts remain in force today, but Le Bridge and Claimant have created a network of duty free shops without a tender and they are apparently profitable even without exclusivity clauses. The Economic Court of Appeal made an error (<i>ultra petitia</i>) by substituting a formal request with a deduction and that this error remained throughout the proceedings. However this cannot be said to have been made in bad faith as it did not negatively affect the Claimant. The Tribunal does not have the competence to assess the second claim, that the competitor submitted a forged application document to retroactively prove it met certain procedural requirements. The Tribunal therefore dismisses all claims to procedural and substantive denials of justice. The legitimate expectation of the investor of a secure legal framework to operate a duty free store at Chisinau Airport was breached by actions of Respondent. The Tribunal refers to the following considerations that demonstrate this breach of Claimant's legitimate expectation and the standard of fair and equitable treatment under the BIT: the claimant has not been able to open their store because the contract signed by the state was found to be null and void; there is inconsistency between organs of the state; the state cannot defend itself against an international claim by reference to the laws of its own system; the complaint is not the non-performance, but the non-existence of that contract; and, finally, the state has failed to provide any remedies.</p>
<p><b>Indirect Expropriation (Decided in favour of: State )</b></p>	
<p>Article 5(2): The Contracting Parties shall not make any measures of expropriation or nationalization or any other measure that has the effect of dispossessing, directly or indirectly, the nationals and companies of the other Contracting Party of their investments, on their territory and on their maritime area, save for a public purpose and on the condition that such measures not be discriminatory or contrary to a specific commitment. Any measures of dispossession that could be taken have to result in the payment of a prompt and adequate compensation, an amount equal to the real value of the concerned investments, which shall be valued in relation to a normal economical situation, prior to any threat of dispossession. This compensation, its amount and payment methods are established on the date of dispossession at the latest. This compensation shall be effectively encashable, paid without delay and freely transferable. It shall produce, until the date of payment, interest calculated according to the appropriate market rates.</p>	

Application of Provision to Facts	The Tribunal has already accepted the invalidity of these rights as declared by the Moldovan judicial system as a result of the legitimate application of Moldovan law and has found that this invalidity cannot be interpreted as an expropriation of the investor's rights, i.e., the Tribunal has found that there is no possible expropriation of invalid rights. Therefore, Claimant's argument that a State cannot rely on its internal law to invalidate its own obligations is not applicable with respect to Claimant's claim for expropriation. It is therefore rejected.
<b>Full Protection and Security (Decided in favour of: State)</b>	
Article 5(1): Investments made by the nationals or companies of one of the Contracting Parties shall enjoy, in the territory and in the maritime area of the other Contracting Party, full protection and security.	
Definition of Provision	The standard of FPS is clearly addressed in a separate article in the BIT. The Tribunal therefore finds that FPS is a separate and independent standard to that of FET.
Application of Provision to Facts	By the same token, Claimant's general argument that all of Moldova's acts and omissions in breach of FET also constitute breaches of Moldova's obligation to grant FPS is rejected. Claimant has to prove how the alleged acts and omissions are in breach of Respondent's alleged obligation to grant FPS.
<b>National Treatment (Decided in favour of: State )</b>	
Article 4: Each Contracting Party shall extend, in its territory and in its maritime area, to nationals and companies of the other Contracting Party, regarding their investments and activities connected with these investments, treatment not less favourable than that granted to its nationals or companies.	
Definition of Provision	The Tribunal notes that there is no independent obligation not to discriminate under the BIT. Discrimination is an essential element of a "national treatment" clause. Discriminatory measures towards the foreign investor in relation to more favourable treatment awarded to national investors will imply a breach of the national treatment standard.
Methods for Testing Provision	Claimant has to prove how the alleged acts and omissions are in breach of Respondent's obligation not to discriminate in order for the Tribunal to find a breach of national treatment for discrimination.
Application of Provision to Facts	<p>Claimant indeed tries to prove discrimination based on certain facts. Nevertheless, the Tribunal is not persuaded that there has been discrimination against Claimant for the reasons stated below.</p> <p>With regard to the cancellation of the Lease Agreement, the Tribunal has already found that it was the result of the application by the Moldovan courts of Moldovan law, under which the Lease Agreement was invalid. The legitimate application of Moldovan law cannot be considered discriminatory against Claimant and Claimant's argument to the contrary is rejected by this Tribunal. Finally, the Tribunal notes that even though discrimination may also be considered an element of FET, the actions and omissions in breach of FET will not necessarily imply a breach with respect to non-discrimination. Therefore, Claimant's general argument that all of Moldova's acts and omissions in breach of FET also constitute breaches of Moldova's obligation not to discriminate is dismissed. Claimant has to prove that each of the alleged acts and omissions were in breach of Respondent's obligation</p>

	not to discriminate in order for the Tribunal to find such breach. Claimant has not satisfied his burden of proof.
<b>Unreasonable Measures (Decided in favour of: State )</b>	
The Treaty does not contain an express obligation not to impose unreasonable or arbitrary measures. Accepting Claimant’s logic that this standard is applicable via the MFN clause and that it does not differ from the FET standard, (i) unreasonable and arbitrary measures protections are the same as FET protections, (ii) unreasonable and arbitrary measures protections are therefore by definition not more favourable than the protections already afforded in the treaty, and (iii) such protections therefore cannot be imported as an independent treaty standard via the MFN clause in Article 4, which requires application of other provisions only if they are more favourable.	
Definition of Provision	The Tribunal notes that there is no independent obligation not to impose arbitrary or unreasonable measures under the BIT. Even though non-arbitrariness may be considered as one of the elements of the FET standard a breach of FET does not necessarily imply the existence of arbitrariness.
Methods for Testing Provision	Claimant has to successfully prove how the alleged acts and omissions are in breach of Respondent’s alleged obligation not to impose arbitrary or unreasonable measures.
Application of Provision to Facts	Claimant’s general argument that all the acts and omissions alleged to have breached the FET standard also are in breach of Respondent’s obligation not to impose unreasonable or arbitrary measures is rejected. Claimant has not successfully proved before this Tribunal in what way each of the alleged acts and omissions of Respondent would amount to a breach of Respondent’s alleged obligation not to impose unreasonable or arbitrary measures
<b>Importance/Relevance to Analysis/Lessons for Health-Medium</b>	
Tribunal found that if rights are found to be invalid by a judicial system as a result of the legitimate application of domestic law, the invalidity cannot be interpreted as expropriation, such that you cannot expropriate invalid rights. May be of relevance to ongoing <i>Eli Lilly v Canada</i> case, if invalidation of patent seen as a legitimate application of Canadian law, under this case law Eli Lilly would be unable to claim expropriation. Case where MFN clause was used to incorporate provisions from third party agreements, pending that they are more favourable.	

<b>Case Title (Full):</b> Ioannis Kardassopoulos and Ron Fuchs (Israeli) v Georgia	
<b>Case Title (Shorthand):</b> Fuchs v Georgia	
<b>Claimant:</b> Ioannis Kardassopoulos and Ron Fuchs	<b>Respondent:</b> Georgia (LMIC)
<b>Treaty:</b> BIT Georgia – Israel; BIT Georgia-Greece; and the Energy Charter Treaty (ECT)	
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 4 years 5 months
<b>Number of Elite 15:</b> 2	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> Damages + USD 137,901 + 50% in expenses, pre-/post-award interest, and legal costs	<b>Damages Awarded:</b> USD 45,124,737 paid to each + semi-annual compound interest of 4% until Award is paid in full. State bears investor’s arbitration costs of US\$ 7,942,297 + all arbitration proceeding costs in full.
<b>Issue</b>	In 1992, the claimants, Ron Fuchs (Israeli national) and Ioannis Kardassopoulos (Greek national), co-owners of TrameX Internatioal, entered into a joint venture (GTI) with Georgian Oil, a state owned company. GTI was then granted a 30-year concession over Georgia’s main pipeline system. In 1996, after adopting another resolution, Georgia terminated GTI’s concession and granted the same rights to a consortium of transnational oil companies. At the time, a governmental commission considered compensating the claimants; however, the new governmental commission of 2004 decided against any form of compensation.
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
<p>Georgia-Israel BIT: Article 2(2): Investments made by investors of each Contracting Party shall be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.</p> <p>Georgia-Greece BIT: Article 2(2): Investments by investors of a Contracting Party shall, at all times, be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal, in its territory, of investments by investors of the other Contracting Party, is not in any way impaired by unjustifiable or discriminatory measures.</p> <p>ECT: Article 10(1): Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.</p>	
<i>Definition of Provision</i>	The standard of FET in Article 2(2) must be understood in the context of this aim of encouraging the inflow and retention of foreign investment. Such provisions form the

	basis for an investor’s decision to invest— or not – in a particular territory: “An investor’s decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor’s expectation that the conduct of the host State subsequent to the investment will be fair and equitable” ( <i>Saluka</i> ).
<i>Application of Provision to Facts</i>	The tribunal interpreted the standard broadly as a violation of the investor’s “reasonable expectations.” While the Georgia-Israel BIT entered into force after the expropriation took place, Georgia’s assurances of compensation after the investment provided Fuchs with legitimate expectations of a fair and equitable compensation process. “[T]he fact that it was after the investment was made that specific assurances of compensation were given, which assurances gave rise to a specific expectation of compensation, does not preclude Mr. Fuchs from holding throughout the term of his investment the legitimate expectation that Georgia would conduct itself vis-à-vis his investment in a manner that was reasonably justifiable and did not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination.”
<b>Direct Expropriation (Decided in favour of: Investor)</b>	
Georgia-Greece BIT: Article 4(1): Investments by investors of either Contracting Party in the territory of the other Contracting Party, shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization (hereinafter referred to as “expropriation”), except in the public interest, under due process of law, on a non-discriminatory basis and against payment of prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment affected immediately before the actual measure was taken or became public knowledge, whichever is the earlier. It shall include interest from the date of expropriation until the date of payment at a normal commercial rate and shall be freely transferable in a freely convertible currency.	
ECT: Article 13(1): Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subject to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “Expropriation”) except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.	
<i>Application of Provision to Facts</i>	While it may, in certain circumstances, be the case that a taking can be considered discriminatory absent an intention to discriminate against an investor on the basis of nationality, the Tribunal is not convinced that this is such a case. The tribunal concluded that Kardassopoulos’ investment was unlawfully expropriated in breach of the ECT, because Georgia failed to provide “prompt, adequate and effective” compensation and the expropriation took place under due process of law. Therefore, the investors did not have a “reasonable chance within a reasonable time” to be heard and claim their rights ( <i>ADC v. Hungary</i> ).
<b>Importance/Relevance to Analysis/Lessons for Health-Low</b>	
The Tribunal appears to offer a relatively comprehensive interpretation of the FET, not a violation of the investor’s “legitimate” expectations but a violation of the investor’s “reasonable expectations.”	

<b>Case Title (Full):</b> GEA Group Aktiengesellschaft v. Ukraine	
<b>Case Title (Shorthand):</b> GEA v Ukraine	
<b>Investor/Claimant:</b> GEA Group Aktiengesellschaft (German)	<b>State/Respondent:</b> Ukraine (LMIC)
<b>Treaty:</b> The Agreement between the Federal Republic of Germany and Ukraine on the Promotion and Mutual Protection of Investments	
<b>Court:</b> ICSID (ICSID Convention-Arbitration Rules)	<b>Duration:</b> 2 years and 4 months
<b>Number of Elite 15:</b> 2	<b>Party Awarded:</b> State
<b>Damages Requested:</b> USD 30,831,915	<b>Damages Awarded:</b> Investor to pay all State costs in the matter
<b>Issue</b>	The Respondent failed to honour its repeated promises to ensure that GEA would be paid for its Products, and has taken multiple steps in intervening years to ensure that no compensation would be paid.
<b>Fair and Equitable Treatment (Decided in favour of: State )</b>	
Article 2(1): Either Contracting State shall, if possible, promote within its territory investments by nationals or companies of the other Contracting State and shall permit such investments in accordance with its legislation. It shall in any case grant investments fair and equitable treatment.	
Methods for Testing Provision	<p>1-(Legitimate Expectations) Did respondent make any promises that gave rise to a reasonable expectation that was then violated?</p> <p>2-(Denial of Justice) from Mondev “The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.</p>
Application of Provision to Facts	<p>1- In the Tribunal’s view, it is entirely unclear from the documents that Ukraine in fact made any such promises to the Claimant, or failed to keep any promises made.</p> <p>2- The Tribunal has not been presented with any evidence that the Ukrainian courts “failed to administer due process” or “deprived” the Claimant of a “fair procedure.” To the contrary, the record before it demonstrates that the Claimant was accorded a full hearing by the Ukrainian courts, but that the courts disagreed with the Claimant’s point of view.</p>
<b>Indirect Expropriation (Decided in favour of: State )</b>	

<p>Article 4(2): Investments by nationals or companies of either Contracting State may not, within the territory of the other Contracting State, be expropriated, nationalized or subjected to such other measures the effect of which would be tantamount to expropriation or nationalization except for the public interest and against compensation. . .</p>	
<p>Application of Provision to Facts</p>	<p>The Tribunal has been presented with no evidence that the actions taken by the Ukrainian courts were “egregious” in any way; that they amounted to anything other than the application of Ukrainian law; or that they were somehow deliberately taken to thwart GEA’s ability to recover on the ICC Award.</p>
<p><b>Most-Favoured Nation (Decided in favour of: State )</b></p>	
<p>Article 3(1): Neither Contracting State shall subject investments in its territory that are owned or controlled by nationals or companies of the other Contracting State and that have been authorised and made pursuant to Article 2(2) in accordance with the legislation in force in the territory of the given Contracting State to treatment less favourable than it accords to investments by its own nationals or companies of third states. Article 3(2): Neither Contracting State shall subject nationals or companies of the other Contracting State to treatment less favourable than it accords to investments by its own nationals or companies or investments by nationals or companies of third states.</p>	
<p>Methods for Testing Provision</p>	<p>Compare treatment by government of two similarly situated investors (or investments).</p>
<p>Application of Provision to Facts</p>	<p>The Tribunal is not convinced that the situation of the Seychelles company is comparable to that of GEA.</p> <p>With respect to Article 6 of the Law on Foreign Economic Activities, the Tribunal notes, as pointed out by the Respondent, that this provision applies only to Ukrainian physical and legal persons. What is more, while this legislation may create additional formal requirements for foreigners to invest in Ukraine, it does not concern the treatment of investments once made. In light of this, the Tribunal does not consider Article 6 of the Law on Foreign Economic Activities to be discriminatory.</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health-Low</b></p>	
<p>Legitimate expectations must be based on express promises of the state (e.g. by law or a relevantly empowered state official). As long as courts of law are provided to investor, a very significant error must be made to constitute denial of justice.</p>	

<b>Case Title (Full):</b> Gemplus, S.A. (French), SLP, S.A. (French), Gemplus Industrial, S.A. de C.V. (Mexican) v United Mexican States	
<b>Case Title (Shorthand):</b> Gemplus v Mexico	
<b>Investor/Claimant:</b> Gemplus, S.A. (French), SLP, S.A. (French), Gemplus Industrial, S.A. de C.V. (Mexican)	<b>State/Respondent:</b> Mexico (UMIC)
<b>Treaty:</b> BIT Mexico - France 1998	
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 5 years 9 months
<b>Number of Elite 15:</b> 1	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 37 million or alternatively USD 24 million + compound interest and costs	<b>Damages Awarded:</b> <ul style="list-style-type: none"> <li>- USD 4,483,164 + 6,458,721 (BIT breaches) to Talsud S.A</li> <li>- USD 1,867,589 + 2,698,907 in compound interest to Talsud S.A</li> <li>- USD 4,483,164 + 6,458,721 in compound interest to Gemplus S.A. &amp; Talsud S.A</li> <li>- State bears legal costs of Gemplus S.A. and Talsud S.A. (USD 2,375,000 &amp; USD 3,075,000 respectively)</li> <li>- State bears all other costs of arbitration proceedings</li> </ul>
<b>Issue</b>	This case involves a public concession for the operation Mexico's national registry of vehicles (Concesionaria Renave, S.A. de C.V. (Renave). In 2004, Talsud S.A., an Argentinian company with 29% issued share capital in Renave, and Gemplus, a French company with a 20% capital stock in Renave, brought their claims to arbitration under the Argentina and France BITs.
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
<p>Argentina BIT Article 3(1): Each Contracting Party shall guarantee at all times the fair and equitable treatment of all investors and investments of investors of the other Contracting Party, and shall not prejudice the management, maintenance, use, enjoyment or disposition of their investments through arbitrary or discriminatory measures.</p> <p>France BIT Article 4(1): Each of the Contracting Parties undertakes to guarantee, within its territory and its maritime zone, the fair and equitable treatment, in accordance with principles of International Law, of investments made by investors from the other Contracting Party and shall guarantee that the exercise of this recognised right shall not be impeded either in law or in practice.</p>	
<i>Definition of Provision</i>	This phrase in both BITs includes the exercise of good faith or the absence of manifest irrationality, arbitrariness or perversity by the Respondent
<i>Application of Provision to Facts</i>	The Claimants established their FET claims with both the Requisition of 25 June 2001 and the Revocation of 13 December 2002. On the facts found in this Award, the Tribunal can only characterise the Respondent's conduct from 25 June 2001 onwards to 13 December 2002 as manifestly irrational, arbitrary and perverse, being also conducted in bad faith towards the Claimants and their rights as investors under the two BITs.

<b>Indirect Expropriation (Decided in favour of: Investor)</b>	
<p>Argentina BIT Article 5: Neither of the Contracting Parties may nationalise or expropriate, either directly or indirectly, an investment made by an investor from the other Contracting Party in its territory or adopt any measures equivalent to the expropriation or nationalisation of this investment, except: a) for reasons of public utility; b) on a non-discriminatory basis; c) in accordance with the legality; and principle d) with compensation, pursuant to paragraphs (2) and (4) below.</p> <p>France BIT Article 5: Neither Contracting Party shall take any direct or indirect measures to expropriate or nationalise, or any other measure which has the equivalent effect, an investment made by an investor within its territory or its maritime zone, except: (i) for reasons of public utility; (ii) on the of legal procedure; condition that these measures are not discriminatory; (iii) in accordance with the required legal procedure; (iv) on payment of compensation in accordance with the paragraphs 2 and 3 of this Article.</p>	
<i>Method for Testing Provision</i>	The Tribunal applies the legal submissions made by the Claimant, to the general effect that an indirect expropriation occurs if the state deliberately deprives the investor of the ability to use its investment in any meaningful way and a direct expropriation occurs if the state deliberately takes that investment away from the investor.
<i>Application of Provision to Facts</i>	The Tribunal considers that the Claimants have established their case on indirect expropriation with the Requisition on 25 June 2001 and direct expropriation with the Revocation on 13 December 2002. The Tribunal concludes that these expropriations were unlawful under the BITs and international law, given the facts found by the Tribunal and the further fact that the Respondent did not meet the condition required by Article 5 of both treaties regarding the payment of adequate compensation. As will appear later from Part XIV of this Award, the Tribunal does not consider that the Claimants' receipt of dividends, return of capital and reimbursement of start-costs amounted to adequate compensation required by Article 5 of the two BITs. This Tribunal is not concerned with the legal rights of the Secretariat and the Concessionaire under the Concession Agreement or Mexican law. The Claimants' investments were unlawfully expropriated by the Respondent, indirectly with the Requisition on 25 June 2001 and directly with the Revocation on 13 December 2002, in violation of Article 5 (1) of the Argentina BIT and Article 5 (1) of the France BIT respectively.
<b>Full Protection and Security (Decided in favour of: State)</b>	
<p>Argentina BIT Article 3(2): Each Contracting Party, after admitting in its territory investments from investors of the other Contracting Party, shall provide full legal protection to those investors and their investments and shall grant them a treatment no less favourable than that granted to investors and investments of its own investors or investors from third States.</p> <p>France BIT: Article 4(3): Investments made by investors of one Contracting Party within the territory or the maritime zone of the other Contracting Party shall benefit from full and complete protection and security within the territory and maritime zone.</p>	
<i>Definition of Provision</i>	The Tribunal considers that the two BIT provisions relating to the Respondent's obligation to provide 'protection' are materially similar for the purposes of the present case, despite their different wording and different scope (the Argentina BIT referring to investors and investments; and the France BIT referring to investments

	<p>only). Such ‘protection’ provisions, in the form of the wording here under consideration, do not generally impose strict liability on a host state under international law; and the mere fact of other unlawful conduct in the form of expropriation or inequitable and unfair treatment by the host state is not, without more, to be treated as a breach of these provisions. The Tribunal also considers that these BIT provisions are directed at different kinds of unlawful treatment from that proscribed by other provisions of the two BITs, particularly those regarding FET and Expropriation. The latter involve the investor and the host state, whereas the ‘protection’ provisions also involve the host state protecting the investment from a third party.</p>
<i>Application of Provision to Facts</i>	<p>This was never a case about a failure by the Respondent (including the Secretariat) to afford physical or other like protection to the Claimants. Moreover, the harm alleged by the Claimants is attributed to the Respondent itself and not to any third party; and the existence of the many legal proceedings involving the Concession and the Concessionaire, recorded in Part IV (28) above, demonstrate that it was also never a case about a failure by the Respondent to afford, indirectly, legal protection to the Claimants or their investments under Mexican law within the Mexican legal system. It is clear that the Concessionaire was itself entitled to resort and did resort to domestic legal remedies in the Respondent’s state courts; and the Claimants have advanced no pleaded case in these arbitration proceedings for denial of justice. The Tribunal decides that the Respondent has not breached Article 3(2).</p>
<b>National Treatment (Decided in favour of: State)</b>	
<p>Argentina BIT Article 3(2): Each Contracting Party, after admitting in its territory investments from investors of the other Contracting Party, shall provide full legal protection to those investors and their investments and shall grant them a treatment no less favorable than that granted to investors and investments of its own investors or investors from third States.</p> <p>Argentina BIT Article 2(5)(b): This Agreement shall not apply to measures adopted by a Contracting Party for reasons of national security or public order.</p> <p>France BIT Article 4(2): Each of the Contracting Parties shall grant, within its territory and its maritime zone, to investors of the other Contracting Party a treatment no less favourable than it would grant its own investors or treatment granted to investors of the most favoured Nation, if the latter is more favourable, with regard to their investments and the operation, administration, maintenance, use, enjoyment or disposition of such investments.</p>	
<i>Application of Provision to Facts</i>	No significant interpretation provided under this claim.
<b>Causation (Decided in favour of: Investor)</b>	

<p>Argentina BIT Article 10(6): The arbitration award shall be limited to determining whether a Contracting Party has breached this Agreement, whether this breach has caused a loss to the investor and, if so:- a) fix the amount of compensatory indemnification for the damage suffered; b) restitution of property or, if that is not possible, the corresponding compensatory indemnification.</p> <p>France BIT Article 9(1): This Article only applies to disputes between one Contracting Party and an investor of the other Contracting Party in relation to an alleged breach by the Contracting Party under this Agreement which causes loss or damage to the investor or his investment.</p>	
<p><i>Definition of Provision</i></p>	<p>This issue relates to whether any unlawful act or omission by the Respondent caused the Claimants' loss and whether any fault of the Claimants contributed to that loss, such that any amount of compensation should be reduced or extinguished.</p>
<p><i>Methods for Testing Provision</i></p>	<p>It is clear under international law that compensation for violation of a BIT will only be due from a respondent state if there is a sufficient causal link between the treaty breach by that state and the loss sustained by the claimant. Article 39 of the ILC's Articles on State Responsibility precludes full or any recovery, where, through the wilful or negligent act or omission of the claimant state or person, that state or person has contributed to the injury for which reparation is sought from the respondent state.</p>
<p><i>Application of Provision to Facts</i></p>	<p>None of the Claimants knew or could reasonably have known of Mr. Cavallo's past (assuming even, for present purposes, that his past is as was alleged by the Respondent). If that little was achieved by the Respondent as a state receiving assistance from a state, how much less could have become known by the Claimants. Therefore, the Respondent caused the losses suffered by the Claimants as assessed later in this Award, without any reduction for "contributory negligence" or other fault, as alleged by the Respondent.</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health - Low</b></p>	
<p>Case turned on an extensive set of details, and legitimate investor challenge, no relevant lessons for health policy.</p>	

<b>Case Title (Full):</b> Gold Reserve Inc. v Bolivarian Republic OF Venezuela	
<b>Case Title (Shorthand):</b> Gold Reserve v Venezuela	
<b>Investor/Claimant:</b> Gold Reserve Inc.	<b>State/Respondent:</b> Bolivarian Republic OF Venezuela (HIC)
<b>Treaty:</b> Treaty between the Government of Canada and the Government of Venezuela for the Promotion and Protection of Investments, which entered into force on 28 January 1998	
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 4 years 10 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 1,735,124,200 + interest <b>(Counter Damages Requested:</b> Fees + costs)	<b>Damages Awarded:</b> USD 713,032,000 + compound interest.  Venezuela to reimburse USD 5 million of Investor's legal fees; each equally bear Tribunal's and ICSID's costs
<b>Issue</b>	Gold Reserve Inc., the Claimant, is a company incorporated in Canada. In 1992/1993, Gold Reserve Corp., a United States predecessor to the company acquired a gold and copper project based in south-eastern Venezuela, which included the Brisas Project. In 2008, after having invested USD 300 million in project development and the company was ready to begin construction, the disputes between the Brisas Project and the Venezuelan government arose. Under the former President Hugo Chávez the government terminated the Brisas and the Unicornio concessions, suspended mining activities in the Brisas concession, occupied the site of the Brisas Project, and seized Gold Reserve's assets, with the intention to turn private concessions into joint ventures between the government and private firms. The Claimant alleged that Venezuela violated its obligations under the Canada-Venezuela FIPA regarding the Brisas and Unicornio mining concessions not to expropriate property without compensation, to provide fair and equitable treatment, and most favoured nation treatment.
<b>Full Protection and Security (Decided in favour of: State)</b>	
Article II(2): Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security.	
<i>Definition of Provision</i>	"[F]ull security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force." This standard of treatment refers to protection against physical harm to persons and property.
<i>Application of Provision to Facts</i>	The obligation to accord full protection and security under the BIT refers to the protection from physical harm. There has been no suggestion in the present case that Respondent failed to protect Claimant's investment from physical harm, and therefore no breach of the full protection and security standard occurred.
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
Article II(1) Each Contracting Party shall encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory.	

<i>Definition of Provision</i>	Legitimate expectations are created when a State’s conduct is such that an investor may reasonably rely on that conduct as being consistent. A reversal of assurances by the host State that have led to legitimate expectations will violate the principle of fair and equitable treatment.
<i>Methods for Testing Provision</i>	The Tribunal shares the view expressed by other investment treaty tribunals that in order to establish whether an investment has been accorded fair and equitable treatment, all of the facts and circumstances of the particular case must be considered. In particular, the Tribunal agrees that even if a measure or conduct by the State, taken in isolation, does not rise to the level of a breach of the FET, such a breach may result from a series of circumstances or a combination of measures. In the Tribunal’s view, this is the more so when the measures are part of a State policy aimed at gaining control of the object of the investment.
<i>Application of Provision to Facts</i>	The reasons given by the tribunal in the Metalclad v. Mexico case for concluding that a breach of the FET provision had occurred can also be applied to the present case: “failing to ensure a transparent and predictable framework for Metaclad’s business planning and investment” or to provide an “orderly process and timely disposition in relation to an investor acting in the expectation that it would be treated fairly and justly.” The conclusion here is the same as in the Metalclad case: Respondent failed to accord Claimant FET regarding the whole process leading to the termination of the Brisas Concession by failing inter alia to respect Claimant’s due process rights. The reasons for the termination of the Brisas, Unicornio and El Pauji Concessions are not limited to those officially stated by MIBA, rather they are to be found in the change of political priorities of the Administration. A State has a responsibility to preserve the environment and protect local populations living in the area where mining activities are conducted. However, this responsibility does not exempt a State from complying with its commitments to international investors by searching ways and means to satisfy in a balanced way both conditions. The Respondent’s conduct did not accord with the obligations required by the FET standard. Respondent issued the Revocation Order without allowing Claimant an opportunity to be heard. It is only reasonable to infer that MinAmb’s conduct was determined by the change of State’s policy. The number, variety and seriousness of the breaches make the FET violation by Respondent particularly egregious. The compensation due to Claimant for such breaches should reflect the seriousness of the violation.
<b>Indirect Expropriation (Decided in favour of: State)</b>	
Article VII(1): Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation.	
<i>Method for Testing Provision</i>	In relation to the terminations of the Concession contracts for Brisas and Unicornio, to be able to be considered an expropriation there must have been an exercise of sovereign authority, not just a contractual termination. The key issue is to determine whether the reasons cited for the terminations of the Brisas and Unicornio Concessions were sufficiently well-founded and, if so, the terminations would not be considered expropriations.

<i>Application of Provision to Facts</i>	This is not a straight-forward issue, as the political motivations that undoubtedly existed make it difficult to distinguish between sovereign and regulatory acts. The Respondent's acts were an exercise of regulatory powers under the 1999 Mining Law and the relevant Mining Titles, and therefore not acts of an expropriatory nature. This does not detract from the fact that the manner by which such regulatory powers were exercised has led to a finding of a serious breach by the State of the FET standard under Article II(2) of the BIT. Even if the prior revocation of the Phase I Permit and failure to sign the Initiation Act could in themselves constitute an indirect expropriation, the subsequent revocation of the Concessions means these prior acts had no material impact on the Tribunal's finding of absence of expropriation.
<b>Most-Favoured Nation (Decided in favour of: State)</b>	
Article III (1): Each Contracting Party shall grant to investment, or returns of investors of the other Contracting Party, treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors of any third State. Article III(2): Each Contracting Party shall grant investors of the other Contracting Party, as regards their expansion, management, conduct, operation, use enjoyment, sale, or disposal of their investments or returns, treatment no less favourable than that which, in like circumstances, it grants to investors of any third State.	
<i>Application of Provision to Facts</i>	There is no need to reach a conclusion as to whether Article III of the BIT imports more favorable provisions from other bilateral investment treaties with the effect of extending the breach of FET standard to include "arbitrary or discriminatory" treatment. Given the Tribunal's findings on FET, there is nothing to be gained by importing these additional standards of treatment.
<b>Importance/Relevance to Analysis/Lessons for Health-Medium</b>	
The Tribunal acknowledged the State responsibility to protect its people; specifically that a State has a responsibility to preserve the environment and protect local populations living in the area where mining activities are conducted, but cannot fail to respect due process while doing so.	

<b>Case Title (Full):</b> Grand River Enterprises Six Nations, LTD., ET AL. v United States of America	
<b>Case Title (Shorthand):</b> Grand River v USA	
<b>Investor/Claimant:</b> Grand River Enterprises Six Nations	<b>State/Respondent:</b> United States of America (HIC)
<b>Treaty:</b> North American Free Trade Agreement	
<b>Court/Rules:</b> United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules; ICSID Convention - Arbitration Rules	<b>Duration:</b> 6 years 9 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> State
<b>Damages Requested:</b> USD 3,917,377 (Counter damages USD 2,792,592)	<b>Damages Awarded:</b> None, each bears own costs and half the costs/expenses of these proceedings
<b>Issue</b>	The case involved a claim against the U.S. by a Canadian tobacco corporation that sold tobacco on reservations in the U.S. and three Canadian members of the Haudenosaunee indigenous group who owned or did business with the corporation. Claimants argued that the implementation of the deal U.S. states made with tobacco companies in the 1990s and later to address underage smoking and public health concerns relating to tobacco violated their NAFTA rights.
<b>Minimum Standard of Treatment (Decided in favour of: State)</b>	
Article 1105(1): Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.	
NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001): Clause 2 of the Commission's Notes of Interpretation provides as follows: (1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. (2) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).	
<i>Definition of Provision</i>	Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.
<i>Methods for Testing Provision</i>	Any obligations requiring consultation run between the state and indigenous peoples as such, that is, as collectivities bound in community. Article 19 of the U.N. Declaration provides that "States shall consult with indigenous peoples through their own representative institutions".

<p><i>Application of Provision to Facts</i></p>	<p>Arthur Montour, one of the distributors, should be seen as the beneficiary of the customary international law obligation for governments to consult with indigenous communities. Thus, the argument went, NAFTA entitled him to be directly consulted before the states took any action affecting his investment. The Tribunal finds this particular argument unpersuasive and unsubstantiated. That said, the Tribunal believes that a good case could be made that consultations should have occurred with governments of the Indian tribes or nations in the United States whose members and sovereign interests could, and apparently are, being affected by the Master Settlement Agreement (MSA) and related measures to regulate commerce in tobacco. Retail tobacco businesses are in many Indian reservations across the country, constituting important sources of income and catalyzing other economic activity among indigenous communities. The evidence before the Tribunal has shown many of the actual or potential effects of the MSA and related measures on reservation tobacco sales and distribution to reservations retailers. The United States federal government admits to the need for consultations with indigenous communities on legislative and administrative measures affecting them, as a matter of federal policy if not as a matter of international law. However, at the hearing the Respondent's counsel, when questioned by the Tribunal, confirmed that the governments of Indian nations had not been consulted about the MSA. No evidence was introduced to show that anything adverse happened to Arthur Montour or NWS as the result of the three disputed letters to the Las Vegas foreign trade zone. Instead, the record shows that NWS continues to distribute large quantities of cigarettes to on-reservation customers in western states. There is no evidence that this is not being done from the Las Vegas foreign trade zone. In this regard, the second report of the Claimants' valuation expert states that sales by Native Wholesale Supply's sales in California, have grown at an annual rate of (redacted) per year or severs years. The expert's second report also shows substantial continued sales through December 2008 in other western states including Idaho and Nevada. The Expert's report makes no claim of damages for any impairment of on-reservation sales in Oklahoma or New Mexico, suggesting that sales are continuing there as well. Arthur Montour's claim of breach of NAFTA presented at the hearing involving letters sent by several states' legal officers to the Las Vegas foreign trade zone is denied.</p>
<p><b>Indirect Expropriation (Decided in favour of: State)</b></p>	
<p>Article 1110(1): No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.</p>	
<p><i>Definition of Provision</i></p>	<p>Any act of expropriation will affect the totality of an investment. This is in harmony with the conception of expropriation applied in numerous cases—that expropriation involves the deprivation or impairment of all, or a very significant proportion of, an investor's interests.</p>
<p><i>Methods for Testing Provision</i></p>	<p>An expropriation must involve the deprivation of all, or a very great measure, of a claimant's property interests.</p>
<p><i>Application of Provision to Facts</i></p>	<p>An act of expropriation must involve "the investment of an investor," not part of an investment. This is particularly so in these circumstances, involving an investment</p>

	<p>that remains under the investor's ownership and control and apparently prospered and grew throughout the period for which the Tribunal received evidence. Arthur Montour's expropriation claim fails for failure to establish an expropriation within the scope of Article 1110.</p>
<p><b>Most-Favoured Nation &amp; National Treatment (Decided in favour of: State)</b></p>	
<p>Article 1102(1): Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. Article 1102(2): Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.</p>	
<p>Article 1103(1): Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. Article 1103 (2): Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.</p>	
<p><i>Methods for Testing Provision</i></p>	<p>To assess whether there was a violation of either Article 1102 or 1103, the Claimants urged the Tribunal to utilize the three-step analytical model articulated by the Pope &amp; Talbot. That is, the Tribunal should: (1) identify comparable domestic investors and/or investments; (2) determine whether the domestic investors/investments receive more favorable treatment, and (3) determine whether the difference in treatment is justified in the circumstances.</p>
<p><i>Application of Provision to Facts</i></p>	<p>The reasoning in different cases shows that the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103. The Tribunal understands a core element of Mr. Montour's NAFTA claims to be that he and his distribution companies should not have been subject to the disputed measures applicable to other similarly situated investors and investments, because of his situation as a First Nations trader. Given that there has been no showing that the disputed enforcement measures have subjected Arthur Montour to treatment less favorable than that accorded the appropriate domestic comparator, regardless of his nationality, the Tribunal need not consider this issue or make any decisions in this regard.</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health-Low</b></p>	
<p>While this case centers on tobacco, it is addressing the rights of indigenous peoples to consultation. The tribunal and the State acknowledged that the United States federal government should have met their obligation under customary international law to consult with indigenous communities on legislative and administrative measures affecting them; however the argument that NAFTA entitled an indigenous investor to be directly consulted before the states took any action affecting his investment was found to be unpersuasive and unsubstantiated. Given that the investment remained under the investor's ownership and control and apparently prospered and grew throughout the period led the Tribunal to dismiss the case. That</p>	

tobacco was the product was largely immaterial to the case and is unlikely to have implications for future cases regarding tobacco products.	
<b>Case Title (Full):</b> Guaracachi America, Inc. (U.S.A.) and 2. Rurelec plc (United Kingdom) v Plurinational State of Bolivia	
<b>Case Title (Shorthand):</b> Guaracachi v Bolivia	
<b>Investor/Claimant:</b> Guaracachi America, Inc. (U.S.A.) and 2. Rurelec plc (United Kingdom)	<b>State/Respondent:</b> Bolivia (LMIC)
<b>Treaty:</b> Treaty between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments.	
<b>Court/Rules:</b> PCA – UNCITRAL Arbitration Rules 2010	<b>Duration:</b> 3 years 2 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 136.4 million + interest, costs, legal	<b>Damages Awarded:</b> USD 28,927,582 + compound interest of 5.63%
<b>Issue</b>	The Claimants, Guaracachi (US company) and Rurelec (UK company) brought a claim against Bolivia under the USA-Bolivia and the UK-Bolivia BITs for the nationalization in 2010 of Guaracachi's 50.001% shareholding in Empresa Electrica Guaracachi S.A. and of additional assets owned by Rurelec's subsidiary, Energia para Sistemas Aislados Energais S.A. (an electricity generation business in Bolivia). Rurelec indirectly owns Guaracachi through a chain of BVI companies. Rurelec's claim with respect to Empresa Electrica was for the expropriation of an indirect shareholding.
<b>Fair and Equitable Treatment (Decided in favour of: State)</b>	
Article 2(1): Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital. Article 2(2): Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall, in any way, impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.	
<i>Application of Provision to Facts</i>	The Claimants invested in Bolivia in reliance upon a series of fundamental principles that were paramount to the economic feasibility of the investment, and which were enshrined in the regulatory framework governing spot prices at that time. Nonetheless, these fundamental principles were modified in 2008, undermining the stability and foreseeability of the legal framework, and thus frustrating the legitimate expectations of the Claimants. This change meant that spot prices were artificially reduced when these turbines were dispatched, and the most efficient companies (such as EGSA) lost a considerable part of their profit margin. Investors are entitled to fair

	<p>and equitable treatment throughout the life of the investment, in this case, from the year 2006 onwards. Hence, the Claimants could have a legitimate expectation based on such provision. According to Bolivia, the Claimants interpret this standard too broadly. The object of the protection afforded by such standard is the legitimate expectations of the foreign investor, but with a limited scope. Thus, in the absence of a prior commitment by the State, the investor cannot hold a legitimate expectation that the State will not exercise its power to modify the legal framework applicable to the investment and no violation of the standard arises. The absence of such commitment is evident in the instant case. In order to find a breach of the fair and equitable treatment standard under the Treaties and international law, the Claimants must show that Bolivia adopted drastic, unreasonable, unjustified or discriminatory measures. Nevertheless, the Claimants mention no such characteristics. The Tribunal may not replace the State in its regulatory task and determine whether or not such measure complied with the Electricity Law and the efficiency principle. Besides, Econ One demonstrated that such measure had promoted efficiency and that such efficiency had not been curtailed. Nor is it true that Operating Rule No. 3/2008 was aimed at reducing EGSA's value; such Rule is still in force and continues to govern EGSA's present operations. If the purpose of such Rule were that stated by the Claimants, it would have already been repealed by Bolivia.</p>
<p><b>Direct Expropriation (Decided in favour of: Investor)</b></p>	
<p>US-Bolivia BIT: Article 5(1): Neither Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II, paragraph 3.</p>	
<p>UK-Bolivia BIT: Article 5(1): Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose and for a social benefit related to the internal needs of that Party and against just and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have the right to establish promptly by due process of law in the territory of the Contracting Party making the expropriation the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph.</p>	
<p><i>Definition of Provision</i></p>	<p>The right to expropriate is a sovereign right recognized by international law, subject to certain conditions. Both Parties agree with that statement, which is uncontroversial. Legality at the international level, and under Article 5(1) of the UK-Bolivia BIT, is dependent upon the existence of a "public purpose" and the payment at the time of the expropriation of "just and effective compensation". If the expropriation had not been made "for a public purpose and for a social benefit related to the internal needs of that Party" it would have then been illegal per se.</p>

<p><i>Application of Provision to Facts</i></p>	<p>The precise contours of public purpose and social benefit lie with the internal constitutional and legal order of the State in question, and in this case the conditions are evidently met, and are not disputed between the Parties. As for “just and effective compensation”, Bolivia decided that the value of the assets was less than zero and, therefore, no compensation was due. Had this been true, the expropriation would have been legal. EGSA had a positive value. However, irrespective of Bolivia’s failure to properly assess and understand why and how EGSA did not have a negative value, the facts presented by Rurelec were insufficient to convince the Tribunal that Bolivia acted wilfully and intentionally to obtain an expert valuation setting forth such negative value for EGSA. As opposed to the US-Bolivia BIT, which prohibits expropriation “except [...] in accordance with due process of law”, the UK-Bolivia BIT does not explicitly establish due process as a precondition for the expropriation of an investment. The Tribunal considers that Article 5(1) of the UK-Bolivia BIT does not impose upon the expropriating State an obligation to assess the value of compensation through a process in which the expropriated national or company must necessarily participate. The Tribunal also does not consider it possible to derive from the cases cited by Rurelec (which concern radically different facts than the present case) the existence of a rule of customary international law obliging expropriating States to grant to the expropriated national or company a right to participate in such valuation process. The Respondent has expropriated Rurelec’s investment without providing just and effective compensation, and has therefore breached Article 5 of the UK-Bolivia BIT.</p>
<p><b>Full Protection and Security (Decided in favour of: State)</b></p>	
<p>Article 2(2): Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall, in any way, impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.</p>	
<p><i>Methods for Testing Provision</i></p>	<p>The “full protection and security” standard applies essentially when the foreign investment has been affected by civil strife and physical violence. In the AMT arbitration, it was held that the host State “must show that it has taken all measures of precaution to protect the investments of [the investor] in its territory”. The Tecmed tribunal held that “the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it”. The host State is, however, obliged to exercise due diligence.</p>
<p><i>Application of Provision to Facts</i></p>	<p>The standard obliges the host State to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners. The practice of arbitral tribunals seems to indicate, however, that the “full security and protection” clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force. In light of the following findings, it appears not to be necessary for the Tribunal to precisely define the scope of the “full security and protection” clause in this case.</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health-Medium</b></p>	

<p>Upholds a higher threshold for FET, that in the absence of a prior commitment by the State, the investor cannot hold a legitimate expectation that the State will not exercise its power to modify the legal framework applicable to the investment. A breach of the FET standard requires drastic, unreasonable, unjustified or discriminatory measures, and that the Tribunal may not replace the State in its regulatory task.</p>	
<p><b>Case Title (Full):</b> Gustav F W Hamester GmbH &amp; Co KG v Republic of Ghana</p>	
<p><b>Case Title (Shorthand):</b> Gustav v Ghana</p>	
<p><b>Investor/Claimant:</b> Gustav F W Hamester GmbH &amp; Co KG</p>	<p><b>State/Respondent:</b> Republic of Ghana (LMIC)</p>
<p><b>Treaty:</b> Treaty between the Federal Republic of Germany and the Republic of Ghana for the encouragement and reciprocal protection of investments of February 24, 1995</p>	
<p><b>Court/Rules:</b> ICSID Convention - Arbitration Rules</p>	<p><b>Duration:</b> 2 years 9 months</p>
<p><b>Number of Elite 15:</b> 1</p>	<p><b>Party Awarded:</b> State</p>
<p><b>Damages Requested:</b> USD 166,925,714.12 or 199,469,297</p>	<p><b>Damages Awarded:</b> Each bears own legal fees + 50% of arbitration costs</p>
<p><b>Issue</b></p>	<p>In 1992, the Claimant, a German company involved in the international cocoa trade, concluded a joint venture agreement with the Ghana Cocoa Board (Cocobod). Under the joint-venture, the partners created a company (West African Mills Company (Wamco) to which Cocobod contributed an old factory, and its modernization was financed by the claimant. The company was set up for the processing of cocoa beans, sheanuts, and other related products. Cocobod supplied Wamco with cocoa beans and all of the factory's output was sold to the Claimant. The case arose out of constant payment disputes and issues between the Claimant, Cocobod, and Wamco for breaches of the joint-venture agreement as well as the BIT. The Claimant alleges that the 2001 Price Agreement was invalid because it was concluded under duress, namely the threat of cessation of supply to Wamco. Ghana claims that the Claimant's complaints are contractual in nature and cannot be "elevated" to treaty breaches through the umbrella clause contained in the BIT. None of the actions (arbitrary or discriminatory treatment; unfair and inequitable treatment; or expropriation) complained about by the Claimant concern the conduct of Cocobod, or amount to a breach of the BIT.</p>
<p><b>Fair and Equitable Treatment (State)</b></p>	
<p>Article 2(1): Each Contracting Party shall in its territory promote as far as possible investments by nationals or companies of the other Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord such investments fair and equitable treatment.</p>	
<p><i>Methods for Testing Provision</i></p>	<p>Contractual rights are not to be equated with legitimate expectations: "Taken to its logical conclusion this argument would put all agreements between the investor and the host State under the protection of the FET standard. If this position were to be accepted, the FET standard would be nothing less than a broadly interpreted umbrella clause." The Tribunal fully endorses this comment, and concludes that it is not sufficient for a claimant to invoke contractual rights that have allegedly been infringed to sustain a claim for a violation of the FET standard.</p>

<i>Application of Provision to Facts</i>	The Tribunal wishes to make clear that it considers this analysis as no more than one of several attempts to present what are in truth “contract claims” as “treaty claims.” It agrees with the Respondent that: “Hamester’s approach to an FET clause is striking, for it appears to equate every FET clause into an umbrella clause interpreted in the most extreme “transformative” manner.” It is important to emphasise that the existence of legitimate expectations and the existence of contractual rights are two separate issues.
<b>Indirect Expropriation (State)</b>	
Article 4(2): Investments of nationals or companies of either Contracting Party shall not be expropriated, nationalized or subjected to measures having effect equivalent to expropriation or nationalization (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except where expropriation is made for the public interest related to the Contracting Party's internal needs and against compensation.	
<i>Method for Testing Provision</i>	In order to answer the question whether the export ban has resulted in an expropriation of the Claimant, the Tribunal will look more closely at the scope and extent of such measure.
<i>Application of Provision to Facts</i>	The letters written by representatives of Cocobod, a public entity as described in Article 5 of the ILC Articles, constitute purely commercial acts, which cannot therefore be attributed to the ROG. Not one of these letters contains an act of <i>puissance publique</i> which could be attributed to the State. The only acts that the Tribunal has found to be attributable to the Republic of Ghana are first, the police investigation and the alleged harassment of Mr. Holzäpfel; second, the alleged acts of a Ghanaian Minister during an April 14, 2003 meeting; and third, the export ban imposed by the Government. May it be added that this measure intervened at a time when the Claimant had already clearly manifested its intention to abandon the joint-venture, and had already taken steps to implement this intention. It was precisely in order to avoid negative effects on Wamco that the ban was introduced. Although the decision to impose a temporary and partial ban on the exports of Wamco is attributable to the Government, in the circumstances of this case, it cannot be characterised as an act of expropriation in violation of Article 4(2) of the BIT, which prohibits expropriation or measures equivalent to expropriation.
<b>Umbrella Clause (State)</b>	
Article 9(2): Each Contracting Party shall observe any other obligation it has assumed with regard to its investments in its territory by nationals or companies of the other Contracting Party.	
<i>Definition of Provision</i>	The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the <i>parties</i> to the obligation ( <i>i.e.</i> the persons bound by it and entitled to rely on it) are likewise not changed because of the umbrella clause.” (ad hoc Committee in <i>CMS v Argentina</i> case)
<i>Methods for Testing Provision</i>	Contracts concluded between an investor and a legal entity separate from the Islamic Republic of Pakistan did not fall within the scope of an umbrella clause ( <i>Impregilo v Pakistan</i> )

<p><i>Application of Provision to Facts</i></p>	<p>The contractual commitments of Cocobod, being a separate entity from the State, cannot be considered as elevated – and transformed in nature – by Article 9(2) of the BIT, into treaty commitments of the State itself. It follows that a violation by Cocobod – if such a violation had been found – could not have constituted a violation of the BIT. The consequence of an automatic and wholesale elevation of any and all contract claims into treaty claims risks undermining the distinction between national legal orders and international law. This is not a result that is in line with the general purpose of the ICSID/BIT mechanism for the international protection of foreign investments.</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health-Low</b></p>	
<p>This case is an example of a failed effort to “repackage” contractual and commercial claims into investment treaty claims through a creative interpretation of the umbrella clause.</p>	

<b>Case Title (Full):</b> Impregilo S.p.A. (Italian) v Argentine Republic	
<b>Case Title (Shorthand):</b> Impregilo v Argentina	
<b>Investor/Claimant:</b> Impregilo S.p.A. (Italian)	<b>State/Respondent:</b> Argentine Republic (HIC)
<b>Treaty:</b> BIT Argentina - Italy 1990	<b>Initiator of Annulment:</b> Argentina
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 6 years 5 months
<b>Number of Elite 15:</b> Award: 2; Annulment: 0	<b>Party Awarded:</b> Award: Investor; Annulment: Investor
<b>Damages Requested:</b> Not specified	<b>Damages Awarded:</b> Award: USD 21,294,000 + compound interest; Annulment: Each bears own legal costs, State to pay arbitration costs
<b>Issue</b>	Impregilo, an indirect minority shareholder in AGBA, a company that obtained a concession in 1999 to operate the water and sewerage services in Buenos Aires. AGBA faced difficulty in raising funds, collecting fees from clients, and fulfilling its responsibilities or investing in, expanding, and improving water and sanitation services in the area. The province terminated the contract in 2006 and transferred the concession to a state-owned entity on grounds that AGBA violated a number of contractual provisions. Impregilo claimed that by frustrating and terminating AGBA's concession, the province breached provisions of the Argentina-Italy BIT, such as FET and expropriation.
<b>AWARD</b>	
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
Article 2(2): Investments made by investors of each Contracting Party shall at all times be accorded fair and equitable treatment. Neither Party shall impair by arbitrary or discriminatory measures the management, maintenance, enjoyment, transformation, cessation or disposal of investments made in its territory by the other Contracting Party's investors.	
<i>Definition of Provision</i>	If FET is linked to the legitimate expectations of the investors, these have to be evaluated considering all circumstances. FET cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilization clauses specifically granted to foreign investors with whom the State has signed investment agreements. The legitimate expectations of foreign investors cannot be that the State will never modify the legal framework, especially in times of crisis, but certainly investors must be protected from unreasonable modifications of that legal framework.
<i>Methods for Testing Provision</i>	The term FET is intended to give adequate protection to the investor's legitimate expectations.
<i>Application of Provision to Facts</i>	The existence of legitimate expectations and the existence of contractual rights are two separate issues. Many of the acts complained of concern the contractual relationship between AGBA and the Province. Argentina, by failing to restore a reasonable equilibrium in the concession, aggravated its situation to such extent as to constitute a breach of its duty under the BIT to afford FET to Impregilo's investment. The Arbitral Tribunal has been persuaded by substantial evidence proffered by Impregilo that Argentina's own economic policies over several years prior to the crisis rendered the

	<p>economy of the country vulnerable to exogenous shocks and pressures, and impacted adversely the sustainability of its economic model on the national and local levels. The majority of the Arbitral Tribunal therefore concludes that Argentina has not satisfied all of the conditions under Article 25 and, accordingly, may not invoke the necessity plea as a ground for precluding the wrongfulness of the acts already identified as violations of its obligations under the BIT. <i>Dissent</i> – Arbitrator Stern agreed that this defense did not apply, but on the grounds that the wrongful conduct continued after the crisis.</p>
<p><b>Indirect Expropriation (Decided in favour of: State)</b></p>	
<p>Article 5(1)(a): Neither Contracting Party may adopt any measure that restricts, whether for a definite or indefinite period of time, the right to property, possession, control or enjoyment in relation to the investments made by investors of the other Contracting Party, except upon specific provisions laid down by law, judgments, or decisions rendered by a competent court and other general non-discriminatory provisions intended to regulate economic activities. Article 5(1)(b): Investments by investors of one of the Contracting Parties shall not be nationalized, expropriated, seized or otherwise appropriated, either directly or indirectly, through measures having an equivalent effect in the territory of the other Party, unless the following conditions are complied with: - the measures are for a public purpose, of national interest or security; - they are taken in accordance with due process of law; - they are non-discriminatory or contrary to the commitments undertaken; - they are accompanied by provisions for the payment of prompt, adequate and effective compensation.</p>	
<p><i>Definition of Provision</i></p>	<p>Expropriation is not defined, but is mentioned at the same level as nationalization, seizure and other appropriation. As in most other BITs, expropriation in the Argentina-Italy BIT may be considered to be an act taken by a State in the exercise of its sovereignty by which an investor is involuntarily deprived of property. Moreover, property should in this connection be given a broad meaning and cover any material and immaterial assets having an economic value, including concessions and contractual rights belonging to the investor. Expropriation is to be distinguished from less far-reaching measures which regulate or restrict the right to use property. Such measures may also have serious economic effects for the investor but do not constitute expropriation.</p>
<p><i>Application of Provision to Facts</i></p>	<p>During the concession period, a number of measures were taken which affected AGBA's rights. However, none of these measures amounted to a loss of the concession. Nor could the joint effect of these measures be considered to be a loss of property rights. A loss only occurred when the Province terminated the concession. However, the termination of the concession is not necessarily equal to expropriation. In fact, the Concession Contract provided for termination in various defined circumstances, and if the Contract is terminated in conformity with these provisions, this is not an act of expropriation by the State but an act performed by the public authorities in their capacity as a party to the Contract. The Arbitral Tribunal accepts that the Argentine administration may have set up as a political goal to transfer water and sewerage services to public entities. However, this does not necessarily lead to the conclusion that the termination of the Concession Contract with AGBA was an act of expropriation. It has also in no way been proven that the termination of the Concession Contract was the last step in a successive series of measures taken by the Province with a view to depriving AGBA of the concession, or, in other words, that AGBA was exposed to "creeping expropriation".</p>

<b>Full Protection and Security (Decided in favour of: Dismissed)</b>	
The requirement of “full protection and security” in the Argentina-US BIT, is claimed to be applicable in this case through the MFN clause in the Argentina-Italy BIT	
<i>Application of Provision to Facts</i>	The Arbitral Tribunal considers that where, as in the present case, there has been a failure to give an investment fair and equitable treatment, it is not necessary to examine whether there has also been a failure to ensure full protection and security.
<b>Most-Favoured Nation (Decided in favour of: State)</b>	
Article 3(1): Each Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments and to all other matters regulated by this Agreement, a treatment that is no less favorable than that accorded to its own investors or investors from third-party countries.	
Article (4): Investors of one Contracting Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, a state of national emergency, or other similar political economic events shall be accorded, by such other Party in whose territory the investment was made, treatment no less favorable than that accorded to its own nationals or legal entities or to investors of any third country as regards damages.	
<i>Definition of Provision</i>	The plain meaning of the provision is that the standards of treatment of the BIT – national and most-favored-nation treatment – have to be applied when a State tries to mitigate the consequences of a situation of war or other emergency.
<i>Application of Provision to Facts</i>	The Tribunal does not accept the Respondent’s interpretation, which goes against the plain meaning of the text, and agrees with Impregilo that Article 4 applies to measures adopted in response to a loss, not to measures that cause a loss. Dissent: Arbitrator Stern disagreed and stated that tribunals should not use MFN provisions to expand their jurisdiction as Impregilo has allowed.
<b>ANNULMENT</b>	
<b>Tribunal Manifestly Exceeded its Power</b>	
<i>Definition of Provision</i>	The word “manifest” has to be given its plain meaning, in the context of the purpose of Article 52, bearing in mind the features of finality and binding effect of awards set out in Article 53. This means that the excess of power has to be obvious, self-evident, clear, flagrant and substantially serious, as found by other Committees.
<i>Application of Provision to Facts</i>	The Committee considers that none of the five “grounds” for requesting annulment submitted by Argentina in relation to the Tribunal’s alleged manifest excess of powers constitutes grounds for annulment. For that reason, Argentina’s application for annulment of the Award, based on Article 52(1) (b) of the ICSID Convention will be rejected.
<b>Serious Departure from Fundamental Rule of Procedure</b>	
<i>Definition of Provision</i>	The departure has to have a material impact on the outcome of the award for the annulment to succeed. In the opinion of the Committee, the word “serious” expresses that impact.

<i>Application of Provision to Facts</i>	With respect to this issue, Argentina expressed a purely theoretical opinion, making no reference to the specific case. For the reasons outlined in the previous paragraphs, the Committee rejects Argentina’s arguments for annulment, which were based on the alleged serious departure from fundamental rules of procedure (Article 52(1)(d) of the ICSID Convention).
<b>Award Failed to State Reasons</b>	
<i>Definition of Provision</i>	As indicated by the Committee in MINE “The requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that” “the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B, and eventually to its conclusion, even if it made an error of fact or of law”.
<i>Application of Provision to Facts</i>	<p>The Committee concludes that the Tribunal provided detailed information and analysis on the evidence that it considered and clearly outlined how it arrived at its ruling against Argentina. Evidently, this</p> <p>Committee does not have authority nor is it empowered (among other reasons, because it did not have direct access to the evidence submitted by the parties) to ascertain whether or not the Tribunal’s conclusions were correct. Based on the reasons set forth in the foregoing paragraphs, the Committee will reject the arguments for annulment put forward by Argentina which are based on the alleged failure to state the reasons for the Award.</p>
<b>Importance/Relevance to Analysis/Lessons for Health-Medium</b>	
Suggests that the ‘necessity’ defence for a policy may not hold if the state contributed to the conditions behind the crisis. Case highlights considerable dissent within the system, dissenting documents presented by Brigitte Stern and Charles Bower in this case, both Elite 15 arbitrators, demonstrate a pro-state sovereignty view, in the case of the former, and a pro-expansive investor rights stance in the case of the latter.	

<b>Case Title (Full):</b> LG&E Energy Corp. (U.S.), LG&E Capital Corp. (U.S.), LG&E International Inc. (U.S.) v Argentine Republic	
<b>Case Title (Shorthand):</b> LG&E v Argentina	
<b>Investor/Claimant:</b> LG&E Energy Corp. (U.S.), LG&E Capital Corp. (U.S.), LG&E International Inc. (U.S.)	<b>State/Respondent:</b> Argentine Republic (HIC)
<b>Treaty:</b> BIT United States of America - Argentina 1991	
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 13 years 1 month
<b>Number of Elite 15:</b> Award: 1	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 248 million or, if Tribunal finds expropriation, USD 268 million + compound pre-/post-award interest and costs	<b>Damages Awarded:</b> USD 57.4 million + compound interest
<b>Issue</b>	The claimants are 3 U.S. investors, LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc., that held shareholding interest in three domestic gas distribution companies in Argentina, which were created during the privatization campaign in the early 1990s. In an attempt to attract U.S. investors, Argentina adopted legislation which guaranteed the calculation of tariffs for gas distribution in U.S. dollars and automatic semi-annual adjustments of tariffs based on the U.S. Producer Price Index (PPI). Several other guarantees relating to the tariff regime were provided. However, during the economic crisis that developed in Argentina in the late 1990s to early 2000s, the Government abrogated the guarantees it provided during the privatization, which resulted in a significant reduction in the profitability of the gas distribution business and LG&E's investment.
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
Article II2(a): Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law.	
<i>Definition of Provision</i>	The stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment. Violations of the fair and equitable treatment standard may arise from a State's failure to act with transparency.
<i>Methods for Testing Provision</i>	The Tribunal is not convinced that bad faith or something comparable would ever be necessary to find a violation of fair and equitable treatment. The sources of international law, understands that the fair and equitable standard consists of the host State's consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.
<i>Application of Provision to Facts</i>	Argentina acted unfairly and inequitably when it prematurely abandoned the PPI tariff adjustments; acted unfairly and inequitably in forcing the licensees to renegotiate public service contracts, and waive the right to pursue claims against the Government, or risk rescission of the contracts. Even though the Gas Law provided for the renegotiation of public service contracts, in practice there was no real renegotiation, but rather the imposition of a process. Argentina had breached the FET obligation by failing to uphold the guarantees it provided to investors, thus, in breach of the "stability and predictability" requirement. While the tribunal acknowledged the economic hardships

	in Argentina at the time, it held that Argentina “went too far by completely dismantling the very legal framework constructed to attract investors.”
<b>Indirect Expropriation (Decided in favour of: State)</b>	
Article IV(1): Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (‘expropriation-’) except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.	
<i>Methods for Testing Provision</i>	In order to establish whether State measures constitute expropriation under Article IV(1) of the BIT, the Tribunal must balance two competing interests: the degree of the measure’s interference with the right of ownership and the power of the State to adopt its policies. The impact must be substantial in order that compensation may be claimed for the expropriation. One must consider the duration of the measure as it relates to the degree of interference with the investor’s ownership rights. Generally, the expropriation must be permanent, that is to say, it cannot have a temporary nature, unless the investment’s successful development depends on the realization of certain activities at specific moments that may not endure variations. Proportionality Test: The proportionality to be used when making use of this right is “whether such actions or measures are proportional to the public interest presumably protected thereby and the protection legally granted to investments, taking into account that the significance of such impact, has a key role upon deciding the proportionality.”
<i>Application of Provision to Facts</i>	It is important not to confound the State’s right to adopt policies with its power to take an expropriatory measure. While the tribunal acknowledged that Argentina’s actions had a negative impact on the investment of the claimants, it found that its measures did not deprive them of the “right to enjoy their investment”. “Without a permanent, severe deprivation of LG&E’s rights with regard to its investment, or almost complete deprivation of the value of LG&E’s investment, the Tribunal concludes that these circumstances do not constitute expropriation.”
<b>Umbrella Clause (Decided in favour of: Investor)</b>	
Article II(2)(c): Each party shall observe any obligation it may have entered into with regard to investments.	
<i>Methods for Testing Provision</i>	The issue for the Tribunal’s consideration is whether the provisions of the Gas Law and its implementing regulations constitute (i) “obligations” (ii) “with regard to” LG&E’s capacity as a foreign investor (iii) with respect to its “investment,” such that abrogation of the guarantees set forth in the Gas Law and its implementing regulations give rise to a violation of the Treaty. In order to determine the applicability of the umbrella clause, the Tribunal should establish if by virtue of the provisions of the Gas Law and its regulations, the Argentine State has assumed international obligations with respect to LG&E and its investment.
<i>Application of Provision to Facts</i>	These laws and regulations became obligations within the meaning of Article II(2)(c), by virtue of targeting foreign investors and applying specifically to their investments, that gave rise to liability under the umbrella clause. Argentina’s statutory framework

	was not of a general nature; rather it was specific in relation to LG&E’s investment in Argentina. Thus, its abrogation constituted a violation of the umbrella clause. As such, Argentina’s abrogation of the guarantees under the statutory framework—calculation of the tariffs in dollars before conversion to pesos, semi-annual tariff adjustments by the PPI and no price controls without indemnification—violated its obligations to Claimants’ investments.
<b>Unreasonable Measures (Decided in favour of: State)</b>	
Article II(2)(b): Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.	
<i>Definition of Provision</i>	A measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect. According to international law, arbitrariness has been described as “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”
<i>Methods for Testing Provision</i>	In order to establish when a measure is discriminatory, there must be (i) an intentional treatment (ii) in favor of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national.
<i>Application of Provision to Facts</i>	Even though it was not proved that these measures had been adopted with the purpose of causing Claimants’ foreign investments damage, discrimination against gas distribution companies vis-à-vis other companies, such as water supply and electricity companies, is evident. The Tribunal concludes that the acts of Argentina were not arbitrary, and therefore did not violate Article II(2)(b) for the following reasons. Even though the measures adopted by Argentina may not have been the best, they were not taken lightly, without due consideration. This is particularly reflected in the PPI adjustments which, before deciding on their postponement, Argentina negotiated with the investors. The Tribunal concludes that the charges imposed by Argentina to Claimants’ investment, though unfair and inequitable, were the result of reasoned judgment rather than simple disregard of the rule of law (distinguishes between arbitrary and unfair measures)
<b>Importance/Relevance to Analysis/Lessons for Health-Medium</b>	
The Tribunal implemented the proportionality test for indirect expropriation, a procedure that is favourable for health policy space as it examines the measure against the public interest of a policy.	

<b>Case Title (Full):</b> Metalclad Corporation v The United Mexican States	
<b>Case Title (Shorthand):</b> Metalclad v Mexico	
<b>Investor/Claimant:</b> Metalclad Corporation	<b>State/Respondent:</b> Mexico (UMIC)
<b>Treaty:</b> North American Free Trade Agreement	<b>Initiator of Review:</b> State
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 4 years 3 months
<b>Number of Elite 15:</b> Award: 0	<b>Party Awarded:</b> Award: Investor; Annulment: Investor
<b>Damages Requested:</b> (1) discounted cash flow analysis of future profits to establish the fair market value of the investment (approximately USD 90 million); (2) Metalclad's actual investment in the landfill (approximately USD 20–25 million) + USD 20–25 million for the negative impact on its other business operations + legal fees	<b>Damages Awarded:</b> Award: USD 16.7 million + compound interest of 6%; Annulment: recalculated interest from later date
<b>Issue</b>	Metalclad, the Claimant is a U.S. corporation operating through its Mexican subsidiary (investment) that received the permit to construct a hazardous waste landfill in Guadalucazar, Mexico from the Mexican government. Five months into construction, the Municipality of Guadalucazar notified Metalclad that it was operating unlawfully without a municipal construction permit. The Claimant applied for a permit and completed the landfill construction. Metalclad's application was denied, which effectively barred operation of the completed facility. The Governor also issued an Ecological Decree, which protected natural area, including the landfill site, thereby permanently closing it. Metalclad claims that Mexico, through its local governments of San Luis Potosi and Guadalucazar, interfered with its development and operation of a hazardous waste landfill, which violated NAFTA.
<b>AWARD</b>	
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
Article 1105(1): Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.	
NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001): Clause 2 of the Commission's Notes of Interpretation provides as follows: (1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. (2) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).	
<i>Definition of Provision</i>	Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so

	that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.
<i>Application of Provision to Facts</i>	The denial of the permit for any reason other than those related to the physical construction or defects in the site, was improper. Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill. Metalclad was denied fair and equitable treatment by Mexico because the municipal government did not have the authority to deny the construction permit on environmental grounds, as well the lack of clear rules and procedures governing the municipal construction permit, which was a failure of Mexico to ensure transparency required by NAFTA.
<b>Indirect Expropriation (Decided in favour of: Investor)</b>	
Article 1110(1): No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.	
<i>Definition of Provision</i>	Expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.
<i>Application of Provision to Facts</i>	By permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation. The Ecological Decree also constituted an act of expropriation. Metalclad's investment was completely lost due to Mexico's actions.
<b>JUDICIAL REVIEW – SUPREME COURT OF BRITISH COLUMBIA, CANADA</b>	
<b>Appeal – Incorrect Reading of NAFTA Chapter 11</b>	
<i>Application of Provision to Facts</i>	The Court agreed with Mexico that Chapter 11 did not contain any transparency requirements. Applying transparency obligations to Chapter 11 disputes would be equivalent to creating new obligations, which would fall outside the Tribunal's jurisdiction. Therefore, the Tribunal's findings on this matter were beyond the scope of the submission to arbitration. The first part of the Tribunal's finding on the allegations of expropriation were also set aside, as it was also on transparency grounds. The second part of the findings on expropriation as a result of the Ecological Decree was upheld.

	<p><b>Revision:</b> The British Columbia Supreme Court reviewed the Tribunal’s award, and set aside its findings on Article 1105.</p> <p><b>Revision:</b> The BC Supreme Court reviewed the Tribunal’s award, and set aside part of its findings on Article 1110. However, it was upheld on the basis of expropriation resulting from the Ecological Decree.</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health-High</b></p>	
<p>Case shows how tribunals may create expansive interpretations of provisions, including equating the MST in NAFTA with the broader FET provision and adding in obligations on transparency found in another section of the agreement. This concern of other treaty elements being read into FET provisions led NAFTA Parties to adopt an interpretative statement that MST refers only to customary international law and does not include international treaties as a basis for a claim. Also created a legal obligation from statements made by government officials to jurisdictions over which they have no legal influence (i.e. statements of federal government officials creating legal obligations on municipalities). Finally, the economic impact test created in the interpretation of indirect expropriation is very expansive and liable to capture all government measures.</p>	

<b>Case Title (Full):</b> Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L., and S.C. Multipack S.R.L. v. Romania	
<b>Case Title (Shorthand):</b> Micula v. Romania	
<b>Investor/Claimant:</b> Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L., and S.C. Multipack S.R.L.	<b>State/Respondent:</b> Romania (UMIC)
<b>Treaty:</b> Agreement Between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments	
<b>Court:</b> ICSID (the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings)	<b>Duration:</b> 8 years and 2 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 540 million + costs + future losses + interest	<b>Damages Awarded:</b> USD 116,694,301 + interest
<b>Issue</b>	The present dispute arises from Romania’s introduction of certain economic incentives for the development of disfavored regions of Romania, and their subsequent revocation in the context of Romania’s accession to the European Union (“EU”).
<b>Fair and Equitable Treatment (Decided in favour of: Investor )</b>	
Article 2(3): Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof, as well as the acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measures.	
Definition of Provision	FET’s plain meaning is vague and must be applied on a case by case basis, but that does not mean that it is entirely subjective. The state’s conduct does not need to be egregious to violate the standard. It should be interpreted in the light of the object and purpose of the BIT as reflected in its Preamble (i.e. intensifying economic cooperation). Agreeing with Saluka the fair and equitable treatment standard prescribed in the Treaty should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors. In the Tribunal’s view, the correct position is that the state may always change its legislation, being aware (that it must) tak(e) into consideration that: (i) an investor’s legitimate expectations must be protected; (ii) the state’s conduct must be substantively proper (e.g., not arbitrary or discriminatory); and (iii) the state’s conduct must be procedurally proper (e.g., in compliance with due process and fair administration).
Methods for Testing Provision	Did Romania fail to provide a predictable and stable legal framework for the Claimants’ investments? In particular, did it violate the Claimants’ legitimate expectations of regulatory stability? Did Romania act unreasonably? Did Romania fail to act transparently or consistently?
Application of Provision to Facts	The Tribunal concludes that, by repealing the EGO 24 incentives prior to 1 April 2009, Romania did not act unreasonably or in bad faith (except that the Respondent acted unreasonably by maintaining investors’ obligations after terminating the

	incentives). The Tribunal, however, concludes by majority that Romania violated the Claimants’ legitimate expectations that those incentives would be available, in substantially the same form, until 1 April 2009. The Tribunal finds that the manner in which Romania carried out that termination was not sufficiently transparent to meet the fair and equitable treatment standard. Once it became clear to Romania that the incentives would have to be abolished (sometime in 2003, according to Mr. Orban), Romania should have made Permanent Investor Certificate (PIC) holders aware of this fact.
<b>Indirect Expropriation (Decided in favour of: Not Decided )</b>	
Provision text unavailable	
Application of Provision to Facts	In light of the Tribunal’s conclusion regarding FET, the Tribunal does not need to address the Claimant’s remaining claims.
<b>Unreasonable Measures (Decided in favour of: Not Decided)</b>	
Provision text unavailable	
Application of Provision to Facts	In light of the Tribunal’s conclusion regarding FET, the Tribunal does not need to address the Claimant’s remaining claims.
<b>Umbrella Clause (Decided in favour of: State )</b>	
Article 2(4): Each Contracting Party shall observe any obligation it has entered into with an investor of the other Contracting Party with regard to his or her investment.	
Definition of Provision	The Parties agree that, for the umbrella clause to apply, Romania must have entered into an obligation with the Claimants with regard to their investment. The Parties further agree that this obligation must be specific. The purpose of the umbrella clause is to cover or “elevate” to the protection of the BIT an obligation of the state that is separate from, and additional to, the treaty obligations that it has assumed under the BIT.
Methods for Testing Provision	The first step in the Tribunal’s analysis is thus to determine whether the EGO 24 framework gave rise to an “obligation”. This Tribunal concurs with this view. Thus, whether an obligation has arisen depends on the law governing that obligation, and so the interpretation of the term “obligation” for purposes of the umbrella clause would rely primarily on that law rather than on international law. To determine whether this obligation has been violated, the Tribunal considers two alternative approaches potentially relevant to that analysis. Under the first approach, the answer to the questions above depends on whether the EGO 24 framework provided the Claimants with a vested right to the incentives listed in Annex 2 of GD 194/1999 until 1 April 2009. Under the second approach, it is not necessary that the obligation be “vested” or “actionable” in order to be considered an obligation covered by the umbrella clause.
Application of Provision to Facts	Because investors had to apply and be accepted by the government to qualify for the legislated benefits, a sufficiently specific obligation was created. The majority follows the first approach and concludes that the burden of proof lies with the Claimants and that the Claimants have not met that burden. The majority does not find that the Claimants have provided sufficient evidence and legal arguments on

	the content of Romanian law for the Tribunal to find the existence of an obligation protected by the umbrella clause.
<b>Importance/Relevance to Analysis/Lessons for Health-Medium</b>	
Tribunal supports the state's right to change its legislation, being aware that it must take into consideration that: (i) an investor's legitimate expectations must be protected; (ii) the state's conduct must be substantively proper (e.g., not arbitrary or discriminatory); and (iii) the state's conduct must be procedurally proper (e.g., in compliance with due process and fair administration).	

<b>Case Title (Full):</b> Occidental Petroleum Corporation; Occidental Exploration and Production Company v The Republic of Ecuador	
<b>Case Title (Shorthand):</b> Occidental v Ecuador	
<b>Investor/Claimant:</b> Occidental Petroleum Corporation Occidental Exploration and Production Company	<b>State/Respondent:</b> Ecuador (UMIC)
<b>Treaty:</b> Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment	
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 6 years 2 months
<b>Number of Elite 15:</b> 2	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> Over USD 1 billion	<b>Damages Awarded:</b> USD 1,769,625,000 + 4.188% pre-award interest + post-award interest. Each bears own legal costs and half of ICSID's and the Tribunal's costs of the proceedings.
<b>Issue</b>	This dispute concerns the termination of the Participation Contract between OEPC and PetroEcuador for the exploration and exploitation of hydrocarbons in Block 15 of the Ecuadorian Amazon region.
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
Article II(3)(a): Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.	
<i>Methods for Testing Provision</i>	<p>The argument is not that the State must prove harm, but that any penalty the State chooses to impose must bear a proportionate relationship to the violation which is being addressed and its consequences.</p> <p>The obligation for fair and equitable treatment has on several occasions been interpreted to import an obligation of proportionality. In cases where the administration wishes to impose a severe penalty, then it appears to the Tribunal that the State must be able to demonstrate (i) that sufficiently serious harm was caused by the offender; and/or (ii) that there had been a flagrant or persistent breach of the relevant contract/law, sufficient to warrant the sanction imposed; and/or (iii) that for reasons of deterrence and good governance it is appropriate that a significant penalty be imposed, even though the harm suffered in the particular instance may not have been serious. The test is still one of overall judgment, balancing the interests of the State against those of the individual, to assess whether the particular sanction is a proportionate response in the particular circumstances.</p>
<i>Application of Provision to Facts</i>	Whatever OEPC agreed in the Participation Contract is only relevant to actions taken under or pursuant to the contract – it cannot be relevant to action which is taken independently of the contract and which does not proceed in reliance upon it. It is a matter of central importance in this case that the Caducidad Decree (expiration of contract) was issued pursuant to the provisions of the Hydrocarbons Law. In those circumstances, there cannot be any doubt that OEPC remained entitled to the full

	<p>protection of Ecuadorian law, both procedural and substantive, which would ordinarily apply to such actions regardless of what may or may not have been agreed in the underlying contract. Even if OEPC, as the Tribunal found earlier, breached Clause 16.1 of the Participation Contract and was guilty of an actionable violation of Article 74.11 (or Articles 74.12 or 74.13), the Caducidad Decree was not a proportionate response in the particular circumstances, and the Tribunal so finds. The Caducidad Decree was accordingly issued in breach of Ecuadorian law, in breach of customary international law, and in violation of the Treaty. As to the latter, the Tribunal expressly finds that the Caducidad Decree constituted a failure by the Respondent to honour its Article II(3)(a) obligation to accord fair and equitable treatment to the Claimants’ investment, and to accord them treatment no less than that required by international law.</p>
<p><b>Indirect Expropriation (Decided in favour of: Investor)</b></p>	
<p>Article III: Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (“expropriation”) except: for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(3). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable.</p>	
<p><i>Definition of Provision</i></p>	<p>tantamount to expropriation – This phrase is found in NAFTA Article 1110 which provides that no party shall directly or indirectly expropriate an investment or take a measure tantamount to expropriation</p>
<p><i>Application of Provision to Facts</i></p>	<p>Having found in the previous Section of the present Award that the Caducidad Decree was issued in breach of Ecuadorian law, in breach of customary international law and in violation of the Respondent’s Article II.3(a) obligation to accord fair and equitable treatment to the Claimants’ investment, the Tribunal now has no hesitation in finding that, in the particular circumstances of this case which it has traversed earlier, the taking by the Respondent of the Claimants’ investment by means of this administrative sanction was a measure “tantamount to expropriation”</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health-High</b></p>	
<p>Incorporates tests of proportionality into the FET standard; State must be able to demonstrate (i) that sufficiently serious harm was caused by the offender; and/or (ii) that there had been a flagrant or persistent breach of the relevant contract/law, sufficient to warrant the sanction imposed; and/or (iii) that for reasons of deterrence and good governance it is appropriate that a significant penalty be imposed, even though the harm suffered in the particular instance may not have been serious. May be a helpful test to incorporate for public health when contemplating breaches of FET due to policy changes.</p>	

<b>Case Title (Full):</b> Pope & Talbot Incorporated v Canada	
<b>Case Title (Shorthand):</b> Pope v. Canada	
<b>Investor/Claimant:</b> Pope & Talbot Incorporated	<b>State/Respondent:</b> Canada (HIC)
<b>Treaty:</b> North American Free Trade Agreement	
<b>Court:</b> Ad Hoc Tribunal (UNCITRAL Rules)	<b>Duration:</b> 3 years and 11 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 500 million	<b>Damages Awarded:</b> USD 462,556 + 5% interest + USD 120,200 in costs
<b>Issue</b>	On May 29, 1996, the United States and Canada entered in the Softwood Lumber Agreement (the “SLA”). To give effect to the SLA, Canada created an Export Control Regime (the “Regime”) under which softwood lumber producers from Quebec, Ontario, Alberta and British-Colombia (the “Covered provinces”) were required to obtain export permits and pay fees before exporting their softwood lumber products to the United States. This arbitration arises from the Investor’s contention that the manner in which Canada has chosen to implement the SLA constitutes a breach of its commitments in NAFTA.
<b>Minimum Standard of Treatment (Decided in favour of:</b> Investor)	
Article 1105(1): Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.	
NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001): Clause 2 of the Commission’s Notes of Interpretation provides as follows: (1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. (2) The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).	
Definition of Provision	The Tribunal was in favour of a more expansive interpretation of the fairness elements, over and above just MST, arguing that “First, there is the basic unlikelihood that the Parties to NAFTA would have intended to curb the scope of Article 1105 <i>vis a vis</i> one another when they (at least Canada and the United States) had granted broader rights to other countries that cannot be considered to share the close relationships with the NAFTA parties that those Parties share with one another. NAFTA begins by stressing ‘the special bonds of friendship and cooperation among their nations.’”
Methods for Testing Provision	“Accordingly, the Tribunal interprets Article 1005 to require that covered investors and investments receive the benefits of the fairness elements under the ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be ‘egregious,’ ‘outrageous’ or ‘shocking,’ or otherwise extraordinary.

Application of Provision to Facts	A verification review by Canada’s Softwood Lumber Division upon the Investor serving a Notice of Intent to submit a claim under NAFTA, although the issue about a discrepancy had been raised prior through a letter, constituted a denial of fair and equitable treatment. The review was conducted in an unacceptable way. Canada did not breach fair and equitable treatment in regards to all other claims under Article 1105.
<b>Expropriation (Decided in favour of: State)</b>	
Article 1110(1): No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.	
Definition of Provision	Tribunal concludes that the scope of Article 1110 “does cover non-discriminatory regulation that might be said to fall within an exercise of a state’s so-called police powers.” And that “a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation.” “The Tribunal does not believe that the phrase ‘measure tantamount to nationalization or expropriation’ in Article 1110 broadens the ordinary concept of expropriation under international law to require compensation for measures affecting property interests without regard to the magnitude or severity of that effect.” They noted that “‘Tantamount’ means nothing more than equivalent. Something that is equivalent to something else cannot logically encompass more.”
Methods for Testing Provision	According to the Tribunal, “While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner.” Counsel for the Investor conceded that “under international law, expropriation requires a ‘substantial deprivation.’”
Application of Provision to Facts	The Tribunal does not believe that the regulatory measures taken by Canada “constitute an interference with the investment’s business activities substantial enough to be characterized as an expropriation under international law.” Tribunal rules that there has been no expropriation of the Investor’s investment using the ordinary meaning because “the Investor remains in control of the Investment, it directs the day-to-day operations of the Investment, and no officers or employees of the Investment have been detained by virtue of the Regime. Canada does not supervise the work of the officers or employees of the Investment, does not take any of the proceeds of company sales (apart from taxation), does not interfere with management or shareholders’ activities, does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions ousting the Investor from full ownership and control of the Investment.” While the Investor claims that Canada had interfered with its ability to carry on its business which has resulted in lost profits, according to the Tribunal “it continues to export substantial quantities of softwood lumber to the U.S. and to earn substantial profits on those sales.”
<b>National Treatment (Decided in favour of: State)</b>	

<p>Article 1102(1): Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. Article 1102(2): Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.</p>	
<p>Definition of Provision</p>	<p>“The Tribunal must resolve this dispute by defining the meaning of ‘like circumstances.’ It goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, ‘circumstances’ are context dependent and have to unalterable meaning across the spectrum of fact situations. And the concept of ‘like’ can have a range of meanings, from ‘similar’ all the way to ‘identical.’</p>
<p>Methods for Testing Provision</p>	<p>The Tribunal asserts that “First, how should the terms ‘investments of investors’ and ‘treatment no less favourable’ in Article 1102(2) be interpreted? Secondly, what standards should be employed in determining whether the Investment has been denied ‘treatment no less favourable’ than that received by investment of Canadian investors? Finally, in applying Article 1102(2), to which Canadian-owned investment should the Investment be compared, i.e., which of those Canadian-owned investments are ‘in like circumstances’ to the Investment?”</p>
<p>Application of Provision to Facts</p>	<p>The Tribunal ruled that producers in non-covered provinces were not in like circumstances with those in the covered provinces; the Investment was not in like circumstances to the new entrants; and while there were greater adverse effects on some B.C. producers than others, but this was not convincingly based on a foreign-domestic distinction. Consequently there was no breach of Article 1102.</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health-High</b></p>	
<p>This case made important contributions to the interpretation of both FET and expropriation. In the case of FET it chose to broaden the scope and lower the bar for a breach, citing the evolution of customary international law and BITs and that NAFTA parties would not have wanted to provide better protection for third party investors relative to NAFTA investors given their close relationship. Additionally, in regards to expropriation, while the Tribunal did not believe that there should be a blanket exception for regulatory measures, they provided a means for deciding whether bona fide regulations required compensation based on the level of interference. The criteria from this case is widely referenced by Tribunals.</p>	

<b>Case Title (Full):</b> Railroad Development Corporation v Republic of Guatemala	
<b>Case Title (Shorthand):</b> Railroad v Guatemala	
<b>Investor/Claimant:</b> Railroad Development Corporation	<b>State/Respondent:</b> Guatemala (LMIC)
<b>Treaty:</b> CAFTA	
<b>Court:</b> ICSID (ICSID-Arbitration Rules)	<b>Duration:</b> 5 years and 2 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> fair market value	<b>Damages Awarded:</b> USD 64,035,859 + interest
<b>Issue</b>	The Claimant alleged that Guatemala through FEGUA (Ferrocarriles de Guatemala, a state-owned company) failed to remove squatters from the rail right of way and to make agreed payments to the Trust Fund. The government declared, on the recommendation of the Attorney General, the contract with investor as void and not in the interest of the country.
<b>Indirect Expropriation (Decided in favour of: State )</b>	
Article 10(7)(1): No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except: (a) for a public purpose; (b) in a non-discriminatory manner;  (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and (d) in accordance with due process of law and Article 10.5.	
Definition of Provision	A common theme is that an effect of the measures is that the claimant is deprived substantially of the use and benefits of the investment.
Methods for Testing Provision	Analyze (1) the nature of the Lesivo Declaration, (2) its public purpose, (3) whether the Government interfered with reasonable investment backed expectations and (4) their economic impact on Claimant’s investment.
Application of Provision to Facts	(1) The Tribunal concludes that FVG’s rights under Contract 143/158 are in effect and could be expropriated by Respondent, as well as a number of other things regarding the legal effect, process, and assumptions built into the Lesivo. (2) The Lesivo was not instituted to transfer the railroad to shady businessmen in the sugar industry, but rather as a tactic to get the claimants to invest more in the railway. (3) It was legitimate for the investor to expect that the contract declared Lesivo was in fact legal, since all the conduct of the state, from accepting payment without protest to allowing work on the railway to be done, would suggest that both parties were acting as if the contract was valid. (4) The Lesivo is a powerful tool for negatively affecting perception of the business by customers and potential investors. After the Lesivo there was a drop in customers, as well as an increase in squatters and thefts. But, the Tribunal would note: (a) that more than five years after the publication of the Lesivo Declaration, Contract 143/158 and Contract 402 remain in effect; (b) Claimant continues to be in possession of the railway equipment; (c) Claimant continues to receive rents associated with its real estate rights under Contract 402; and (d) such rents amount to 92% of revenues of FVG. For these reasons, the Tribunal concludes that the effect on Claimants’ investment does not rise to the level of an indirect expropriation

<b>National Treatment (Decided in favour of: State )</b>	
<p>Article 10(3)(1): Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, 10-2 acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.</p> <p>Article 10(3)(2): Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.</p>	
Application of Provision to Facts	<p>More than five years after the Lesivo Resolution, Claimant continues to have its contractual rights to the right-of-way and to remain in possession of the railway equipment. This by itself is sufficient basis for rejecting Claimants' allegation that Respondent treated Claimant differently from Mr. Campollo. Furthermore, the Tribunal considers that Respondent has failed to show that Claimant and Mr. Campollo are foreign and domestic investors in "like circumstances." Mr. Compollo is also not an investor in like circumstances. The scale of the trains he operates for his sugar plantation do not make him a competitor with RDC. Although Claimants also compare themselves to "other investors" this is too vague and it's not the Tribunal's job to figure out who these other investors would be.</p>
<b>Minimum Standard of Treatment (Decided in favour of: Investor )</b>	
<p>Article (10)(5)(1): 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. Article (10)(5)(2): For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.</p>	
Definition of Provision	<p>The Tribunal adopts this reasoning in ADF and shares the conclusion that the minimum standard of treatment is "constantly in a process of development," including since Neer's formulation. The Tribunal refers to and adopts the conclusion reached by the tribunal in Waste Management II in considering NAFTA Article 1105 standard of review and after surveying NAFTA arbitral awards: "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest justice in judicial proceedings or a complete lack of transparency and candor in an administrative process.</p>
Application of Provision to Facts	<p>In the circumstances of this case, Claimant has fully participated in proceedings before the Administrative Tribunal and, given the fact that the Tribunal has found a breach of the minimum standard on other grounds, the Tribunal finds it unnecessary to determine whether a breach of due process has occurred on this</p>

	<p>ground. The manner in which and the grounds on which Respondent applied the lesivo remedy in the circumstances of this case constituted a breach of the minimum standard of treatment in Article 10.5 of CAFTA by being, in the words of Waste Management II, “arbitrary, grossly unfair, [and] unjust.” This is so because of numerous facts that point to the government having been either responsible or able to rectify the so-called problems in the Lesivo prior to the Lesivo and having connected the Lesivo to more investment.</p>
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**Importance/Relevance to Analysis/Lessons for Health-Medium**

This case reflects the evolution of the MST standard. The Tribunal introduces criteria outside of the treaty text in deciding on the violation, stating that developments in international law needed to be considered, including developments after the Neer standard. The Neer standard was that a State was held to fall below the minimum international threshold if its treatment to foreigners amounted to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. This standard was modified by the *Mondev* case, where the Tribunal reasoned that "what is unfair or inequitable need not equate with the outrageous or egregious", and in particular that, "a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith". It has been suggested that, "The interpretation on MST offered in *Mondev*, *ADF*, and *Loewen* that disassociates MST from bad faith is problematic because it invites after-the-fact second-guessing and exposes States to liability on subjective considerations that vary by tribunal. By departing from the need to find bad faith, or something equally egregious, this standard would raise the minimum threshold to a degree where any governmental act could be found to breach MST if an ad hoc tribunal can imagine a more adequate way to treat the investor under the circumstances (CIEL, 2003)."

<b>Case Title (Full):</b> The Rompetrol Group N.V. v Romania	
<b>Case Title (Shorthand):</b> Rompetrol v Romania	
<b>Investor/Claimant:</b> The Rompetrol Group N.V.	<b>State/Respondent:</b> Romania (UMIC)
<b>Treaty:</b> Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and Romania which came into force on 1 February 1995; Energy Charter Treaty	
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 7 years 3 months
<b>Number of Elite 15:</b> 1	<b>Party Awarded:</b> Decided in favour of neither party (liability found but no damages awarded)
<b>Damages Requested:</b> USD 139,385,084 + interest and costs	<b>Damages Awarded:</b> None, each bears 50% of Arbitration costs
<b>Counter Damages:</b> Costs – USD 10.75 million	
<b>Issue</b>	The dispute arose from measures taken by Romania’s anti-corruption and criminal prosecution authorities against two individuals, Mr. Patriciu and Mr. Stephenson, directors of RRC affairs, a company established through the privatization of the State oil-refining industry after the fall of Ceausescu in 1989. The Claimant alleges that the arrest, detention, criminal investigations, travel-ban, and wire-tapping of its directors, were motivated by political and commercial interests and breached the guarantees provided under the BIT. In response, Romania argued that the investigations were a legitimate part of its National Anti-Corruption Strategy implementation, which it pursued in order to gain entry to the European Union.
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
Article 3(1): Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full physical security and protection.	
<i>Definition of Provision</i>	This standard is said to contain the following sub-elements from arbitral case law: (1) Transparency and the protection of the investor’s basic expectations; (2) Freedom from harassment; (3) Procedural propriety and due process; and (4) Good faith.
<i>Methods for Testing Provision</i>	The tribunal (in keeping with the approach adopted by other arbitral tribunals) prefers to follow the ordinary meaning of the words used, in their context, and in the light of the object and purpose of the BIT. In doing so, it will take into particular account the two general elements that other tribunals have found come into play in connection with claims to ‘fair and equitable treatment,’ namely the way in which the foreign investor or the foreign investment have been treated by the organs of the host State (whether in a regulatory context or otherwise), measured against the expectations legitimately entertained by the foreign investor in making its investment. To qualify as a violation of the guarantees laid down in the BIT, actions or omissions by the Respondent must consist of conduct toward TRG itself, the protected entity, or towards its investments in Romania. Such conduct can however be direct, or it can be indirect. This Tribunal can join other recent tribunals in accepting that the cumulative effect of a succession of impugned actions by the State of the investment can together amount to a failure to accord fair and equitable treatment even where the individual actions, taken on their own, would not surmount the threshold for a Treaty breach.

	But this would only be so where the actions in question disclosed some link of underlying pattern or purpose between them; a mere scattered collection of disjointed harms would not be enough.
<i>Application of Provision to Facts</i>	The following (and only the following) would fall within the area of protection under the BIT: (a) actions against the investor itself (or its investment); (b) action against the investor’s executives for their activity on behalf of the investor; and (c) action against the executives personally but with the intent to harm the investor. In each case, much would turn on the facts of the particular complaint, and in particular the crucial question whether, even if the situation fell within the zone of protection, the conduct in question did in fact constitute a failure to respect the treaty protection at issue. There is however no evidence that steps were taken either to assess or to avoid, minimise, or mitigate that possibility of harm. On the basis of the procedural irregularities during the criminal investigation of Mr. Patriciu and others, including the conduct of the prosecutors, the attachment of RRC’s shares, and the arrest and attempted imprisonment of Messrs. Patriciu and Stephenson, the Tribunal accordingly holds that to that limited extent the Respondent is in breach of the guarantees accorded to the Claimant by Article 3(1) of the BIT, notably the guarantee of ‘fair and equitable treatment’. In so finding, the Tribunal wishes to make it plain that it would not regard any breach, or indeed any series of breaches, of procedural safeguards provided by national or international law in the context of a criminal investigation or prosecution as giving rise to the breach of an obligation of fair and equitable treatment. All will depend on the nature and strength of the evidence in the particular case, on the impact of the events complained about on the protected investor or investment, and on the severity and persistence of any breaches that can be duly proved, as well as on whatever justification the respondent State may offer for the course of events. The Tribunal’s finding is based entirely on the facts of the present case.
<b>Full Protection and Security (Decided with FET)</b>	
Article 3(1): Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full physical security and protection.	
<i>Definition of Provision</i>	Just as with the FET standard, the FPS standard relates specifically to the treatment of the foreign investment as such by the host State, and notes further that, on the terms of Article 3(1), the protection and security required is expressly qualified as ‘physical’.
<i>Application of Provision to Facts</i>	When a treaty provision establishes a requirement to secure FET for the investments of foreign investors, that requirement refers in the first instance to the host State’s treatment of the investment, taken as a whole; the Claimant has said something similar when it framed its complaints in terms of a ‘campaign of harassment’. The requirement may however also apply to specific individual.
<b>Unreasonable Measures (Decided with FET)</b>	
Article 3(1): Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the	

operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full physical security and protection.	
<i>Definition of Provision</i>	Protection against Unreasonable or Discriminatory Measures was said to be related to the Fair and Equitable Treatment standard. So far as the 'non-impairment' standard is concerned, what the treaty language has in view is the possibility of harmful effects on the operation, management etc. of the foreign investment itself, by the foreign investor (and then only by measures that are 'unreasonable or discriminatory').
<i>Methods for Testing Provision</i>	Examination of state actions taken against the investor, investment, or an employee or manager of the investment in connection with that investment. Such actions will be viewed against the background of TRG's legitimate expectations in respect of those investments, and notably whether the evidence shows that the actions by Romania in question were tainted by unfairness or unreasonableness, or were discriminatory.
<i>Application of Provision to Facts</i>	An important element, in the particular context of unreasonableness or discrimination, will be to keep in mind the qualitative distinction between the proposition that an investigation by the State into potential wrongdoing was illegitimate in itself, and the proposition at a different level that things done in the course of a legitimate investigation were wrongful, unreasonable, or discriminatory. The Tribunal accordingly finds that the evidence mustered by the Claimant falls well short of what would be required to establish its claim that the woes that befell Mr. Patriciu and RRC must be linked together and seen as part of a co-ordinated campaign of harassment by the Romanian State.
<b>Importance/Relevance to Analysis/Lessons for Health-Medium</b>	
Tribunal adds to the development of 'creeping FET' that this would only occur where the actions in question disclosed some link of underlying pattern or purpose between them; a mere scattered collection of disjointed harms would not be enough. Would need to assess whether public health actions would be considered linked or scattered. Also, a lesson from treaty text that the full protection and security provision is expressly qualified as 'physical'.	

<b>Case Title (Full):</b> S.D. Myers Inc. and Government of Canada	
<b>Case Title (Shorthand):</b> S.D. Myers v. Canada	
<b>Investor/Claimant:</b> S.D. Myers Inc.	<b>State/Respondent:</b> Government of Canada (HIC)
<b>Treaty:</b> NAFTA	
<b>Court:</b> UNCITRAL	<b>Duration:</b> 4 years and 2 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> Compensation for losses + interest + costs	<b>Damages Awarded:</b> USD 3,872,000
<b>Issue</b>	Canada issued an interim order banning the export of PCB for disposal.
<b>Minimum Standard of Treatment (Decided in favour of: State )</b>	
<p>Article 1105(1): Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.</p> <p>NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001): Clause 2 of the Commission’s Notes of Interpretation provides as follows: (1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. (2) The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).</p>	
Definition of Provision	MST sets a floor for prohibiting treatment by the state that falls under expectations of customary international law, but is not discriminatory and so doesn’t violate MST or MFN.
Methods for Testing Provision	The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case (however a breach of an international rule is not sufficient to breach this standard). When interpreting and applying the “minimum standard”, a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.
Application of Provision to Facts	The Tribunal determined that on the facts of this particular case the breach of Article 1102 essentially established a breach of Article 1105 as well. One of the members of the S.D. Myers Tribunal dissented

	from this view, noting that breach of another provision of the NAFTA is not a foundation for a finding of a violation of the MST.
<b>Indirect Expropriation (Decided in favour of: State )</b>	
Article 1110(1): No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.	
Definition of Provision	<p>The term "expropriation" in Article 1110 must be interpreted in light of the whole body of state practice, treaties and judicial interpretations of that term in international law cases. In general, the term "expropriation" carries with it the connotation of a "taking" by a governmental-type authority of a person's "property" with a view to transferring ownership of that property to another person, usually the authority that exercised its de jure or de facto power to do the "taking". The Tribunal accepts that, in legal theory, rights other than property rights may be "expropriated" and that international law makes it appropriate for tribunals to examine the purpose and effect of governmental measures. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out that possibility.</p> <p>An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary.</p>
Methods for Testing Provision	Was there a lasting taking?
Application of Provision to Facts	The fact that the closure eliminated the investor's competitive advantage may affect quantum, but has no bearing on determining a violation. The Interim Order and the Final Order were designed to, and did, curb SDMI's initiative, but only for a time. Canada realized no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others. An opportunity was delayed.
<b>National Treatment (Decided in favour of: Investor )</b>	
Article 1102(1): Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. Article 1102(2): Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.	
Methods for Testing Provision	<ol style="list-style-type: none"> <li>1. Are the investors in like circumstances (i.e. are they in the same "sector", meaning economic or business sector)?</li> <li>2. If so, were they "treated" differently in a manner unjustified by public interest or policy goals allowable under the principle of national treatment (e.g. environment)? The Tribunal takes the view that, in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account: whether the practical effect of the measure is to create a</li> </ol>

	<p>disproportionate benefit for nationals over non-nationals; whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.</p> <p>Intent is important, but protectionist intent is not necessarily decisive on its own. The word “treatment” suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.</p>
<p>Application of Provision to Facts</p>	<p>From the business perspective, it is clear that SDMI and Myers Canada were in “like circumstances” with Canadian operators such as Chem-Security and Cintec. They all were engaged in providing PCB waste remediation services. While Canada’s policy goal, to maintain domestic capacity to dispose of PCB, was legitimate, however, Canada had alternatives and preventing the investor exporting was not a legitimate way to pursue that goal.</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health-High</b></p>	
<p>Case has highlights for public health, the Tribunal suggested that regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under indirect expropriation, and that tribunals do not have an open-ended mandate to second-guess government decision-making when determining a breach of the minimum standard of treatment. Case also deals with a set of international health regulations. PCB wastes are covered by the Basel Convention on the Transboundary Movement of Hazardous Wastes and subject to that agreement's preference for domestic treatment. Debate exists over the Tribunal’s examination and dismissal of the Basel Convention. While it promotes domestic treatment Article 11 of the Basel Convention allows regional agreements for cross-border movement, and NAFTA while stating that the Basel Convention would have priority if ratified by NAFTA countries, the US never ratified. Also, the NAFTA contained language that <i>where a party has a choice among equally effective and reasonably available alternatives for complying....with a Basel Convention obligation, it is obliged to choose the alternative that is ...least inconsistent... with the NAFTA</i>. May contain lessons for new agreements to list international health regulations that will have priority over the agreement in the case of a incongruity, also may need to restrict to if majority of members ratify, e.g. the US has also not ratified the FCTC.</p>	

<b>Case Title (Full):</b> Saluka Investments BV (The Netherlands) v. The Czech Republic	
<b>Case Title (Shorthand):</b> Saluka v. Czech Republic	
<b>Investor/Claimant:</b> Saluka Investments BV	<b>State/Respondent:</b> The Czech Republic (HIC)
<b>Treaty:</b> The Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic	
<b>Court:</b> PCA (UNCITRAL Arbitration Rules 1976)	<b>Duration:</b> 4 years and 8 months
<b>Number of Elite 15:</b> 1	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 1.9 billion	<b>Damages Awarded:</b> (Partial Award – settled out of court for ~ USD 300 million)
<b>Issue</b>	The Government decided not to adopt the IPB (IP Banka) proposal but instead to impose forced administration coupled with a quick sale to a strategic investor, with CSOB as the only bank which could quickly take over IPB.
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
Article 3(1): Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.	
Definition of Provision	<p>Even though Article 3 obviously leaves room for judgment as the tribunal in S.D. Myers has said, the “fair and equitable treatment” standard does not create an “open-ended mandate to second-guess government decision-making”. The standards formulated in Article 3 of the Treaty, vague as they may be, are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow the case to be decided on the basis of law. The difference between the Treaty standard laid down in Article 3(1) and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. If FET coincides with the minimum standard, then, since it only establishes a minimum, it will require a relatively higher degree of inappropriateness (besides which MST applies to everyone regardless of contract). But if FET is meant to be a guarantee providing an additional incentive for investors, then a relatively lower degree of inappropriateness is required for violation. However, in both cases, FET should be read in the context of overall agreement’s purpose, which is not only to protect investments, but to encourage economic activity. If protection of investment is exaggerated, then it may discourage economic activity. FET, in this case, is an autonomous standard.</p> <p>The ordinary meaning of FET can only be defined with reference to terms of equal vagueness.</p> <p>“Legitimate expectations” forms the dominant element of FET. Legitimate expectations include the generic expectations of: good faith, due process, and non-discrimination. Some tribunals go as far as to say that the legal and business framework is an essential part of FET. However, no investor may reasonably expect that circumstances prevailing at the time of investment would not change. In order to determine violations of FET, the state’s right to regulate must be considered. Non-discriminatory: any differential treatment of a foreign investor must not be based on</p>

	<p>unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment. A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances. A host State's government is not under an obligation to accept whatever proposal an investor makes in order to overcome a critical financial situation like that faced by IPB. Neither is a host State under an obligation to give preference to an investor's proposal over similar proposals from other parties. An investor is, however, entitled to expect that the host State takes seriously a proposal that has sufficient potential to solve the problem and deal with it in an objective, transparent, unbiased and even-handed way.</p>
<p>Methods for Testing Provision</p>	<p>State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification. Legitimate Expectations: 1) were there legitimate expectations? 2) were these expectations violated? (Good Faith) The Tribunal's assessment starts from the proposition that the Czech Republic's conduct was unfair and inequitable if it unreasonably frustrated IPB's and its shareholders' good faith efforts to resolve the bank's crisis.</p>
<p>Application of Provision to Facts</p>	<p>(i) Evidence does not demonstrate sufficient difference in risky debt policies to distinguish claimant from other major Czech banks. The Tribunal is not convinced that the increasing financial difficulties with which IPB was faced and that finally resulted in its forced administration were predominantly due to bad banking management and organisational deficiencies. The big four banks were therefore sufficiently comparable.</p> <p>(ii) IPB was excluded from the post-privatisation revitalization program to which the other big four banks were parties.</p> <p>(iii) The Tribunal finds that the Claimant's reasonable expectations to be entitled to protection under the Treaty need not be based on an explicit assurance from the Czech Government. It is sufficient that Nomura (and subsequently Saluka), when making its investment, could reasonably expect that, should serious financial problems arise in the future for all of the Big Four banks equally and in case the Czech Government should consider and provide financial support to overcome these problems, it would do so in a consistent and even-handed way. Claimant cannot be said to have assumed a risk of being treated differently from the other comparable banks as no level of due diligence could have allowed them to anticipate such treatment. The state's defence that it was just acting as a shareholder towards the other three banks does not hold water, because such behavior does not entitle the bank to forego its role as a regulator as well. The rationality of its policy does not excuse it from non-discriminatory treatment. The Tribunal therefore finds that the Respondent has not offered a reasonable justification for IPB's differential treatment.</p> <p>1) Many of the legitimate expectations of the investor amount to the issues that have already been dealt with above (i.e. discriminatory measures). Although the state's law on creditor protection was not updated fast enough to help the investor, this does not constitute a violation of a legitimate expectation. There was however a legitimate expectation for the State to negotiate a solution to the</p>

	<p>financial woes in good faith. There might also be an expectation of not unjust enrichment.</p> <p>2) The Czech government violated the good faith expectation by: being biased towards CSOB investors' proposals, not stating their expectations of a proposal from claimant transparently and consistently, so that the claimant could craft a desirable solution for both parties, they refused adequate communication. If there were an expectation of unjust enrichment it would not have been violated because the state was not enriched.</p>
<b>Direct Expropriation (Decided in favour of: State )</b>	
<p>Article 5: Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with: a. the measures are taken in the public interest and under due process of law; b. the measures are not discriminatory; c. the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in any freely convertible currency accepted by the claimants.</p>	
Definition of Provision	<p>It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare. An uncompensated taking of the sort referred to shall not be considered unlawful provided that: (a) it is not a clear and discriminatory violation of the law of the State concerned; (b) it is not the result of a violation of any provision of Articles 6 to 8 [of the draft Convention]; (c) it is not an unreasonable departure from the principles of justice recognised by the principal legal systems of the world; (d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property. International law has yet to identify a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law. The notion of deprivation is to be understood in terms of the meaning it has taken on in customary international law.</p>
Methods for Testing Provision	<p>The context within which an impugned measure is adopted and applied is critical to the determination of its validity. If the Tribunal finds that the Czech Republic has adopted such measures without having complied with one or more of the conditions set out in the treaty text, the conclusion will inevitably follow that the Respondent has breached Article 5 of the Treaty.</p>
Application of Provision to Facts	<p>In the absence of clear and compelling evidence that the CNB (Czech National Bank) erred or acted otherwise improperly in reaching its decision, which evidence has not been presented to the Tribunal, the Tribunal must in the circumstances accept the justification given by the Czech banking regulator for its decision.</p>
<b>Full Protection and Security (Decided in favour of: State)</b>	
<p>Article 3(2): More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third States, whichever is more favourable to the investor concerned.</p>	

Definition of Provision	The “full protection and security” standard applies essentially when the foreign investment has been affected by civil strife and physical violence. The standard does not imply strict liability however the state is obligated to act with due diligence (i.e. to take reasonable actions to protect the physical integrity of the investor’s assets. It is not necessary in the current case to be any more specific.
Application of Provision to Facts	Neither the suspension of trading of IPB shares, which was justifiable by legitimate concerns relating to the securities market, nor the prohibition of transfers of Saluka’s IPB shares or the police searches of Nomura’s Prague Representative Office and the seizure of Nomura’s documents, against which Saluka has lodged appeals or petitions to the competent authorities or courts, amount to a breach of that obligation.
<b>Unreasonable Measures (Decided in favour of: State )</b>	
Article 3(1): Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.	
Definition of Provision	A deprivation is most certainly also an impairment. In other words: to the extent that the concepts of “deprivation” and “impairment” overlap, because a “deprivation” is just one variety of possible “impairments”, the regulatory power exception (or “police power exception”) explained in the previous Chapter of this Award applies to both. The term “measures” covers any action or omission of the Czech Republic. As the ICJ has stated in the Fisheries Jurisdiction Case (Spain v. Canada) [I]n its ordinary sense the word is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby. The standard of “reasonableness” has no different meaning in this context than in the context of the “fair and equitable treatment” standard with which it is associated; and the same is true with regard to the standard of “non-discrimination.
Methods for Testing Provision	To find a violation of this standard a measure must be found that is unreasonable or discriminatory.  The standard of “reasonableness” therefore requires, in this context as well, a showing that the State’s conduct bears a reasonable relationship to some rational policy, whereas the standard of “non-discrimination” requires a rational justification of any differential treatment of a foreign investor.
Application of Provision to Facts	Czech Republic did not violate Article 3(1) of the Treaty in this respect either. Since in the context of Article 5, the “deprivation” of Saluka’s investment by the imposition of forced administration upon IPB was justified on reasonable regulatory grounds, the same applies <i>a majore ad minus</i> to the impairment of Saluka’s investment in the context of Article 3(1).
<b>Importance/Relevance to Analysis/Lessons for Health-High</b>	
Tribunal developed a very clear, step-by-step procedure for addressing FET that takes significant account of a state’s police powers. Added that if protection of investment is exaggerated, then it may discourage economic activity, which would be counter to the purpose of the agreement. Also concluded that it is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide	

regulations that are aimed at the general welfare. Also clarified that the “full protection and security” standard applies essentially when the foreign investment has been affected by civil strife and physical violence. The standard does not imply strict liability however the state is obligated to act with due diligence (i.e. to take reasonable actions to protect the physical integrity of the investor’s assets). While the Tribunal ultimately found in favour of the investor for a breach of the FET provision by the Czech Republic, the Tribunal carved out considerable space for public health policy and the execution of state police power throughout the award.

<b>Case Title (Full):</b> Sempra Energy International (U.S.) v Argentine Republic	
<b>Case Title (Shorthand):</b> Sempra v Argentina	
<b>Investor/Claimant:</b> Sempra Energy International (U.S.)	<b>State/Respondent:</b> Argentina (HIC)
<b>Treaty:</b> BIT United States of America - Argentina 1991	
<b>Initiator of Annulment:</b> Argentine Republic	<b>Initiator of Resubmission:</b> Investor - Discontinued
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 11 years 4 months
<b>Number of Elite 15:</b> 2	<b>Party Awarded:</b> Investor <b>Annulment:</b> State
<b>Damages Requested:</b> USD 209.3 million	<b>Damages Awarded:</b> Award: USD 128,250,462 + compound interest; Annulment: Investor to reimburse State arbitration costs. Each bears own legal fees.
<b>Issue</b>	The Claimant, Sempra, an indirect US investor in CGS and CGP, two Argentinean gas distribution companies created in the early 1990s during the time of the privatization campaign, during which Argentina enacted legislation that would attract foreign investors through its guarantee that tariffs for gas distribution would be calculated in US currency at an exchange rate of one to one. The Government also began reimbursing CGS and CGP the subsidies allocated for Patagonia’s residential customers. Due to the economic crisis that developed in the early 2000s, the government undertook measures, which, according to Sempra, were a wholesale repudiation and abrogation of most of the rights it had under the Licences and regulatory framework. The government’s actions were a repudiation of the guarantees, including the reimbursement of subsidies, which significantly reduced the gas distribution business, and thus, Sempra’s investment profits. In 2001, Sempra lent CGS and CGP USD 56 million to prevent them from going into default. These rights involved the guarantee that the licensed companies would receive automatic semi-annual adjustments of tariffs based on the US Producer Price Index (US PPI), in breach of the BIT.
<b>AWARD</b>	
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
Article II(2)(a): Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law.	
<i>Definition of Provision</i>	FET standard may be more specific, but it might develop into a broader one.
<i>Methods for Testing Provision</i>	The principle of good faith is thus relied on as the common guiding beacon that will orient the understanding and interpretation of obligations, just as happens under civil codes. On occasion the line separating the breach of the fair and equitable treatment standard from an indirect expropriation can be very thin, particularly if the breach of the former standard is massive and long-lasting. In case of doubt, however, judicial prudence and deference to State functions are better served by opting for a determination in the light of the fair and equitable treatment standard.

<i>Application of Provision to Facts</i>	The Tribunal agrees with the Respondent that FET is a standard that is none too clear and precise. This is because international law is itself not too clear or precise as concerns the treatment due to foreign citizens, traders and investors. This is the case because the pertinent standards have gradually evolved over the centuries. Customary international law, treaties of friendship, commerce and navigation, and more recently bilateral investment treaties, have all contributed to this development. Not even in the case of rules which appear to have coalesced, such as denial of justice, is there today much certainty. The measures have substantially changed the legal/business framework under which the investment was decided and implemented. Where there was business certainty and stability, there is now the opposite. Assuming that the Respondent was guided by the best of intentions, what the Tribunal has no reason to doubt, there has here been an objective breach of the fair and equitable treatment due under the Treaty.
<b>Umbrella Clause (Decided in favour of: Investor)</b>	
Article II(2)(c): Each party shall observe any obligation it may have entered into with regard to investments.	
<i>Definition of Provision</i>	Ordinary commercial breaches of a contract are not the same as Treaty breaches
<i>Method for Testing Provision</i>	The decisions dealing with the issue of the umbrella clause and the role of contracts in a Treaty context have all distinguished breaches of contract from Treaty breaches on the basis of whether the breach has arisen from the conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect.
<i>Application of Provision to Facts</i>	The measures discussed before this Tribunal are not, however, mere ordinary contractual breaches of a commercial nature. They are instead the outcome of major legal and regulatory changes introduced by the State, and give expression to a change of policy that is evidently not what was envisaged in the License and legal framework governing the privatization and the investments made in its context. Only the State, and not an ordinary contract party, can decide that such sweeping changes will operate as part of the public function. Contractual breaches made in this context are far from ordinary, and may in themselves be a source of Treaty violations if they affect a right protected under the Treaty. Specific obligations undertaken not to freeze the tariffs or subject them to price controls, to compensate for any resulting differences if such actions were in fact taken, and not to amend the License without the licensee's consent are among the obligations that typically come under the protection of the umbrella clause. The breach of the aforementioned obligations undertaken in respect of the investment have resulted in a breach of the protection provided by the umbrella clause of Article II(2)(c).
<b>Expropriation (Decided in favour of: State)</b>	
Article IV(1): Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation-') except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.	

<i>Definition of Provision</i>	The expropriation claim can therefore refer to those elements of the investment that are inextricably linked to the legal and contractual framework that governs the operation of the business, such as profitability.
<i>Method for Testing Provision</i>	A transfer of property and ownership requires positive intent. This is not a question of formality, but rather one of establishing a causal link between the measure in question and the title to property.
<i>Application of Provision to Facts</i>	There cannot be a direct form of expropriation if at least some essential component of the property right has not been transferred to a different beneficiary, in particular the State. As argued by the Claimant, interference with contractual rights can in certain circumstances amount to an expropriation. Yet, here the Tribunal is not persuaded that such has been the result of the measures taken. In spite of all the difficulties which the Licensees and the investors have experienced, and which have doubtlessly affected rational management, they are still the rightful owners of the companies and their business. No one else has or could lawfully claim any such right. While the noted adverse effects can give rise to compensation, they cannot do so in connection with direct expropriation.
<b>Indirect Expropriation (Decided in favour of: State)</b>	
Article IV(1): Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation-') except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.	
<i>Method for Testing Provision</i>	Indirect or creeping expropriation can arise from many kinds of measures; these have to be assessed by their cumulative effects. Yet, in this case, the Tribunal is not convinced that such has happened either. A finding of indirect expropriation would require more than adverse effects. It would require that the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated. This is not the case in the present dispute. Substantial deprivation results from depriving the investor of control over the investment, managing the day-to-day operations of the company, arresting and detaining company officials or employees, supervising the work of officials, interfering in administration, impeding the distribution of dividends, interfering in the appointment of officials or managers, or depriving the company of its property or control in whole or in part (from Pope & Talbot).
<i>Application of Provision to Facts</i>	Even though the parties discuss legitimate expectations, which are subject to protection under broadly conceived treaty standards and international law, it does not mean that this right will operate to make the test for indirect expropriation less stringent. The Tribunal must accordingly conclude that the Government did not breach the standard of protection established in Article IV(1) of the Treaty by adopting the measures complained of.
<b>Full Protection and Security (Decided in favour of: State)</b>	

<p>Article II (2)(a): Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.</p>	
<p><i>Application of Provision to Facts</i></p>	<p>The Claimant relies on the broader interpretation of this requirement in CME, in which the standard was deemed applicable not just to physical security but also to the legal protection of the investment. The Respondent argues (1) that the standard relates only to physical protection and security (AAPL and AMT), and (2) the support of CME does not mean that the Claimant’s interpretation of the standard is the one accepted under international law, particularly as it was contemporaneously contradicted by the opposite conclusion in <i>Lauder</i>. Based on principle, the Tribunal does not exclude the possibility that there might be cases in which a broader interpretation could be justified. Such situations would, however, no doubt constitute specific exceptions to the operation of the traditional understanding of the principle. If such an exception were justified, then the situation would become difficult to distinguish from that resulting in a breach of fair and equitable treatment, and even from some form of expropriation. There has been no allegation of a failure to give full protection and security to officials, employees or installations. The general argument made about a possible lack of protection and security in the broader ambit of the legal and political system has in no way been proven or even adequately developed.</p>
<p><b>Unreasonable Measures (Decided in favour of: State)</b></p>	
<p>Article II (2)(b): Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.</p>	
<p><i>Methods for Testing Provision</i></p>	<p>Irrespective of the question of intent, a finding of arbitrariness requires that some important measure of impropriety be manifest. This is not found in a process which, although far from desirable, is nonetheless not entirely surprising in the context in which it took place.</p>
<p><i>Application of Provision to Facts</i></p>	<p>The Tribunal remains unpersuaded by the Claimant’s view that there is here arbitrariness or discrimination. The measures adopted might have been good or bad, but this is not a matter which is for the Tribunal’s to judge. Tribunal has already concluded, they were inconsistent with the domestic and Treaty frameworks. They were not, however, arbitrary in that they responded to what the Government believed and understood to be the best response to the unfolding crisis. The Tribunal reaches a similar conclusion in respect of the alleged discrimination. There are quite naturally important differences between the various affected sectors, so it is not surprising that different solutions might have been or are being sought for each. There has not been any capricious, irrational or absurd differentiation in the treatment accorded to the Claimant as compared to other entities or sectors. Thus, the Respondent has not breached the duty of protection established under Article II(2)(b)</p>
<p><b>ANNULMENT</b></p>	
<p><b>Tribunal Manifestly Exceeded its Power (Decided in favour of: State)</b></p>	
<p><i>Definition of Provision</i></p>	<p>In order for excess of powers to require annulment of an Award, the excess must be “manifest”. In a literal sense “manifest” is something which is “plain”, “clear”, “obvious”, “evident” i.e. easily understood or recognized by the mind. The Committee favours a</p>

	two-step approach: determining (1) whether there is an excess of powers and, if so, (2) whether that excess was manifest.
<i>Application of Provision to Facts</i>	<p>Argentina argues that by failing to appreciate that Article XI is self-judging, the Tribunal disregarded Argentina’s discretion to take measures in order to maintain public order and protect its essential security interests. Therefore, by ignoring the fact that a state invoking Article XI is the sole judge of the appropriateness of the contested measures, the Tribunal manifestly exceeded its powers. In the Committee’s view, it is clear that there was no failure on the part of the Tribunal to consider the matter of whether Article XI is self-judging or not. On the contrary, it applied considerable attention to the subject (as evidently did the Parties), reaching the conclusion that Article XI is not self-judging, a conclusion that the Tribunal was perfectly entitled to reach. It will therefore be necessary to determine whether the error in question amounts (i) to a failure to apply the law, in which event the award of the Tribunal may be annulled, or (ii) to a misapplication of the law, in which event the award, although to that extent defective, will not be annulled. In this case, the Committee finds that the following sentence in paragraph 388 of the Award demonstrates that the Tribunal failed to apply the applicable law: Since the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under Article XI given that this Article does not set out conditions different from customary law in such regard. The Tribunal has held, in effect, that the substantive criteria of Article XI simply cannot find application where rules of customary international law – as enunciated in the ILC Articles - do not lead to exoneration in case of wrongfulness, and that Article 25 “trumps” Article XI in providing the mandatory legal norm to be applied. Thus, the Tribunal adopted Article 25 of the ILC Articles as the primary law to be applied, rather than Article XI of the BIT, and in so doing made a fundamental error in identifying and applying the applicable law. The Committee is therefore driven to the conclusion that the Tribunal has failed to conduct its review on the basis that the applicable legal norm is to be found in Article XI of the BIT, and that this failure constitutes an excess of powers within the meaning of the ICSID Convention. It is obvious from a simple reading of the reasons of the Tribunal that it did not identify or apply Article XI of the BIT as the applicable law, and that it failed to do so on the assumption that the language of this provision was somehow not legitimated by the dictates of customary international law.</p>
<b>Annulment – Award Failed to State Reasons (Decided in favour of: Upheld Tribunal Award)</b>	
<i>Application of Provision to Facts</i>	The Tribunal dedicated considerable attention to the question whether or not Article XI is self-judging (a point also extensively argued by Argentina) and arrived at a reasoned conclusion on that point. Having reasoned so far, the Tribunal held that judicial review of the invocation of Article XI, and the measures adopted, must be a substantive one, and concerned with whether the requirements under customary law or the Treaty were met and could thereby preclude wrongfulness. The Tribunal reasoned that since the BIT itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity, criteria found in customary international law had to be applied. From the above overview it is clear how the Tribunal reasoned in order to reach the conclusion it did. Hence, there is no failure to state reasons.

**Importance/Relevance to Analysis/Lessons for Health-Medium**

Discusses evolution of FET standard and sets high threshold for direct and indirect expropriation. Important for understanding of necessity in international investment law. Case is the only one reviewed that was originally found in favour of the investor, but later annulled because the Tribunal failed to apply the law (not misapplication though, would not have resulted in an annulment). The decision to annul based on the “necessity” clause—a standard provision in bilateral investment treaties that exempts state actions in extraordinary circumstances from the protection of the treaties, lent further support to a state’s defense of necessity in times of economic and political turmoil, and suggests that the scope of annulment committee review may be more expansive than previously thought. Customary international law provides a “far more rigorous standard” than Argentina negotiated for in its BIT. Yet both tribunals reasoned that because the BIT does not define necessity and the conditions for its operation, they must rely on customary international law for the elements of Article XI. Applying these elements, both tribunals held that Argentina could not invoke the necessity defense. According to the tribunals, the crisis did not qualify as one involving an essential state interest, the state’s response was not the only one available, and the state substantially contributed to the situation it faced. According to the annulment committee in *Sempra*, the tribunal’s mistake was equating customary international law with Article XI. The two may share similar language, but the committee found that customary international law is not a guide to Article XI’s interpretation, much less a proxy for its express terms (OMM, 2010).

<b>Case Title (Full):</b> Spyridon Roussalis v. Romania	
<b>Case Title (Shorthand):</b> Spyrindon v. Romania	
<b>Investor/Claimant:</b> Spyridon	<b>State/Respondent:</b> Romania (UMIC)
<b>Treaty:</b> Agreement between the Government of Romania and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments	
<b>Court:</b> ICSID (ICSID Arbitration Rules)	<b>Duration:</b> 5 years and 11 months
<b>Number of Elite 15:</b> 1	<b>Party Awarded:</b> State
<b>Damages Requested:</b> USD 117-142 million	<b>Damages Awarded:</b> Investor to pay 60% of the State's costs and 60% of the State's legal fees
<b>Issue</b>	Claimant asserts that his investments were subject to a series of malicious and unjustifiable acts (e.g. harassment, investigations, etc.) taken by various agencies of the Romanian government.
<b>Fair and Equitable Treatment (Decided in favour of: State )</b>	
Article 2(2): Investments by investors of a Contracting Party shall, at all times, be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.	
Definition of Provision	The Tribunal considers that FET encompasses the following: the State must act in a transparent manner; the State is obliged to act in good faith; the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; the State must respect procedural propriety and due process. Denial of justice - that is, a failure of due process - constitutes a violation of the Fair and Equitable Treatment standard. The case law also confirms that to comply with the FET standard, the State must respect the investor's reasonable and legitimate expectations. Beyond these principles, the scope of the standard is not precisely defined.
Application of Provision to Facts	On the basis of the evidence, the Arbitral Tribunal is of the view that the controls and decisions of the Tax Authorities were consistent with common tax accounting principles, and consequently that none of them was arbitrary. Claimant did not present any convincing evidence that the control actions and the subsequent decisions of the tax authorities were aimed at harassing Claimant. The Tribunal considers that the State authorities acted in transparency and in a manner that cannot be considered arbitrary, unfair, unjust, discriminatory or lacking due process. The tax regulations which led to the incriminated decisions existed and were enforceable by law at the time of the investment. Each of the controls and decisions was based on Romanian legal provisions. Moreover, Claimant could not reasonably have expected that the Romanian authorities would refrain from resolving reasonable concerns they might have concerning Claimant's fulfillment of its tax obligations. The sequestration orders of which the claimant complains were legitimate and not disproportionate. Food and safety policies are commonplace in many countries and promote an important public safety purpose, namely public health. Each of the State authorities' decisions was motivated in regard to these food and safety regulations. Suspending or revoking operating permits may be regarded as a reasonable and appropriate measure to penalize serious irregularities to the

	<p>food and safety regulations. The record shows that the State authorities had legitimate concerns about the fulfillment of Claimant’s obligations in regard to the food and safety regulations. Claimant did not establish any procedural or substantive irregularities in the inspections conducted by the Food Safety department. In the Tribunal’s view, Claimant may not have expected that the State would refrain from adopting regulations in the public interest, nor may Claimant have expected that the Romanian authorities would refrain from implementing those regulations.</p>
<p><b>Indirect Expropriation (Decided in favour of: State )</b></p>	
<p>Article 4(1): Investments by investors of either Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization (hereinafter referred to as “ expropriation”), except under the following conditions: a) the measures are taken in the public interest and under due process of law; b) the measures are clear and on a non-discriminatory basis; c) the measures are taken against payment of prompt, adequate and effective compensation.</p>	
<p>Definition of Provision</p>	<p>Expropriation can be direct, that is, resulting from a deliberate formal act of taking, or indirect. Indirect expropriation may occur when measures “result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor” (UNCTAD Series on issues in international investment agreements, Taking of Property, 2000, p.2). In order to qualify as indirect expropriation, the measure must constitute a deprivation of the economic use and enjoyment, as if the rights related thereto, such as the income or benefits, had ceased to exist (Tecmed v. Mexico, Award, May 29, 2003, 43 ILM (2004) 133, para. 115) Expropriation may occur in the absence of a single decisive act that implies a taking of property. It could result from a series of acts and/or omissions that, in sum, result in a deprivation of property rights. The intention or purpose of the State is relevant but is not decisive of the question whether there has been an expropriation.</p>
<p>Application of Provision to Facts</p>	<p>Claimant was not deprived of the ownership of its investment, nor from its right to manage, control, use or enjoy its investment. The tax liabilities were then currently being challenged in Romanian Court and so, absent a final and irrevocable judgment, the claimant has not proven an actual impairment of the economic value of his investment. The sequestration orders were all conservatory (and not actually takings) and no other assets were actually taken.</p>
<p><b>Full Protection and Security (Decided in favour of: State)</b></p>	
<p>Article 2(2): Investments by investors of a Contracting Party shall, at all times, be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.</p>	
<p>Definition of Provision</p>	<p>As to the standard of liability, it is generally accepted that the obligation to provide protection and security does not create absolute liability.</p>
<p>Application of Provision to Facts</p>	<p>The temporary restriction order did not amount to a breach of the full protection and security standard, as there has been no allegation that the temporary interdiction order compromised the physical integrity of Claimant’s investment against interference by use of force. No other actions taken by the state have been shown to be unreasonable, discriminatory, or otherwise unjustifiable, and so none could be understood to have violated this standard.</p>

<b>Unreasonable Measures (Decided in favour of: State )</b>	
Article 2(2): Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal, in its territory, of investments by investors of the other Contracting Party, is not in any ways impaired by unjustifiable or discriminatory measures.	
Definition of Provision	In order for the State's conduct to be justifiable or reasonable, it requires that the conduct bears a reasonable relationship to some rational policy, whereas the standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor.
Application of Provision to Facts	In light of the above, the tribunal considers that the temporary restriction order did not amount to a denial of due process or to unfair, inequitable, unjustifiable or discriminatory treatment in violation of Article 2(2) of the Treaty. Ten years is a significant period, but a long delay does not automatically result in a breach of due process. The Tribunal must also consider evidence regarding the reasons for the delay to determine whether it was undue. In light of all such circumstances, the Tribunal comes to the conclusion that the delay in issuing a final ruling did not exceed the threshold of reasonableness.
<b>Importance/Relevance to Analysis/Lessons for Health-High</b>	
Investor challenged the implementation of food and safety policies. The Tribunal ruled that these are commonplace in many countries and promote an important public safety purpose, namely public health. Suspending or revoking operating permits may be regarded as a reasonable and appropriate measure to penalize serious irregularities to the food and safety regulations. The record shows that the State authorities had legitimate concerns about the fulfillment of Claimant's obligations in regard to the food and safety regulations. Claimant did not establish any procedural or substantive irregularities in the inspections conducted by the Food Safety department. In the Tribunal's view, Claimant may not have expected that the State would refrain from adopting regulations in the public interest, nor may Claimant have expected that the Romanian authorities would refrain from implementing those regulations. Rational policy implemented in a non-discriminatory fashion for a public health purpose has been protected by investment tribunals.	

<b>Case Title (Full):</b> Swisslion DOO Skopje (Macedonian) v The Former Yugoslav Republic of Macedonia	
<b>Case Title (Shorthand):</b> Swisslion v Macedonia	
<b>Investor/Claimant:</b> Swisslion DOO Skopje	<b>State/Respondent:</b> Macedonia (UMIC)
<b>Treaty:</b> Agreement between the Macedonian Government and the Swiss Federal Council on the Promotion and Reciprocal Protection of Investments	
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 2 years 9 months
<b>Number of Elite 15:</b> 1	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> No less than USD 29,921,088 + pre-/post-award interest of 14.3% + legal costs	<b>Damages Awarded:</b> USD 435,750 USD + interest
<b>Issue</b>	The claims arose from a share sale agreement between Swisslion and Macedonia in 2006, which provided the Swiss investor a controlling share in Agroplod AD Resen, a food production company. In 2008, the Macedonia Ministry of Economy won in the Skopje Basic Court where it sought to terminate the agreement with Swisslion for breach the agreement, by failing to inject sufficient working capital into Agroplod. The court also ordered the transfer of Swisslion’s Agroplod shares to the Ministry without compensation.
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
Article 4(2): Each Contracting Party shall ensure fair and equitable treatment within its investments of the investors of the other Contracting Party.	
<i>Definition of Provision</i>	The standard basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors.
<i>Methods for Testing Provision</i>	The question is whether or not in taking their decision the Macedonian courts acted contrary to international law and in particular whether there has been denial of justice in the present case.
<i>Application of Provision to Facts</i>	There was a basis for the Ministry of Economy to form the view that Swisslion had failed to comply with its contractual obligations and to seize the courts of the issue and to finally ask for termination of the contract. But the Tribunal also accepts that Swisslion, in good faith, could have concluded that, having been precluded from effecting fundamental change in Agroplod’s share capital, it could affect the investment in other ways so long as it did not reduce Agroplod’s overall value to the detriment of other shareholders (i.e. so long as the valuations of the shareholders’ respective contributions in the three subsidiaries were proper). Accordingly, the Tribunal does not accept the Respondent’s contention that, on the merits, the claim should be rejected due to illegality of the investment and bad faith of the investor. It is well established that States are entitled to act as contractual counterparties and to insist upon the observance of contractual commitments owed to them. They do not violate their international obligations by exercising such contractual rights.
<b>Indirect Expropriation (Decided in favour of: State)</b>	
Article 5(1): Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures having the same nature or me same effect against	

<p>investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is earlier. The amount of compensation, including interest calculated on the annual LIBOR basis, shall be settled in a convertible currency and paid without delay to the person entitled thereto without regard to its residence or domicile.</p>	
<p><i>Application of Provision to Facts</i></p>	<p>The Ministry was entitled to form the view that the contract had not been complied with and to put that view before the courts. The fact that the courts accepted that view and the judicial decisions have not been successfully challenged before this Tribunal means that the argument that the court effected an expropriation must fail. The internationally lawful termination of a contract between a State entity and an investor cannot be equated to an expropriation of contractual rights simply because the investor's rights have been terminated; otherwise, a State could not exercise the ordinary right of a contractual party to allege that its counterparty breached the contract without the State's being found to be in breach of its international obligations. Since there was no illegality on the part of the courts, the first element of the Claimant's expropriation claim is not established. It is common ground that the courts did not order the Ministry to pay the Claimant for the purchase price when it resolved to terminate the contract. The question is whether, as the Claimant has alleged, this in itself amounts to an expropriation under the Treaty. The Tribunal considers that no expropriation of the moneys paid for the shares was effected by the fact that the courts terminated the Share Sale Agreement and did not order a return of the purchase price in the absence of a request for such relief. The Tribunal accepts the Respondent's submission that no claim for compensation was made in accordance with Macedonian civil procedure. The Claimant has not proven the juridical fact on which the second limb of its expropriation case is based, i.e., that it had a clear right to recover the purchase price in that proceeding such that the court's failure to so order constituted an expropriation.</p>
<p><b>Unreasonable Measures (Decided in favour of: State)</b></p>	
<p>Article 4(1): Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments.</p>	
<p><i>Application of Provision to Facts</i></p>	<p>The Tribunal has concluded that the Respondent breached the obligation to accord fair and equitable treatment to the Claimant. Most of the measures complained of in the Article 4(1) claim are duplicative of the measures that have already been examined within the context of the breach of the fair and equitable treatment standard. Moreover, it is apparent that the Tribunal has a different view of the characterisation of certain alleged facts from those on which the unreasonable impairment claim is based. The Tribunal finds that the claim is better addressed under Article 4(2) and accordingly the Article 4(1) claim is dismissed.</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health-Low</b></p>	
<p>No relevant lessons for health policy.</p>	

<b>Case Title (Full):</b> Tecnicas Medioambientales Tecmed S.A. v Mexico	
<b>Case Title (Shorthand):</b> Tecmed v. Mexico	
<b>Investor/Claimant:</b> Tecnicas Medioambientales Tecmed S.A.	<b>State/Respondent:</b> Mexico (UMIC)
<b>Treaty:</b> The Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States	
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 2 years 9 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 52,000,000 + interest	<b>Damages Awarded:</b> USD 5,533,017 + compound interest
<b>Issue</b>	The claimant, Tecmed, a Spanish company with its two Mexican subsidiaries, filed a claim against Mexico for breaches of several provisions of the BIT. The breaches concern Tecmed's waste landfill investment acquired in 1996. In 1998, after the adopted of a Resolution, Tecmed's renewal license to operate the landfill was rejected due to minor breaches in the method of landfill operation.
<b>Fair and Equitable Treatment (Decided in favour of: Investor)</b>	
Article IV(1): Each Contracting Party will accord investments of investors of the other Contracting Party, treatment in accordance with customary international law, including fair and equitable treatment, as well as full protection and security.	
<i>Definition of Provision</i>	The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.
<i>Methods for Testing Provision</i>	The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations.
<i>Application of Provision to Facts</i>	Upon making its investment, the fair expectations of the Claimant were that the Mexican laws applicable to such investment, as well as the supervision, control, prevention and punitive powers granted to the authorities in charge of managing such system, would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals underlying such laws. The refusal to renew the Permit and the closing of the site, should have been accompanied, by the payment of the appropriate compensation. The lack of transparency in Mexico's behavior and intention throughout the process that led to the Resolution, which does not reflect in full the reasons that led to the non-renewal of the Permit, cover up the final and real consequence of such actions and of the Resolution: the definitive closing of the activities at the landfill without any compensation whatsoever, whether agreed

	or not, in spite of the expectations created, and without considering ways enabling it to neutralize or mitigate the negative economic effect of such closing by continuing with its economic and business activities at a different place.
<b>Indirect Expropriation (Decided in favour of: Investor)</b>	
Article V(1): Neither Contracting Party will expropriate or nationalize investments of investors of the other Contracting Party either directly or indirectly by means of measures equivalent to an expropriation or nationalization (“expropriation”), unless it is: a) for a public purpose; b) on a non-discriminatory basis; c) in accordance with due process of law; and d) on payment of compensation in accordance with the following paragraph 2.	
<i>Definition of Provision</i>	The Agreement does not define “expropriation”, nor does it establish the measures, actions or behaviors that would be equivalent to an expropriation or that would have similar characteristics. Generally, it is understood that the term “...equivalent to expropriation...” or “tantamount to expropriation” included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called “indirect expropriation” or “creeping expropriation”, as well as to the above-mentioned de facto expropriation. Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect. A difference should be made between creeping expropriation and de facto expropriation, although they are usually included within the broader concept of “indirect expropriation” and although both expropriation methods may take place by means of a broad number of actions that have to be examined on a case-by-case basis to conclude if one of such expropriation methods has taken place.
<i>Method for Testing Provision</i>	It must be first determined if the Claimant, due to the Resolution, was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto —such as the income or benefits related to the Landfill or to its exploitation— had ceased to exist. One of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure, which is an ordinary expression of the exercise of the state’s police power that entails a decrease in assets or rights, and a de facto expropriation that deprives those assets and rights of any real substance.
<i>Application of Provision to Facts</i>	It is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that “...any form of exploitation thereof...” has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed. The government’s intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects. To determine whether such an expropriation has taken place, the Arbitral Tribunal should not restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced. There is no doubt that in the future the Landfill may not be used for the activity for which it has been used in the past and that economic and

	<p>commercial operations in the Landfill after such denial have been fully and irrevocably destroyed. Proportionality Test: in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. At the time the investment was made, Tecmed had no reason to doubt the lawfulness of the Landfill’s location, regardless of the social and political pressure that appeared subsequently. These companies were not negligent upon analyzing the legal issues related to the Landfill’s location. The actions undertaken by the authorities to face these socio-political difficulties, where these difficulties do not have serious emergency or public hardship connotations, or wide-ranging and serious consequences, may not be considered from the standpoint of the Agreement or international law to be sufficient justification to deprive the foreign investor of its investment with no compensation</p>
<p><b>Full Protection and Security (Decided in favour of: State)</b></p>	
<p>Article IV(1): Each Contracting Party will accord investments of investors of the other Contracting Party, treatment in accordance with customary international law, including fair and equitable treatment, as well as full protection and security.</p>	
<p><i>Definition of Provision</i></p>	<p>The guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it.</p>
<p><i>Application of Provision to Facts</i></p>	<p>The Arbitral Tribunal does not consider, even at the time of its consummation and turning point —the refusal to renew the Permit— that such behavior has no legal grounds under Mexican law or that such behavior is discriminatory, as required by Article 3(1) of the Agreement in order to constitute a violation. At any rate, the Arbitral Tribunal holds that there is not sufficient evidence supporting the allegation that the Mexican authorities, whether municipal, state, or federal, have not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements conducted by those who were against the Landfill.</p>
<p><b>Most-Favoured Nation (Decided in favour of: State)</b></p>	
<p>Article III(1): Each Contracting Party will accord in its territory to investments of investors of the other Contracting Party treatment no less favourable than it accords, in like circumstances, to investments of its own investors or to investments of investors of any third state, whichever is the most favourable for the investor.</p>	
<p><i>Application of Provision to Facts</i></p>	<p>The claimant tried to use the MFN clause in the Mexico-Spain BIT to retroactively apply the protections to an investment made prior to the treaty, which was not covered by the BIT’s protections. This argument was rejected because the temporal scope of the BIT’s application “go to the core of matters that must be deemed to be specifically negotiated by the parties they are determining factors for their acceptance of the treaty.”</p>
<p><b>National Treatment (Decided in favour of: State)</b></p>	
<p>Article III(1): Each Contracting Party will accord in its territory to investments of investors of the other Contracting Party treatment no less favourable than it accords, in like circumstances, to investments of its</p>	

own investors or to investments of investors of any third state, whichever is the most favourable for the investor;	
<i>Application of Provision to Facts</i>	The Respondent has furnished satisfactory evidence —not rebutted by the Claimant on this point— of the fact that the circumstances under which RIMSA’s investment was made and concerning such investment materially differed from the investment in the Landfill. Thus, it is not possible to establish standards which allow a comparison of the treatment accorded to the investment in RIMSA’s landfill and the investment in the Landfill. The Claimant has not furnished evidence to prove that the Mexican authorities, regardless of their level, have encouraged, fostered, or contributed their support to the people or groups that conducted the community and political movements against the Landfill, or that such authorities have participated in such movement. Also, there is not sufficient evidence to attribute the activity or behavior of such people or groups to the Respondent pursuant to international law. The Arbitral Tribunal does not consider that the behavior attributable to the Respondent amounts to violations to the guarantee of national or foreign treatment set forth by the provisions of the Agreement referred to above.
<b>Importance/Relevance to Analysis/Lessons for Health-High</b>	
Offers a broad interpretation of FET, which places a responsibility on governments to practice transparency and consistency in developing their regulations. Tecmed Tribunal’s application of the “proportionality” test for indirect expropriation was the first time such a test had been used in modern investment treaty arbitration. The proportionality test may enable tribunals to strike a better balance between investor rights and domestic environmental, health or other concerns when interpreting and applying BIT provisions. Case also illustrates that non-discriminatory measures taken by states to respond to public concerns about threats to health and environmental protection may constitute expropriations and/or violate the FET standard. Mexico contended that its decision did not amount to an expropriation because it was a legitimate regulatory action taken by a government agency consistent with its discretionary authority and in compliance with its police power. With respect to the proportionality analysis, the Tribunal concluded that the facts of the case and justifications offered for the agency’s decision indicated that Tecmed’s breaches of the Permit’s terms and environmental regulations were generally minor and did not, even according to relevant Mexican authorities, “compromise public health, [or] impair ecological balance or protection of the environment” (para. 124; see also paras. 127, 130–32). Finding that the opposition did not rise to the level of an “emergency situation,” and that the opposition that did exist was due largely to the location of the Landfill rather than to wrongful conduct by Tecmed, the Tribunal held Mexico’s “socio-political” interests were likewise not sufficiently weighty to support the Environmental Protection Agency’s decision (paras. 139, 142, 147). To support its use of the proportionality test in determining whether the Environmental Protection Agency’s decision not to renew the Permit effected an expropriation, the Tecmed Tribunal relied entirely on four different decisions of the European Court of Human Rights (paras. 122– 123). This approach signals that tribunals can look to and rely upon other fields of law, such as human rights, labour law and environmental law, when relevant to interpreting parties’ rights and obligations under international investment agreements (IISD, 2010).	

<b>Case Title (Full):</b> Toto Costruzioni Generali S.p.A. and Republic of Lebanon	
<b>Case Title (Shorthand):</b> Toto v. Lebanon	
<b>Investor/Claimant:</b> Toto Costruzioni Generali S.p.A.	<b>State/Respondent:</b> Lebanon (UMIC)
<b>Treaty:</b> the Treaty between the Italian Republic and the Lebanese Republic on the Promotion and Reciprocal Protection of Investments	
<b>Court:</b> ICSID (ICSID Convention-Arbitration Rules)	<b>Duration:</b> 4 years and 11 months
<b>Number of Elite 15:</b> 1	<b>Party Awarded:</b> State
<b>Damages Requested:</b> USD 21,760,467	<b>Damages Awarded:</b> Each bears own legal fees + 50% of arbitration costs
<b>Issue</b>	The CEGP, and later its successor, the Council for Development and Reconstruction (“CDR”), both acting on behalf of the Lebanese Government, was responsible for several actions and omissions in relation to the Project, such as delaying or failing to carry out the necessary expropriation of private property, failing to deliver the sites of the work in a timely fashion, failing to protect Toto's legal possession, giving erroneous or undesirable design information and instructions, changing the regulatory framework, and refusing to adopt corrective measures in relation to the aforementioned matters.
<b>Fair and Equitable Treatment (Decided in favour of: State )</b>	
Article 3(1): Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the other Contracting Party. This treatment shall not be less favourable than that granted by each Contracting Party to the investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of any third State, if this latter treatment is more favourable.	
<b>Definition of Provision</b>	<p>The threshold for finding a violation of the fair and equitable standard is high as confirmed by <i>Biwater Gauff Tanzania Ltd v. United Republic of Tanzania</i>. An unreasonable or discriminatory measure is defined in this case as (i) a measure that inflicts damages on the investor without serving any apparent legitimate purpose; (ii) a measure that is not based on legal standards but on discretion, prejudice or personal preference, (iii) a measure taken for reasons that are different from those put forward by the decision maker, or (iv) a measure taken in wilful disregard of due process and proper procedure.</p> <p>Legitimate expectations may follow from explicit or implicit representations made by the host state, or from its contractual commitments. The investor may even sometimes be entitled to presume that the overall legal framework of the investment will remain stable. Much depends, however, on the circumstances of the case. Legitimate expectations are more than the investor’s subjective expectations. Their recognition is the result of a balancing operation of the different interests at stake, taking into account all circumstances, including the political and socioeconomic conditions prevailing in the host State. For an alleged breach of contract to be considered as a breach of the fair and equitable treatment principle, State conduct (i.e. involving sovereign authority) is required. Furthermore, fair and equitable treatment has to be interpreted with international and comparative standards of</p>

	domestic public law as a benchmark. The investor is certainly entitled to expect that the host State will not act capriciously to violate the rights of the investors.
Application of Provision to Facts	The Tribunal's view is that Toto did not establish that Lebanon behaved negligently or capriciously, or that it acted discriminatorily or violated the international minimum standard by not obtaining immediately the departure of foreign troops. If in fact it had been established that the presence of Syrian troops for a limited period on part of the site materially prejudiced the Toto's operations, Toto would have had a good claim, because, as between Lebanon and Toto, the burden of the presence of Syrian troops on the Lebanese territory would have to be borne by Lebanon. In the view of the Tribunal, Toto has not so established. The Tribunal finds that it would be unreasonable to expect Lebanon to guarantee that no owner objects to the expropriation process including, inter alia, by obstructing access to his/her parcels. Only the frustration of legitimate expectations which upsets the stability of the legal or business framework, the fair and equitable treatment standard, or the rights acquired under domestic law, should be protected under Article 3(1) of the Treaty. Toto did not prove that the owners' (expropriated by the government) obstructions have upset any of such elements. The Tribunal considers that fair and equitable treatment does not, in the circumstances prevailing in Lebanon at the time, entail a guarantee to the investor that tax laws and customs duties would not be changed. Toto failed to prove that Lebanon's actions had drastic or discriminatory consequences.
<b>Full Protection and Security (Decided in favour of: State )</b>	
Article 4(1): Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.	
Definition of Provision	A substantive failure to take reasonable precautionary and preventive action is sufficient to engage the international responsibility of a state for damage to public and private property in that area.
Application of Provision to Facts	Toto accepted the granting of an extension to complete the works and waived any claim to damages because of the delay in expropriations. Such acceptance, in all events, undercuts the factual grounds for arguing that Lebanon failed to protect the investment. The investor should have known about the Syrian troops occupying part of the territory they were given, and Lebanon did everything reasonable within its power to remove them, and so cannot be faulted for taking unreasonable and discriminatory measures. Toto has also not established what material impact the obstruction of the troops actually caused for the work.
<b>Importance/Relevance to Analysis/Lessons for Health-Low</b>	
Tribunal set a high threshold for violations of FET and found in State favour. Few lessons for health policy.	

<b>Case Title (Full):</b> Tulip Real Estate Investment and Development Netherlands B.V. v Republic of Turkey	
<b>Case Title (Shorthand):</b> Tulip Real Estate v Turkey	
<b>Claimant:</b> Tulip Real Estate Investment and Development Netherlands B.V.	<b>Respondent:</b> Turkey (UMIC)
<b>Treaty:</b> Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey dated 27 March 1986	
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 2 years 4 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> State
<b>Damages Requested:</b> Compensation for the loss caused by the termination of the Contract in breach of the BIT	<b>Damages Awarded:</b> Investor to reimburse State's arbitration costs and legal fees
<b>Issue</b>	The claimant invested in a Turkish real-estate project, in partnership with Emlak company, owned by Turkey's Housing Development Administration (TOKI). Four years into the project, Emlak ended the contract with Tulip for delays in the project, and shortly after seized control of the construction site. The claimant asserts that Emlak was responsible for the delays, and terminated the contract as a pretext to seize its assets.
<b>Fair and Equitable Treatment (Decided in favour of: State)</b>	
Article 3(1): Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment, sale or liquidation thereof by those investors.	
<i>Definition of Provision</i>	Art 3(1) of the BIT is to be construed according to the ordinary meaning of the term "fair and equitable," i.e., "'just,' 'even-handed', 'unbiased', 'legitimate'" and infringement of that standard requires "treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable".
<i>Methods for Testing Provision</i>	The Tribunal considers that the primary source of any legitimate expectations with respect to the Ispartakule III project would have been the Contract and any pre-contractual representations made through the Tender Specifications or agreed in the Contract.
<i>Application of Provision to Facts</i>	Turning to the Claimant's complaint surrounding the zoning dispute, the Tribunal considers that there is no cogent evidence that representatives of the Turkish State, such as an aide to Prime Minister Erdogan, the Mayor of Ankara, Mr Bayraktar or any other actors made specific representations or gave concrete assurances to the "Dutch Investors" about the nature and scope of Ispartakule III prior to the execution of the Contract. Rather, the Tribunal finds that, at best, the evidence supports the conclusion that Turkish State actors expressed general support for the "Dutch Investors" making their proposed investment into the Turkish construction sector. The Tribunal also concludes unanimously that the termination of the  Contract was not a violation of Art 3(1) of the BIT in circumstances where Emlak was faced with a project that was in substantial financial hardship and beset with severe construction delays.

<b>Direct Expropriation (Decided in favour of: State)</b>	
Article 5(1): Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory; (c) the measures are accompanied by the provision for the payment of just compensation. Such compensation shall amount to the fair market value of the investment or in the absence of a fair market value the genuine value of the investments affected and shall, in order to be effective for the investors, be paid and made freely transferable, without unreasonable delay, to the country of which the investors concerned are nationals or to any other country accepted by the Contracting Party concerned and in the currency in which the investment was originally made or in any freely convertible currency, mutually agreed to by the investor and the Contracting Party.	
<i>Application of Provision to Facts</i>	The Tribunal has concluded unanimously that the evidence offered by the Claimant falls short of establishing a violation of the BIT, inasmuch as the termination was pursued within the framework of the Contract and in Emlak's perceived commercial best interests. Claimant offers no basis on which the Tribunal could find a mere recommendation to consider taking an action as an improper exercise of sovereign power. Especially is that so in the absence of any evidence that the Board exerted pressure on Emlak to terminate the Contract or that its recommendation was motivated by an improper purpose.
<b>Full Protection and Security (Decided in favour of: State)</b>	
Article 3(2): Each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor. Each Contracting Party shall observe any obligation it may have entered into with regard to investments.	
<i>Definition of Provision</i>	The Tribunal agrees with the observations in Wena Hotels that the FPS standard does not impose on the State a "strict liability" obligation. The State cannot insure or guarantee the full protection and security of an investment. The question of whether the State has failed to ensure FPS is one of fact and degree, responsive to the circumstances of the particular case.
<i>Application of Provision to Facts</i>	Without determining whether the repossession was legally justified under Turkish law, the Tribunal considers it relevant that Emlak came to the site in the belief that, having terminated the Contract, it could exercise its contractual rights to repossess the site in circumstances where it was the owner of the land. While Emlak may have been mistaken, there is no indication that it acted with a pre-determined intention to seize the site illegally and through organised violent action. There is, therefore, no basis to conclude, that the State (assuming, arguendo, that Emlak were an emanation of the State) planned to engage in an unlawful seizure of land belonging to a foreign investor or, alternatively, that State organs failed to exercise due diligence and to prevent planned unlawful action by a private party.
<b>Umbrella Clause (Decided in favour of: State)</b>	
Article 3(2): Each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor. Each Contracting Party shall observe any obligation it may have entered into with regard to investments.	

<i>Methods for Testing Provision</i>	Although the Tribunal has reservations about the argument that a legislative instrument such as the FDIL (Foreign Direct Investment Law) is capable of falling within the scope of obligations envisaged by the “umbrella clause” in Art 3(2) of the BIT, there is no need for the Tribunal to decide this matter conclusively in circumstances where it does not consider that, in any event, there has been any non-compliance with the requirements of the FDIL.
<i>Application of Provision to Facts</i>	First, the Tribunal has already considered and rejected the Claimant’s contention that its investment was subjected to arbitrary and discriminatory treatment. The same reasoning applies to the issue of whether there has been any failure not to afford national treatment to the Claimant. In short, there has not been any such failure in the circumstances. Second, the Tribunal has also addressed the Claimant’s contention that the Respondent breached certain pre-contractual assurances in its determination with respect to the Art 3(1) claim for breach of the FET standard. It is sufficient merely to state that the Tribunal does not find there to be any compelling evidence of specific non-Contractual assurances that went beyond general expressions of support for the proposed foreign investment.
<b>Importance/Relevance to Analysis/Lessons for Health-Low</b>	
No relevant lessons for health policy.	

<b>Case Title (Full):</b> Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica	
<b>Case Title (Shorthand):</b> Unglaube v. Costa Rica	
<b>Investor/Claimant:</b> Marion Unglaube and Reinhard Unglaube	<b>State/Respondent:</b> Republic of Costa Rica (UMIC)
<b>Treaty:</b> Treaty between Costa Rica and Germany concerning the Encouragement and Reciprocal Protection of Investment	
<b>Court:</b> ICSID (ICSID)	<b>Duration:</b> 4 years and 3 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> The value of a number of properties and developments under question.	<b>Damages Awarded:</b> USD 4,065,900
<b>Issue</b>	According to Claimants, Palm Beach donated over 10 hectares of land on the understanding that Costa Rica would, in exchange, reaffirm its approval of the Project and prevent any difficulties from arising in the permitting process. Claimants protest, however, that while Costa Rica initially complied with its side of the agreement – including permitting the construction in Phase I of the Project over the next decade – in 2003, Costa Rican authorities began to act contrary to the commitments entered into in the context of the 1992 Agreement. Resolution 375 purported to expropriate not only the additional 75-meter by 100- meter strip (hereafter the “75-Meter Strip”) which was adjacent to the “inalienable zone,” but the entire Phase II Property. Claimants object that the State has not, as of the present date, either determined the amount owing for the delay, nor has it made any payment to her in this regard.
<b>Fair and Equitable Treatment (Decided in favour of: State )</b>	
Article 2(1): Each Contracting Party shall in its territory promote as far as possible investments by nationals or companies of the other Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord investments fair and equitable treatment.	
Definition of Provision	It is not the Tribunal’s role, having appraised the evidence presented, to decide based on its own judgments of fairness. It is, instead, to assess whether investors have been subjected to arbitrary or discriminatory treatment, to legal arrangements which violate due process, and, in particular, whether the legitimate expectations of the investor (i.e., expectations reasonably held by the investor at the time the investment was made) have been duly respected. Where, however, a valid public policy does exist, and especially where the action or decision taken relates to the State’s responsibility “for the protection of public health, safety, morals or welfare, as well as other functions related to taxation and police powers of states,” such measures are accorded a considerable measure of deference in recognition of the right of domestic authorities to regulate matters with their borders. This deference, however, is not without limits. Even if such measures are taken for an important public purpose, governments are required to use due diligence in the protection of foreigners and will not be excused from liability if their action has been arbitrary or discriminatory.
Methods for Testing Provision	As stated by the Saluka Tribunal, the evidence must establish actions or decisions which are “manifestly inconsistent, non-transparent, [or] unreasonable” (i.e., unrelated to some rational policy). In order to prevail regarding an allegation of discriminatory treatment, a Claimant must demonstrate that it has been subjected to

	<p>unequal treatment in circumstances where there appears to be no reasonable basis for such differentiation. While evidence of discriminatory intent may be relevant, and may reinforce such a finding, it is the fact of unequal treatment which is key. In examining Claimants allegations of discriminatory treatment in this case, the Tribunal must ask “Compared to whom?” and must consider carefully which group must be looked to for this comparison. Claimants have been required, at a minimum, to prove facts which, on their face, suggest discriminatory or less favorable treatment. If they are successful in doing so, further examination may be called for. Legitimate expectations: the unilateral expectations of a party, even if reasonable in the circumstances, do not in and of themselves satisfy the requirements of international investment law. To satisfy such requirements Claimants must demonstrate reliance on specific and unambiguous State conduct, through definitive, unambiguous and repeated assurances, and targeted at a specific person or identifiable group. In order to establish failure to provide an adequate legal remedy, Claimant must prove more than simply that a particular court or administrative tribunal arrived at the wrong result. They must demonstrate that the laws of Costa Rica, taken as a whole, did not afford them an adequate opportunity, within a reasonable time, to vindicate their legitimate rights.</p>
<p>Application of Provision to Facts</p>	<p>The interpretation of the language of the National Park Law by the Attorney General and the Supreme Court does not constitute the denial of a stable legal and business framework. According to Costa Rican law, they are empowered to make these interpretations. While the Tribunal doubts that Supreme Court’s 90-day delay was properly justified, the guidelines that resulted are substantively similar to what the claimants already agreed to in 1992, and so the Tribunal is not convinced that taken together these measures significantly impeded any property rights. Claimants have presented no evidence to suggest either that Claimants themselves or this group of 60 landowners (including Claimants) have been subjected to discriminatory treatment. Claimants have not shown any repeated promise by the state that could have created the legitimate expectations on which they rely.</p>
<p><b>Indirect Expropriation (Decided in favour of: Investor )</b></p>	
<p>Article 4(2): Investments by nationals or companies of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation. These measures must be authorized by statute. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or similar measure has become publicly known. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalization or comparable measure for the determination and payment of compensation shall be subject to review by due process of law.</p>	
<p>Definition of Provision</p>	<p>A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected. 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.” (Santa Elena Tribunal) While there can be no question concerning the right of the government of Costa Rica to expropriate property for a bona fide public purpose, pursuant to law, and in a manner which is neither arbitrary or</p>

	discriminatory, the expropriatory measure must be accompanied by compensation for the fair market value of the investment. Expropriation may result from a variety of potential causes. Among these are included situations where violations of the fair and equitable treatment standard and their consequences are so severe that they result in a taking of an investor’s property.
Application of Provision to Facts	The Tribunal finds that Respondent, in the process of initiating expropriation of the 75-Meter Strip did not make timely arrangements to determine and make payment to Marion Unglaube of the compensation required. As a result, the 75-Meter Strip of Phase II owned by the Claimant, Marion Unglaube, has been subjected to de facto expropriation – in the words of the Treaty, by “measure(s) tantamount to expropriation.”
<b>Full Protection and Security (Decided in favour of: State )</b>	
Article 4(1): Investments by nationals or companies of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party [translated from Spanish].	
Definition of Provision	As with any complex legal standard stated in a brief phrase, the words “full protection and security” allow for a broad range of possible meanings. This Tribunal accepts, as urged by Claimants, that “full protection” may, in appropriate circumstances, extend beyond the traditional standard expressed by the Saluka tribunal.
Methods for Testing Provision	In order to prevail on this issue, Claimants must demonstrate a causal connection between an improper action or failure to act of a State entity, or its agent, in violation of a legal obligation owed to Claimants, and to the detriment of Claimants or their investments
Application of Provision to Facts	Claimants, understandably, have experienced frustration at the three-year delay occasioned by the 2005 amparo petition as well as the subsequent nine-month delay resulting from the 2008 amparo petition. However this Tribunal finds that both court proceedings were conducted in accordance with Costa Rican law. The Tribunal finds no evidence that either these court proceedings, or the actions of SETENA, involved impropriety, corruption or discrimination against the Claimants. Thus, the Tribunal concludes that Claimants have not demonstrated an improper failure of the Respondent to provide full protection or security to the Claimants. If Claimants had succeeded in establishing by appropriate evidence that they possessed certain specific development rights regarding the remainder of Phase II or their Phase I properties and that, as a result, the Respondent had assumed corresponding legal obligations, then failure of Respondent to accord protection to those rights might have constituted a valid claim based on failure to provide full protection and security under Article 4(1) of the Treaty. But, as indicated previously, this Tribunal finds that the alleged rights and obligations regarding Claimants remaining properties have not been proven in this proceeding.
<b>Importance/Relevance to Analysis/Lessons for Health-High</b>	
While the Saluka case may have found for the investor on FET, which turned on the details of the case, their protection of policy space is used by tribunals, such as here, that have found in favour of the State. This Tribunal uses a high threshold for violating FET and establishes that legitimate expectations do not in and of themselves satisfy the requirements of international investment law, and that Claimants must	

demonstrate reliance on specific and unambiguous State conduct, through definitive, unambiguous and repeated assurances, and targeted at a specific person or identifiable group. This is a high threshold for proving legitimate expectations. Tribunal required deference to the domestic right to regulate when a valid public policy exists particularly for the protection of public health, safety, morals or welfare, as well as other functions related to taxation and police powers of states within limits. Although in addressing indirect expropriation the tribunal, having established the measures were for a bona fide public purpose, pursuant to law, and in a manner which is neither arbitrary nor discriminatory, still required compensation.

<b>Case Title (Full):</b> Vannessa Ventures LTD. v Bolivarian Republic of Venezuela	
<b>Case Title (Shorthand):</b> Vannessa v Venezuela	
<b>Investor/Claimant:</b> Vannessa Ventures LTD.	<b>State/Respondent:</b> Venezuela (HIC)
<b>Treaty:</b> BIT Canada - Venezuela, Republica Bolivariana de 1996	
<b>Court/Rules:</b> ICSID Convention - Arbitration Rules	<b>Duration:</b> 8 years 1 month
<b>Number of Elite 15:</b> 2	<b>Party Awarded:</b> State
<b>Damages Requested:</b> not less than USD 1,045,000,000 + compound interest <b>(Counter Damages Requested:</b> Legal cost)	<b>Damages Awarded:</b> Each bears own costs and one-half of the Tribunal and ICSID's costs
<b>Issue</b>	In early 1990s, Placer Dome Inc. (PDI), a Canadian mining company, entered into a joint venture with a Venezuelan Government Agency (CVG). Under a shareholders agreement, Placer Dome and CVG established MINCA company for the exploration and extraction of gold deposits from at Las Cristinas mine, in the Guayana region of Venezuela. Under the Shareholder's Agreement, the assignment of rights required the prior consent of the other party. Due to the deteriorating gold market conditions around 1999, PDI sought to suspend the project due to low gold prices. CVG agreed to a temporary suspension; however, the parties failed in finding a new investor. PDI entered into negotiations with Vannessa Ventures, a Vancouver-based company, without informing CVG or obtaining its consent. Vannessa acquired its share in the mining project from PDI Placer Dome for a nominal fee of \$50. The agreement provided PDI with a share of the revenues for any exploitation work Vannessa did in Las Cristinas, as well as a share of any damages that may be awarded if Vannessa elected to commence legal action against Venezuela for breach of contract. Taking issue with the acquisition, CVG opted to rescind the Work Contract with MINCA, claiming contractual violations. Subsequently, CVG seized physical control over the mining site and awarded the project to another Canadian company. Following a set of unsuccessful legal proceedings in Venezuelan courts, requesting the protection of its claimed rights to the Las Cristinas project, Vannessa filed a claim at ICSID for breaches of the Canada-Venezuela BIT.
<b>Fair and Equitable Treatment and Full Protection and Security (Decided in favour of: State)</b>	
Article II(2): Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security.	
<i>Definition of Provision</i>	FET standard does not guarantee the success or profitability of an investment but requires that the treatment of investments not fall below a minimum standard of fairness and equitableness that all investors have a right to expect. FPS standard applies at least in situations where actions of third parties involving either physical violence or the disregard of legal rights occur, and requires that the State exercise due diligence to prevent harm to the investor, it being understood that the FPS standard does not grant the investor an insurance against all and every risk.
<i>Methods for Testing Provision</i>	Two questions: (1) whether Respondent violated the Treaty by treating the investment unfairly or inequitably, and whether there was any failure to accord full protection and security to the investment; and (2) not whether the host State legal system is performing as efficiently as it ideally could, but whether it is performing so

	badly as to violate treaty obligations to accord fair and equitable treatment and full protection and security.
<i>Application of Provision to Facts</i>	Vannessa alleged that Venezuela violated the BIT provisions of FET because it unilaterally terminated the Work Contract without first seeking arbitration, as provided for in the Work Contract; and, FPS, because it did not exercise due diligence in protecting Vannessa from damaging acts of Venezuelan authorities. The treatment of Vannessa’s investment and any delays in the local legal proceedings cannot be regarded as falling below the minimum standard. The evidence in this case does not warrant a conclusion that the decisions of the courts in Venezuela in the proceedings instituted by Claimant demonstrate a lack of independence or impartiality, and the Tribunal does not accept that they amount to breaches of either the right to fair and equitable treatment or the right to full protection and security.
<b>Most- Favoured Nation (Decided in favour of: State)</b>	
Article III(1): Each Contracting Party shall grant to investments, or returns of investors of the other Contracting Party, treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors of any third State. Article III(2): Each Contracting Party shall grant investors of the other Contracting Party, as regards their expansion, management, conduct, operation, use, enjoyment, sale, or disposal of their investments or returns, treatment no less favourable than that which, in like circumstances, it grants to investors of any third State.	
<i>Application of Provision to Facts</i>	Cannot apply the BIT’s MFN clause to expand the definition of “investment” because the BIT’s MFN clause is only applicable once the BIT itself applied.
<b>Expropriation (Decided in favour of: State)</b>	
Article VII(1): Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation. Such compensation shall be based on the genuine value of the investment or returns expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier, shall be payable from the date of expropriation with interest at a normal commercial rate, shall be paid without delay and shall be effectively realizable and freely transferable.	
<i>Application of Provision to Facts</i>	Vannessa’s expropriation claim was dismissed. The Tribunal agreed with Venezuela that CVG had rightfully terminated the Work Contract because PDI failed to cooperate with CVG to find a new investor they both accepted, and PDI was required to obtain CVG’s consent before bringing a new investor into the project.
<b>Importance/Relevance to Analysis/Lessons for Health-Low</b>	
Tribunal adds that in assessing FET and FPS it is not a question of whether the host State legal system is performing as efficiently as it ideally could, but whether it is performing so badly as to violate treaty obligations to accord fair and equitable treatment and full protection and security. Moreover that FPS cannot be viewed as an insurance against all and every risk.	

<b>Case Title (Full):</b> Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., & Mobil Venezolana de Petróleos, Inc AND The Bolivarian Republic of Venezuela	
<b>Case Title (Shorthand):</b> Mobil v Venezuela	
<b>Claimant:</b> Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., & Mobil Venezolana de Petróleos, Inc	<b>Respondent:</b> The Bolivarian Republic of Venezuela (HIC)
<b>Treaty:</b> Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela	
<b>Court:</b> ICSID (Arbitration Rules)	<b>Duration:</b> 7 years
<b>Number of Elite 15:</b> 1	<b>Party Awarded:</b> Investor
<b>Damages Requested:</b> USD 14.679 billion + costs + interest	<b>Damages Awarded:</b> USD1,420,742,482 + interest + net of tax
<b>Issue</b>	The unilateral termination of the Cerro Negro Royalty Reduction Agreement and the Cerro Negro Royalty Procedures Agreement; the further increase in the royalty rate through the imposition of the extraction tax; the increase in the income tax rate applicable to participants in Orinoco Oil Belt ventures; the production and export curtailments imposed on the Cerro Negro Project; and the direct expropriation of Mobil Cerro Negro's and Mobil Venezolana's entire interests in the activities of the Cerro Negro Joint Venture and the La Ceiba Joint Venture, as well as the related assets.
<b>Fair and Equitable Treatment (Decided in favour of: Investor )</b>	
Article 3(1): Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by arbitrary or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Article 3(2): More particularly, each Contracting Party shall accord to such investments full physical security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.	
Definition of Provision	Legitimate expectations may result from specific formal assurances given by the host state in order to induce investment.
Methods for Testing Provision	1) Did the investor have legitimate expectations created by express acts of the state? 2) If so, were those expectations violated?
Application of Provision to Facts	The Claimants could have reasonably expected at the time of investment to produce at least 120,000 barrels of oil a day without it being lowered except in such circumstances stipulated in the contract. The government unilaterally imposed two such cuts, both of which failed to meet the contract's stipulations. The first failed because it was not required by OPEC. The second failed because, although it was required by OPEC, it was not shared by all producers, only the claimant. The Tribunal finds however that the expropriation measures did not constitute unfair or inequitable treatment as it met the requirements of a lawful expropriation.

<b>Direct Expropriation (Decided in favour of: State )</b>	
<p>Article 6: Neither Contracting Party shall take measures to expropriate or nationalise investments of nationals of the other Contracting Party or take measures having an effect equivalent to nationalisation or expropriation with regard to such investments, unless the following conditions are complied with: a) the measures are taken in the public interest and under due process of law; b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party taking such measures may have given; c) the measures are taken against just compensation. Such compensation shall represent the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is earlier; it shall include interest at a normal commercial rate until the date of payment and, shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any convertible currency accepted by the claimants.</p>	
Methods for Testing Provision	<p>The mere fact that an investor has not received compensation does not in itself render an expropriation unlawful. An offer of compensation may have been made to the investor and, in such a case, the legality of the expropriation will depend on the terms of that offer. In order to decide whether an expropriation is lawful or not in the absence of payment of compensation, a tribunal must consider the facts of the case. Did the expropriation fail to meet any of the criteria of a legal expropriation, in this case: public purpose, due process, just compensation?</p>
Application of Provision to Facts	<p>The state's intent was to create mixed companies in which the government maintained control over natural resources (public purpose). The law that enacted this project was done legitimately (indeed the contract specifies that it in no way abridges the state's sovereign authority) and provided for a negotiation period in which companies could represent their interests and determine a fair price (due process). Claimants had this opportunity. The offer that was ultimately made to them does not seem to the panelists to be unreasonable or contrary to just compensation.</p>
<b>Indirect Expropriation (Decided in favour of: State )</b>	
<p>Article 6: Neither Contracting Party shall take measures to expropriate or nationalise investments of nationals of the other Contracting Party or take measures having an effect equivalent to nationalisation or expropriation with regard to such investments, unless the following conditions are complied with: a) the measures are taken in the public interest and under due process of law; b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party taking such measures may have given; c) the measures are taken against just compensation. Such compensation shall represent the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is earlier; it shall include interest at a normal commercial rate until the date of payment and, shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any convertible currency accepted by the claimants.</p>	
Definition of Provision	<p>The Tribunal considers that, under international law, a measure which does not have all the features of a formal expropriation may be equivalent to an expropriation if it gives rise to an effective deprivation of the investment as a whole. Such a deprivation requires either a total loss of the investment's value or a total loss of control by the investor of its investment, both of a permanent nature.</p>

Application of Provision to Facts	It is undisputed that those conditions are not fulfilled in the present case with respect to either the Cerro Negro Project or the La Ceiba Project. Accordingly, the pre-migration measures enumerated by the Claimants cannot be characterized as equivalent to an expropriation of the Claimants' investments.
<b>Importance/Relevance to Analysis/Lessons for Health-Medium</b>	
<p>That the Venezuelan state included in its contract that “all activities and operations conducted under it would not impose any obligations on the Respondent, nor restrict its sovereign powers” led the tribunal to rule that “in reserving its sovereign rights, the Respondent reserved inter alia its right to expropriate the Claimants' investments. There is no indication that Venezuela later committed not to exercise that right.” This may be a valuable inclusion in future contracts. Additionally the Tribunal found that as long as a state makes a reasonable monetary offer for expropriation, the claimant does not need to accept it for the expropriation to be legal.</p>	

<b>Case Title (Full):</b> Compania De Aguas Del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic	
<b>Case Title (Shorthand):</b> Vivendi v Argentina	
<b>Investor/Claimant:</b> Compania De Aguas Del Aconquija S.A. and Vivendi Universal S.A. (CGE)	<b>State/Respondent:</b> Argentine Republic (HIC)
<b>Initiator of Annulment I:</b> Investor	<b>Initiator of Annulment II:</b> State
<b>Treaty:</b> Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments	
<b>Court:</b> ICSID (ICSID Convention - Arbitration Rules)	<b>Duration:</b> 13 years and 5 months
<b>Number of Elite 15:</b> 1 <sup>st</sup> Award: 0; 1 <sup>st</sup> Annul: 1; 2 <sup>nd</sup> Award: 1; 2 <sup>nd</sup> Annul: 0	<b>Party Awarded:</b> 1 <sup>st</sup> Award: State; 1 <sup>st</sup> Annul: Investor; 2 <sup>nd</sup> Award: Investor 2 <sup>nd</sup> Annul: Investor
<b>Damages Requested:</b> 1 <sup>st</sup> Award: +USD 300 million; 2 <sup>nd</sup> Award: +USD 317 million	<b>Damages Awarded:</b> 1 <sup>st</sup> Award: Each to pay own legal fees and costs; 2 <sup>nd</sup> Award: USD 105 million + interest
<b>Issue</b>	From an early point in the CGE's performance under the Concession Contract, disputes arose between CGE and the authorities of Tucumán (Argentinean State). A renegotiation process was undertaken and concluded, after which point claimants assert that the government unilaterally changed the contract against the claimants' wishes.
<b>AWARD I</b>	
<b>Analysis not clearly divided by provision (Decided in favour of: State )</b>	
Methods for Testing Provision	The Tribunal resolves this case on the basis of the specific allegations on which the Claimants base their claims and their legal significance in light of the terms of the Concession Contract and the BIT, specifically looking at bad faith and obligation.
Application of Provision to Facts	Claimants do not assert that Tucumán was legally obligated to modify the Concession Contract. It is also undisputed that the Argentine Republic, fully supported by the Claimants, sought in a variety of ways to bring about agreement of the parties, including the so-called Rottenberg mission and political pressure on certain of the key political parties in Tucumán. The Tribunal does not find the basis for holding the Argentine Republic liable for actions of the Tucumán authorities that may be attributed to Respondent.  Because the Tribunal has determined that on the facts presented Claimants should first have challenged the actions of the Tucumán authorities in its administrative courts, any claim against the Argentine Republic could arise only if Claimants were denied access to the courts of Tucumán to pursue their remedy under Article 16.4 or if the Claimants were treated unfairly in those courts.
<b>ANNULMENT I</b>	
<b>Tribunal Manifestly Exceeded its Power (Decided in favour of: Investor )</b>	
The Committee concludes that the Tribunal exceeded its powers in the sense of Article 52(1)(b), in that the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims. Given the clear and serious implications of that decision for Claimants in terms of Article 8(2) of the BIT, and the surrounding	

<p>circumstances, the Committee can only conclude that that excess of powers was manifest. It accordingly annuls the decision of the Tribunal so far as concerns the entirety of the Tucumán claims.</p>	
<p><b>Serious Departure From Fundamental Rule of Procedure (Decided in favour of: State )</b></p>	
<p>From the record, it is evident that the parties had a full and fair opportunity to be heard at every stage of the proceedings. They had ample opportunity to consider and present written and oral submissions on the issues, and the oral hearing itself was meticulously conducted to enable each party to present its point of view. The Tribunal’s analysis of issues was clearly based on the materials presented by the parties and was in no sense <i>ultra petita</i>. For these reasons, the Committee finds no departure at all from any fundamental rule of procedure, let alone a serious departure.</p>	
<p><b>Award Failed to State Reasons (Decided in favour of: N/A )</b></p>	
<p>In view of the foregoing conclusion, it is unnecessary to consider the further ground of annulment relied on by Claimants</p>	
<p><b>AWARD II</b></p>	
<p><b>Fair and Equitable Treatment (Decided in favour of: Investor )</b></p>	
<p>Article 3: Each of the Contracting Parties undertakes to grant, within its territory and its maritime area, fair and equitable treatment according to the principles of international law to investments made by investors of the other Party, and to do it in such a way that the exercise of the right thus recognized is not obstructed de jure or de facto.</p>	
<p>Definition of Provision</p>	<p>FET is not limited to MST, it is an autonomous standard (i.e. independent of any other). FET includes but is not limited to denial of justice. It is an objective standard, meaning it doesn’t matter what the State’s intention was. Under the fair and equitable treatment standard, there is no doubt about a government’s obligation not to disparage and undercut a concession (a “do no harm” standard). The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment. First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. Second, the wording of Article 3 requires that the fair and equitable treatment conform to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty’s fair and equitable treatment standard. Third, the language of the provision suggests that one should also look to contemporary principles of international law, not only to principles from almost a century ago.</p>
<p>Methods for Testing Provision</p>	<p>Were the respondent’s acts responsible, proportionate and appropriate responses to contractual violations by the claimant?</p>
<p>Application of Provision to Facts</p>	<p>Claimants acted reasonably and professionally with regard to the alleged (public health related) contract issues, e.g. by informing the public about the problem and the risks; whereas state officials responded irresponsibly, unreasonably and disproportionately, by declaring danger without evidence.</p> <p>The Tribunal is in no doubt that even if the MST interpretation of the FET was adopted, the Respondent’s many acts and omissions cumulatively constituted an “international delinquency” (Neer) and so violate MST.</p>

<b>Indirect Expropriation (Decided in favour of: Investor )</b>	
Article 5(2): The Contracting Parties shall not adopt, directly or indirectly, measures of expropriation or nationalization or any other equivalent measure having an effect similar to dispossession, except for public purpose and provided that such measures are not discriminatory or contrary to a specific commitment. Such measures referred to above which could be adopted, shall allow the payment of a prompt and adequate compensation, the amount of which, computed on the basis of the actual value of the investments affected, shall be evaluated in relation to the normal economic situation, and prior to any threat of dispossession.	
Definition of Provision	Case law appears to draw a distinction between only partial deprivation of value (not an expropriation) and a complete or near complete deprivation of value (expropriation). Measures short of physical takings may amount to takings in that they result in the effective loss of management, use or control, or a significant depreciation of the value of the asset of a foreign investor. Takings tantamount to expropriation are those that result in a substantial loss of control or value of a foreign investment. Creeping expropriation may be defined as the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment. All of the above holds true even if the claimant still legally owns the property under question.
Methods for Testing Provision	The structure of Article 5(2) of the Treaty directs the Tribunal first to consider whether the challenged measures are expropriatory, and only then to ask whether they can comply with certain conditions, i.e. public purpose, non-discriminatory, specific commitments, et cetera. Where, as here, there has been no taking or dispossession, as such, and the question turns on whether there have been measures equivalent to expropriation which have had an effect similar to the dispossession of Claimants' rights and expectations, it is necessary to consider whether the challenged measures have or will (i) radically deprive Claimants of the economic use and enjoyment of its investment – Tecmed, (ii) effectively neutralise the benefit of Claimants' property – CME, (iii) deprive the owner of the benefit and economic use of its contractual rights – Santa Elena, (iv) render Claimants' property rights useless – Starrett Housing, or have a similar dispossessory effect.
Application of Provision to Facts	Here, as in Tecmed, Claimants were radically deprived of the economic use and enjoyment of their concessionary rights. The ad hoc Committee well understood the potential for such a finding when it stressed that: "the conduct complained of here was not more or less peripheral to a continuing successful enterprise. The Tucumán conduct (in conjunction with the acts and decisions of Claimants) had the effect of putting an end to the investment."
<b>Full Protection and Security (Decided in favour of: Investor )</b>	
Article 5(1): investments...shall enjoy...protection and full security in accordance with the principle of fair and equitable treatment referred to in Article 3 of this Agreement.	
Definition of Provision	Because the Treaty does not expressly limit it, the FPS standard should be interpreted to reach any act or measure which deprives an investor's investment of protection and full security, providing in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment.

Methods for Testing Provision	It seems to be intimately intertwined with FET, so they are taken together.
<b>ANNULMENT II</b>	
<b>Improper Constitution of Tribunal (Decided in favour of: Investor)</b>	
A basic issue is the compatibility of a directorship in a major international bank with the function of international arbitrator...these present or prospective conflicts must be handled and managed by the arbitrator, notably in terms of (a) investigation of any connections between the bank and the parties in the pending arbitrations; (b) disclosure of any such connections to the parties in such arbitrations if the arbitrator wishes to continue; and (c) notice to the parties of the appointment regardless of any connections so found so that they may be properly informed. In this case, the fact remains, however, that despite most serious shortcomings, Professor Kaufmann-Kohler's exercise of independent judgment under Article 14 of the ICSID Convention was in the circumstances not impaired. The Tribunal was thus functional and operated properly in respect of both parties.	
<b>Tribunal Manifestly Exceeded its Powers (Decided in favour of: Investor)</b>	
"Manifest" means "evident." Although an improper application of the applicable law is not directly mentioned as ground for annulment under Article 52(1)(b), it is generally accepted that it may amount to an annulment ground under that Article and this issue needs therefore further consideration. The ad hoc Committee considers that in the aspects under challenge, the Second Tribunal acted within its powers and that there was neither procedural impropriety in the manner in which the Tribunal narrowed the issues and chose to explain its findings nor insufficiency in its reasoning.	
<b>Serious Departure from Fundamental Rule of Procedure (Decided in favour of: Investor)</b>	
There was no procedural impropriety in the consideration of the arguments.	
<b>Award Failed to State Reasons (Decided in favour of: Investor)</b>	
Article 52(1)(e) is cast more in terms similar to an ordinary appeal, but, in the view of the ad hoc Committee, the standard is that the reasoning used by the Tribunal must have been plausible, that means adequate to understand how the Tribunal reached its decisions, it being given the benefit of the doubt if there is room for a difference of opinion in the matter. Only in this manner is, in the view of the ad hoc Committee, the nature and role of Article 52(1)(e) properly understood and safeguarded. Because interest falls within the discretion of the Tribunal, and there is no obvious indication that they abused this power, the absence of reasons does not lead to a violation of this provision.	
<b>Importance/Relevance to Analysis/Lessons for Health-High</b>	
State reactions (e.g. declaring a public health crisis officially or unofficially) regarding public health-related issues can be relevant to the case, specifically to FET claims. Alarmist actions by the government of the health implications of the water turbidity instances contributed to violation of FET in this case. The government's intention in developing a policy is not a justification for implementing it if it impacts on the investor.	

<b>Case Title (Full):</b> Waste Management, Inc. versus United Mexican States	
<b>Case Title (Shorthand):</b> Waste Management v. Mexico	
<b>Investor/Claimant:</b> Waste Management, Inc.	<b>State/Respondent:</b> Mexico (UMIC)
<b>Treaty:</b> North American Free Trade Agreement	
<b>Court:</b> ICSID (ICSID Additional Facility)	<b>Duration:</b> 3 years and 7 months
<b>Number of Elite 15:</b> 0	<b>Party Awarded:</b> Mexico
<b>Damages Requested:</b> >USD 36,630,000 + costs	<b>Damages Awarded:</b> Each Party shall bear its own costs and half of the costs and expenses of these proceedings.
<b>Issue</b>	A concession agreement was entered into between claimant and a municipality of Mexico (Acapulco). Claimant asserts that respondent violated the agreement by failing to wholly enforce the exclusivity of the contract, to pay for the services rendered, the alleged reneging on certain promises related to a loan by a state agency, and that higher orders of government denied the investor justice by failing to adequately enforce the contract.
<b>Minimum Standard of Treatment (Decided in favour of: State )</b>	
Article 1105(1): Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.	
NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001): Clause 2 of the Commission’s Notes of Interpretation provides as follows: (1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. (2) The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).	
Definition of Provision	Despite certain differences of emphasis, a general standard for Article 1105 is emerging. The minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.
Methods for Testing Provision	1. Were the actions attributable to the state? 2. Were the actions harmful to the investor? 3. Were the actions arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety?
Application of Provision to Facts	On the information before the Tribunal it is clear that the City failed in a number of respects to fulfill its contractual obligations to Claimant under the Concession Agreement (e.g. monthly payments). On the other hand there are a number of countervailing factors. The City did make at least some attempts to enforce the 1995

	<p>Ordinance. In the Tribunal’s view the evidence before it does not support the conclusion that the City acted in a wholly arbitrary way or in a way that was grossly unfair. It performed part of its contractual obligations, but it was in a situation of genuine difficulty (economic hardship). The non-payments therefore do not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem. The Mexican court decisions were not, either ex facie or on closer examination, evidently arbitrary, unjust or idiosyncratic. There is no trace of discrimination on account of the foreign ownership of Acaverde, and no evident failure of due process.</p>
<p><b>Indirect Expropriation (Decided in favour of: State )</b></p>	
<p>Article 1110(1): No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.</p>	
<p>Definition of Provision</p>	<p>It may be noted that Article 1110(1) distinguishes between direct or indirect expropriation on the one hand and measures tantamount to an expropriation on the other. An indirect expropriation is still a taking of property. By contrast where a measure tantamount to an expropriation is alleged, there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant. In the Tribunal’s view, an enterprise is not expropriated just because its debts are not paid or other contractual obligations towards it are breached. It is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise.</p> <p>The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts, as is envisaged by the use of the term “measure” in Article 1110(1).</p>
<p>Methods for Testing Provision</p>	<p>There was no outright repudiation of the transaction in the present case, and if the City entered into the Concession Agreement on the basis of an over-optimistic assessment of the possibilities, so did Acaverde. All the same, the normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach. Only where such access is legally or practically foreclosed that the breach could amount to an definitive denial of the right (i.e., the effective taking of the choice in action) and the protection of Article 1110 be called into play.</p>
<p>Application of Provision to Facts</p>	<p>Turning to the impact of the Mexican measures on Acaverde as a whole, the first point is that in the present case there was at no stage any expropriation of physical assets. The assets of Acaverde were sold off in an apparently orderly way at about the time it withdrew from operations under the Concession Agreement.</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health-Medium</b></p>	

A comprehensive definition of the MST standard. Tribunal drew a distinction between direct and indirect expropriation and measures tantamount to expropriation. Also highlights that the mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts, as is envisaged by the use of the term "measure" in Article 1110(1).

<b>Case Title (Full):</b> Yukos Universal Limited (Isle of Man), Hulley Enterprises Limited (Cyprus), Veteran Petroleum Limited (Cyprus) vs. The Russian Federation	
<b>Case Title (Shorthand):</b> Yukos v Russia	
<b>Investor/Claimant:</b> Hulley, Yukos, Veteran Petro	<b>State/Respondent:</b> The Russian Federation (HIC)
<b>Treaty:</b> Energy Charter Treaty of 1994	
<b>Court/Rules:</b> PCA (UNCITRAL Arbitration Rules 1976)	<b>Duration:</b> 9 years 5 months
<b>Number of Elite 15:</b> 2	<b>Party Awarded:</b> Investors
<b>Damages Requested:</b> No less than USD 114.174 billion	<b>Damages Awarded:</b> USD 39.9 billion + >50 million in costs
<b>Issue</b>	Russian measures taken against claimant companies including: criminal prosecutions, harassment of employees and related persons and entities; massive tax reassessments, VAT charges, fines, asset freezes and other measures to enforce tax reassessments; the forced sale of core oil production asset; and other measures culminating in bankruptcy, subsequent sale of remaining assets, and being struck off the register of companies.
<b>Fair and Equitable Treatment (Decided in favour of: Undecided)</b>	
Article 10(1): Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.	
<i>Application of Provision to Facts</i>	The Tribunal is unable to accept that the expectations of Yukos should have included the extremity of the actions which in the event were imposed upon it. Having found Respondent liable under international law for breach of Article 13 of the ECT, the Tribunal does not need to consider whether Respondent's actions are also in breach of Article 10 of the Treaty.
<b>Expropriation (Decided in favour of: Investor)</b>	
Article 13(1): Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.	
<i>Methods for Testing Provision</i>	In order to establish their claim for a breach of Article 13(1) ECT, Claimants must show that the measures complained of must be "measures having effect equivalent to nationalization or expropriation."

<p><i>Application of Provision to Facts</i></p>	<p>Condition A, was in the interest of the largest State-owned oil company, which took over the principal assets virtually cost-free, but that is not the same as saying that it was in the public interest of the economy, polity and population of the Russian Federation. Condition B, appropriation of its assets by Rosneft), when compared to the treatment of other Russian oil companies that also took advantage of investments in low-tax jurisdictions, may well have been discriminatory, a question that was inconclusively argued between the Parties and need not be and has not been decided by this Tribunal. Condition C, Yukos was subjected to processes of law, but the Tribunal does not accept that the effective expropriation of Yukos was “carried out under due process of law” for multiple reasons. Condition D, expropriation of Yukos was not “accompanied by the payment of prompt, adequate and effective compensation”, or, in point of fact, any compensation whatsoever. Respondent has not explicitly expropriated Yukos or the holdings of its shareholders, but the measures that Respondent has taken in respect of Yukos, in the view of the Tribunal have had an effect “equivalent to nationalization or expropriation”. The four conditions specified in Article 13 (1) of the ECT do not qualify that conclusion.</p>
<p><b>Importance/Relevance to Analysis/Lessons for Health-Low</b></p>	
<p>Case turned on an extensive set of details, and legitimate investor challenge, no relevant lessons for health policy.</p>	

## Appendix G: Lessons for Health Policy from Tribunal Awards Included in Chapter 7

### Analysis

CASE	RATING	DESCRIPTION
ACHMEA V. SLOVAKIA	HIGH	Remuneration is required if privatisation of health insurance services is reversed. Many countries privatised health insurance services under GATS agreement, unlikely to be protected from exemptions as most countries allow some commercial or competitive provision of virtually all public services.
AES V HUNGARY	HIGH	Health policies, particularly those aimed at tobacco, alcohol, and diet, are highly likely to deprive investors of at least part of the value of their investment. However that is not sufficient to find indirect expropriation, they must be deprived, “in whole or significant part, of the property in or effective control of its investment; or for its investment to be deprived, in whole or significant part, of its value.” The finding that because investors continued to receive substantial revenues from their investments it could not amount to indirect expropriation is an important consideration to deter regulatory chill of these products. Important case in establishing the right to regulate, stating that an FPS provisions does not protect against a state’s right to “legislate or regulate in a manner which may negatively affect a claimant’s investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals.” The case also provides guidance for what can be claimed as unreasonable measures, policies that are neither rational nor reasonable. “A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state’s public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.” Finally, this case supports regulation for political reasons: “In fact, it is normal and common that a public policy matter becomes a political issue; that is the arena where such matters are discussed and made public. Having concluded that Hungary was principally motivated by the politics surrounding so-called luxury profits, the tribunal nevertheless is of the view that it is a perfectly valid and rational policy objective for a government to address luxury profits.”
ALPHA V UKRAINE	MEDIUM	Although a reference to international law was not made in the treaty the tribunal felt that this was commonplace enough to assume that, by not stating differently, the parties did not intend to deviate from this. It is important in treaty design to think about what is not being said that may be inferred by a tribunal, make exclusions such as these explicit. Indirect expropriation only occurs when there is a substantial deprivation of value, that is effectively permanent, and that was the result of government action. Health policies that reduce value without substantially depriving should not be threatened by indirect expropriation claims.
APOTEX V USA	HIGH	Affirms that while the state’s conduct must be measured against international law, it has a large regulatory space, especially with regard to matters of public

		interest such as morals and health, and that the tribunal is not entitled to second-guess government policy.
AZURIX V. ARGENTINA	MEDIUM	Tribunal interpreted the FET standard as setting a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law. In regards to indirect expropriation the tribunal stated that the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim. High standard of deprivation generally required to find indirect expropriation led the tribunal to find that compensation was not owed, but an open comment for future tribunals. That the tribunal referred to an expansive understanding on the FPS provision in the Occidental case, a treaty which used the same language, to justify their own relatively 'less' expansive interpretation, shows that single cases can be used by a tribunal to justify expansive interpretations of provisions in favour of the investor.
BOSH V UKRAINE	MEDIUM	Case provides set of criteria that may provide a high threshold for breaching FET. Distinction between a party and a state enterprise can avoid the umbrella clause applying to contracts entered into by entities 'owned, or controlled' by the state, such as a university in this case. However this could potentially apply to hospitals in future cases.
CHEMTURA V CANADA	HIGH	Deferent to health policy space such that the tribunal concludes that a valid exercise of police powers to protect public health and the environment cannot be expropriation. Add that it is not the tribunal's task to assess whether certain uses of lindane are dangerous, the role of the tribunal is not to second guess domestic regulators. Also highlights the importance of international commitments (such as the Aarhus Protocol in this case), for providing legitimacy and justification for conducting reviews, can support a decision that such a review was not taken in bad faith.
CMS V ARGENTINA	LOW	An example of a more comprehensive interpretation of FET by the tribunal, i.e., providing an expectation of stability and predictability. May reinforce the need to explore public health carve-outs from legitimate expectations of a stable and predictable environment in FET provisions.
DEUTSCHE BANK V SRI LANKA	LOW	Deprivation does not need to be economic in nature, can have interference of rights or economic loss. Utilised a proportionality test, whether the measures taken against the investor were justified by a public purpose, which can be deferential to policy space and sovereignty.
EDF V. ARGENTINA	MEDIUM	Example of a case where the MFN clause was used to bring in more "favourable" provisions for investors contained in agreements states have signed with third party countries, specifically here to include an umbrella clause and an unreasonable measures provision. Demonstrates that an MFN clause needs to be constructed carefully to avoid this; otherwise addressing the language of provisions in new treaties will be inadequate if other, more favourable, treaty language can be incorporated in place of it.

EL PASO V ARGENTINA	MEDIUM	The tribunal concluded that the state can treat economic actors in different sectors differently as long as the differential treatment applies equally to domestic and foreign investors. Although the claimant argued that the primarily domestically owned banking system enjoyed an advantage over the primarily foreign-owned oil and gas sector, the facts showed that the pesification also disadvantaged the banking sector. Also, introduces the idea of that creeping FET, acts over time that accumulate to produce similar effects, may violate FET, and thus may need to consider health policies as a whole. Finally, argues, unlike in other cases, that an investment is not expropriated simply because the investor has lost economic benefits, i.e. profits. Rather, the loss of economic benefits is only evidence of expropriation if it results from a loss of economic rights due to a State's action.
FRANCK V MOLDOVA	MEDIUM	The tribunal was clear that legitimate expectations require an exact identification of the origin of the expectation alleged; that not every expectation of an investor is protected, only those recognised and protected in international law; and even made reference to the tribunal in <i>Saluka v Czech Republic</i> that they recognise "the host State's legitimate right subsequently to regulate domestic matters in the public interest" (para. 305). The tribunal noted that "a state cannot rely on its internal law to justify an internationally wrongful act" (para. 547c). That is, even if a state action is legal according to domestic law this fact cannot be used to justify defaulting on international responsibilities, specifically the legitimate expectations protected by FET. Case where MFN clause was used to incorporate provisions from third party agreements, pending that they are more favourable.
FUCHS V GEORGIA	LOW	The tribunal appears to offer a relatively comprehensive interpretation of the FET, not a violation of the investor's "legitimate" expectations but a violation of the investor's "reasonable expectations."
GEA V UKRAINE	LOW	Legitimate expectations must be based on express promises of the state (e.g. by law or a relevantly empowered state official). As long as courts of law are provided to investor, a very significant error must be made to constitute denial of justice.
GEMPLUS V MEXICO	NA	No relevant lessons for health policy.
GOLD RESERVE V VENEZUELA	MEDIUM	The tribunal acknowledged the state responsibility to protect its people specifically that a state has a responsibility to preserve the environment and protect local populations living in the area where mining activities are conducted, but cannot fail to respect due process while doing so.
GRAND RIVER V USA	LOW	While this case regards tobacco, it is addressing the rights of indigenous peoples to consultation. The tribunal and the state acknowledged that the United States federal government should have met their obligation under customary international law to consult with indigenous communities on legislative and administrative measures affecting them; however the argument that NAFTA entitled an indigenous investor to be directly consulted before the state took any action affecting his investment was found to be unpersuasive

		and unsubstantiated. Given that the investment remained under the investor's ownership and control and apparently prospered and grew throughout the period led the tribunal to dismiss the case. That tobacco was the product was largely immaterial to the case and is unlikely to have implications for future cases regarding tobacco products.
GUARACACHI V BOLIVIA	MEDIUM	Upholds a higher threshold for FET, that in the absence of a prior commitment by the state, the investor cannot hold a legitimate expectation that the state will not exercise its power to modify the legal framework applicable to the investment. A breach of the FET standard requires drastic, unreasonable, unjustified or discriminatory measures, and that the tribunal may not replace the state in its regulatory task.
GUSTAV V GHANA	LOW	This case is an example of a failed effort to “repackage” contractual and commercial claims into investment treaty claims through a creative interpretation of the umbrella clause.
IMPREGILO V ARGENTINA	MEDIUM	Suggests that the ‘necessity’ defence for a policy may not hold if the state contributed to the conditions behind the crisis. Case highlights considerable dissent within the system, dissenting documents presented by Brigitte Stern and Charles Bower in this case, both Elite 15 arbitrators, demonstrate a pro-state sovereignty view, in the case of the former, and a pro-expansive investor rights stance in the case of the latter.
LG&E V ARGENTINA	MEDIUM	The tribunal implemented the proportionality test for indirect expropriation, a procedure that is favourable for health policy space as it examines the measure against the public interest of a policy.
METALCLAD V MEXICO	HIGH	Case shows how tribunals may create expansive interpretations of provisions, including equating the MST in NAFTA with the broader FET provision and adding in obligations on transparency found in another section of the agreement. Also created a legal obligation from statements made by government officials to jurisdictions over which they have no legal influence (i.e. statements of federal government officials creating legal obligations on municipalities). The tribunal ruled that the municipality was responding to social and environmental concerns related to the site’s intended use as a hazardous waste facility, which according to domestic environmental law, including all matters related to hazardous waste, falls under federal jurisdiction, and because the federal environmental agency had approved the project, there was no legal merit for a municipal permit to be based on environmental concerns.
MICULA V ROMANIA	LOW	Tribunal supports the state’s right to change its legislation, being aware that it must take into consideration that: (i) an investor’s legitimate expectations must be protected; (ii) the state’s conduct must be substantively proper (e.g., not arbitrary or discriminatory); and (iii) the state’s conduct must be procedurally proper (e.g., in compliance with due process and fair administration).

MOBIL V VENEZUELA	MEDIUM That the Venezuelan state included in its contract that “all activities and operations conducted under it would not impose any obligations on the Respondent, nor restrict its sovereign powers” led the tribunal to rule that “in reserving its sovereign rights, the Respondent reserved inter alia its right to expropriate the Claimants’ investments. There is no indication that Venezuela later committed not to exercise that right.” This may be a valuable inclusion in future contracts. Additionally the Tribunal found that as long as a state makes a reasonable monetary offer for expropriation, the claimant does not need to accept it for the expropriation to be legal.
OCCIDENTAL V ECUADOR	MEDIUM Incorporates tests of proportionality into the FET standard; state must be able to demonstrate (i) that sufficiently serious harm was caused by the offender; and/or (ii) that there had been a flagrant or persistent breach of the relevant contract/law, sufficient to warrant the sanction imposed; and/or (iii) that for reasons of deterrence and good governance it is appropriate that a significant penalty be imposed, even though the harm suffered in the particular instance may not have been serious.
POPE V CANADA	HIGH This case made important contributions to the interpretation of both FET and expropriation. In the case of FET it chose to broaden the scope and lower the bar for a breach, citing the evolution of customary international law and BITs and that NAFTA parties would not have wanted to provide better protection for third party investors relative to NAFTA investors given their close relationship. Additionally, in regards to expropriation, while the tribunal did not believe that there should be a blanket exception for regulatory measures, they provided a means for deciding whether bona fide regulations required compensation based on the level of interference. The criteria from this case is widely referenced by tribunals.
RDC V GUATEMALA	MEDIUM This case reflects the evolution of the MST standard. The tribunal introduces criteria outside of the treaty text in deciding on the violation, stating that developments in international law needed to be considered, including developments after the Neer standard.
ROMPETROL V ROMANIA	MEDIUM Tribunal adds to the development of ‘creeping FET’ that this would only occur where the actions in question disclosed some link of underlying pattern or purpose between them; a mere scattered collection of disjointed harms would not be enough. Would need to assess whether public health actions would be considered linked or scattered. Also, a lesson from treaty text that the full protection and security provision is expressly qualified as ‘physical’.
SD MEYERS V CANADA	HIGH Case has highlights for public health, the tribunal suggested that regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under indirect expropriation, and that tribunals do not have an open-ended mandate to second-guess government decision-making when determining a breach of the minimum standard of treatment. Case also deals with a set of international health regulations. PCB wastes are covered by the Basel Convention on the Transboundary Movement of Hazardous Wastes and subject to that agreement's preference for domestic treatment. Debate exists over the tribunal’s examination and dismissal of the Basel Convention. While

	<p>it promotes domestic treatment Article 11 of the Basel Convention allows regional agreements for cross-border movement, and NAFTA while stating that the Basel Convention would have priority if ratified by NAFTA countries, the US never ratified. Also, NAFTA contained language that where a party has a choice among equally effective and reasonably available alternatives for complying....with a Basel Convention obligation, it is obliged to choose the alternative that is ...least inconsistent... with NAFTA. May contain lessons for new agreements to list international health regulations that will have priority over the agreement in the case of a incongruity, also may need to restrict to if majority of members ratify, e.g. the US has also not ratified the FCTC.</p>
<p>SALUKA V CEZCH REPUBLIC</p>	<p>HIGH Tribunal developed a very clear, step-by-step procedure for addressing FET that takes significant account of a state's police powers. Added that if protection of investment is exaggerated, then it may discourage economic activity, which would be counter to the purpose of the agreement. Also concluded that it is now established in international law that states are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare. Also clarified that the "full protection and security" standard applies essentially when the foreign investment has been affected by civil strife and physical violence. The standard does not imply strict liability however the state is obligated to act with due diligence (i.e. to take reasonable actions to protect the physical integrity of the investor's assets). While the tribunal ultimately found in favour of the investor for a breach of the FET provision by the Czech Republic, the tribunal carved out considerable space for public health policy and the execution of state police power throughout the award.</p>
<p>SEMPRA V ARGENTINA</p>	<p>MEDIUM Discusses evolution of FET standard and sets high threshold for direct and indirect expropriation. Important for understanding of necessity in international investment law. Case is the only one reviewed that was originally found in favour of the investor, but later annulled because the tribunal failed to apply the law (not misapplication though, would not have resulted in an annulment). The decision to annul based on the "necessity" clause—a standard provision in bilateral investment treaties that exempts state actions in extraordinary circumstances from the protection of the treaties, lent further support to a state's defense of necessity in times of economic and political turmoil, and suggests that the scope of annulment committee review may be more expansive than previously thought. Customary international law provides a "far more rigorous standard" than Argentina negotiated for in its BIT. Yet both tribunals reasoned that because the BIT does not define necessity and the conditions for its operation, they must rely on customary international law for the elements of Article XI. Applying these elements, both tribunals held that Argentina could not invoke the necessity defense. According to the tribunals, the crisis did not qualify as one involving an essential state interest, the state's response was not the only one available, and the state substantially contributed to the situation it faced. According to the annulment committee in Sempra, the tribunal's mistake was equating customary international law with Article XI. The two may share similar language, but the committee found that</p>

		customary international law is not a guide to Article XI's interpretation, much less a proxy for its express terms.
SPYRIDON V ROMANIA	HIGH	Investor challenged the implementation of food and safety policies. The tribunal noted that these are commonplace in many countries and promote an important public safety purpose, namely public health. Suspending or revoking operating permits may be regarded as a reasonable and appropriate measure to penalize serious irregularities to the food and safety regulations. The record shows that the state authorities had legitimate concerns about the fulfillment of investors' obligations in regard to the food and safety regulations. Investor did not establish any procedural or substantive irregularities in the inspections conducted by the Food Safety department. In the tribunal's view, investor may not have expected that the state would refrain from adopting regulations in the public interest, nor may the investor have expected that the Romanian authorities would refrain from implementing those regulations. Rational policy implemented in a non-discriminatory fashion for a public health purpose has been protected by investment tribunals.
SWISSLION V MACEDONIA	NA	No relevant lessons for health policy.
TECMED V MEXICO	HIGH	Offers a broad interpretation of FET, which places a responsibility on governments to practice transparency and consistency in developing their regulations. Tribunal's application of the "proportionality" test for indirect expropriation was the first time such a test had been used in modern investment treaty arbitration. The proportionality test may enable tribunals to strike a better balance between investor rights and domestic environmental, health or other concerns when interpreting and applying BIT provisions. Case also illustrates that non-discriminatory measures taken by states to respond to public concerns about threats to health and environmental protection may constitute expropriations and/or violate the FET standard. Mexico contended that its decision did not amount to an expropriation because it was a legitimate regulatory action taken by a government agency consistent with its discretionary authority and in compliance with its police power. With respect to the proportionality analysis, the tribunal concluded that the facts of the case and justifications offered for the agency's decision indicated that Tecmed's breaches of the permit's terms and environmental regulations were generally minor and did not, even according to relevant Mexican authorities, "compromise public health, [or] impair ecological balance or protection of the environment" (para. 124; see also paras. 127, 130-32). Finding that the opposition did not rise to the level of an "emergency situation," and that the opposition that did exist was due largely to the location of the Landfill rather than to wrongful conduct by Tecmed, the Tribunal held Mexico's "socio-political" interests were likewise not sufficiently weighty to support the Environmental Protection Agency's decision (paras. 139, 142, 147).
TOTO V LEBANON	LOW	Tribunal set a high threshold for violations of FET and found in state favour. Few lessons for health policy.

TULIP V TURKEY	NA	No relevant lessons for health policy.
UNGLAUBE V COSTA RICA	HIGH	While the Saluka case may have found for the investor on FET, which turned on the details of the case, their protection of policy space is used by tribunals, such as here, that have found in favour of the state on this provision. This tribunal uses a high threshold for violating FET and establishes that legitimate expectations do not in and of themselves satisfy the requirements of international investment law, and that investors must demonstrate reliance on specific and unambiguous state conduct, through definitive, unambiguous and repeated assurances, and targeted at a specific person or identifiable group. This is a high threshold for proving legitimate expectations. Tribunal required deference to the domestic right to regulate when a valid public policy exists particularly for the protection of public health, safety, morals or welfare, as well as other functions related to taxation and police powers of states within limits. Although in addressing indirect expropriation the tribunal, having established the measures were for a bona fide public purpose, pursuant to law, and in a manner which is neither arbitrary nor discriminatory, still required compensation.
VANNESSA V VENEZUELA	LOW	Tribunal adds that in assessing FET and FPS it is not a question of whether the host state legal system is performing as efficiently as it ideally could, but whether it is performing so badly as to violate treaty obligations to accord fair and equitable treatment and full protection and security. Moreover that FPS cannot be viewed as an insurance against all and every risk.
VIVENDI V ARGENTINA	HIGH	State reactions (e.g. declaring a public health crisis officially or unofficially) regarding public health-related issues can be relevant to the case, specifically to FET claims. Alarmist actions by the government of the health implications of the water turbidity instances contributed to violation of FET in this case. The government's intention in developing a policy is not a justification for implementing it if it impacts on the investor.
WASTE MANAGEMENT V MEXICO	MEDIUM	A comprehensive definition of the MST standard. Also highlights that the mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts, as is envisaged by the use of the term "measure" in Article 1110(1).
YUKOS V RUSSIA	NA	Case turned on an extensive set of details, and legitimate investor challenge, no relevant lessons for health policy.

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