Court File No.T-153-13

FEDERAL COURT

BETWEEN:

HUPACASATH FIRST NATION

APPLICANT

- and -

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

RESPONDENT

APPLICATION UNDER THE *FEDERAL COURTS ACT*, R.S.C. 1985, c. F-7, s. 18.1

CERTIFICATE CONCERNING CODE OF CONDUCT FOR EXPERT WITNESSES

I, Gus Van Harten, having been named as an expert witness by the applicant, Hupacasath First Nation, certify that I have read the Code of Conduct for Expert Witnesses set out in the schedule to the *Federal Courts Rules* (and attached hereto) and agree to be bound by it.

Date: February 13, 2013

Gus Van Harten
Osgood Hall Law School
York University
4700 Keele Street
Toronto, ON M3J 1P3

CODE OF CONDUCT FOR EXPERT WITNESSES

GENERAL DUTY TO THE COURT

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

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

EXPERTS' REPORTS

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

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

- (*k*) particulars of any aspect of the expert's relationship with a party to the proceeding or the subject matter of his or her proposed evidence that might affect his or her duty to the Court.

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

EXPERT CONFERENCES

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

- (*a*) must exercise independent, impartial and objective judgment on the issues addressed; and

- (*b*) must endeavour to clarify with the other expert witness the points on which they agree and the points on which their views differ.

Court File No.T-153-13

FEDERAL COURT

BETWEEN:

HUPACASATH FIRST NATION

APPLICANT

- and -

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

RESPONDENT

APPLICATION UNDER THE *FEDERAL COURTS ACT*, R.S.C. 1985, c. F-7, s. 18.1

AFFIDAVIT #1 of GUS VAN HARTEN
SWORN FEBRUARY 13, 2013

I, Gus Van Harten, of 4700 Keele Street, Toronto, Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am a law professor at Osgoode Hall Law School at York University and as such have personal knowledge of the facts and matters hereinafter deposed to save and except where the same are stated to be based upon information and belief and where so stated I verily believe the same to be true.

2. Attached to this Affidavit and marked as Exhibit "A" is a true copy of a letter from Mark Underhill, counsel for the Applicant, dated February 7, 2013.

3. Attached to this Affidavit and marked as Exhibit "B" is a true copy of my current curriculum vitae.

4. Attached to this Affidavit and marked as Exhibit "C" is a true copy of my opinion report with respect to this matter.

5. Attached to this Affidavit and marked as Exhibit "D" is a true copy of the list of documents relied upon in preparing my opinion report.

SWORN BEFORE ME at the City of Toronto,
in the Province of Ontario,
this 13th day of February, 2013.

A Commissioner for taking Affidavits within the Province of Ontario

James Stribopoulos
Barrister & Solicitor
Law Society of Upper Canada
38039J
Tel. 416.363-2700

Gus Van Harten

THIS IS EXHIBIT "A" REFERRED TO IN THE AFFIDAVIT OF GUS VAN HARTEN SWORN BEFORE ME AT THE CITY OF TORONTO, ONTARIO THIS 13th DAY OF FEBRUARY, 2013.

A COMMISSIONER FOR THE TAKING OF AFFIDAVITS IN ONTARIO.

Reply to: Mark G. Underhill (Vancouver Office)
munderhill@ubplaw.ca
Our File: 10410

UNDERHILL, BOIES PARKER
LAW CORPORATION INC.
BARRISTERS

MARK G. UNDERHILL
CATHERINE J. BOIES PARKER
ROBIN J. GAGE

WEBSITE: www.ubplaw.ca

VIA EMAIL: GVanHarten@osgoode.yorku.ca

February 7, 2013

Mr. Gus Van Harten
c/o Osgood Hall Law School
York University
4700 Keele Street
Toronto, ON M3J 1P3

Dear Mr. Van Harten:

Re: Canada China Foreign Investment Promotion and Protection Agreement
Request for Expert Report

Further to our recent discussions in respect of the above-captioned matter, this is to confirm that we would like you to provide your expert opinion with respect to the questions set out below.

In preparing your report, please be mindful of the obligations and requirements imposed under Rule 52.2 and the Code of Conduct for Expert Witnesses of the Federal Court of Canada, copies of which are enclosed with this letter. We will forward a Certificate to you under separate cover. If you have any further questions about your responsibilities under the Rules, please do not hesitate to contact us.

1. How does the Canada-China Foreign Investment Promotion and Protection Agreement ("FIPPA") differ from other international treaties to which Canada is a party?

2. What obligations does FIPPA impose on Canada?

3. How will FIPPA apply to federal and provincial government action and legislation, and domestic court decisions which affect land and resources subject to aboriginal or treaty rights claims?

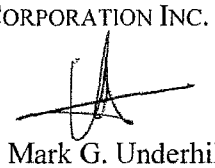
4. Will principles of domestic Canadian law, including the constitutional obligations imposed on government under s. 35 of the Constitution Act, 1982, be taken into account by arbitrators applying FIPPA?

5. Could action taken or legislation passed by First Nations Governments potentially put Canada out of compliance with FIPPA?

Thank you for your assistance in this matter.

Yours sincerely,

UNDERHILL, BOIES PARKER
LAW CORPORATION INC.

Per: 
Mark G. Underhill

MGU/ca

cc: clients

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

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

CODE OF CONDUCT FOR EXPERT WITNESSES

GENERAL DUTY TO THE COURT

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

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

EXPERTS' REPORTS

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

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

EXPERT CONFERENCES

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

- (*a*) must exercise independent, impartial and objective judgment on the issues addressed; and

- (*b*) must endeavour to clarify with the other expert witness the points on which they agree and the points on which their views differ.

GUS VAN HARTEN

Associate Professor
Osgoode Hall Law School, York University
4700 Keele Street, Toronto, Canada M3J 1P3
1 416 650 8419 (tel); 1 416 736 5736 (fax)
gvanharten@osgoode.yorku.ca

PRIMARY SPECIALIZATIONS

International Investment Law, Administrative Law, Public Inquiries.

DEGREES AND QUALIFICATIONS

2002-2006	PhD in Law, London School of Economics & Political Science Doctoral thesis: "The Emerging System of International Investment Arbitration"; supervised by M Loughlin and D Cass.
2004-present	Member of the Bar of Ontario
1994-1999	Masters in Environmental Studies, York University, Toronto
1995-1999	Bachelor of Laws, Osgoode Hall Law School
1990-1994	Bachelor of Arts (Hon), University of Guelph

ACADEMIC APPOINTMENTS

July 2009-present	**Associate Professor** Osgoode Hall Law School
Jan 2008-June 2008	**Assistant Professor** Osgoode Hall Law School
Sept 2005-Dec 2007	**Lecturer in Law** London School of Economics & Political Science

THIS IS EXHIBIT "B" REFERRED TO IN THE AFFIDAVIT OF GUS VAN HARTEN SWORN BEFORE ME AT THE CITY OF TORONTO, ONTARIO THIS 13th DAY OF FEBRUARY, 2013.

A COMMISSIONER FOR THE TAKING OF AFFIDAVITS IN ONTARIO.

PROFESSIONAL EXPERIENCE

June 2004-January 2005	**Legal Advisor to the Commissioner** Arar Inquiry, Ottawa
June 2000-May 2002	**Executive Assistant to the Commissioner** Walkerton Inquiry, Toronto and Walkerton
August 1999-July 2000	**Law Clerk to the Justices** Court of Appeal for Ontario

PUBLICATIONS (* indicates major contributions)**

Books

***Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) (214 pages) (peer reviewed).

Published reviews of the book:
J.E. Alvarez (2008) 102 *American Journal of International Law* 909.
D.S. Meyers (2008) 31 *Houston Journal of International Law* 47.
A. Newcombe (2008) 71 *Modern Law Review* 147.
S.J. Shackleford (2008) 44 *Stanford Journal of International Law* 205.
C. Wittayawarakul (2008) 5 *Manchester Journal of International Economic Law* 119.

Casebooks

***with Gerald Heckman and David Mullan (50% Van Harten, 30% Heckman, 20% Mullan), *Administrative Law – Cases and Materials*, 6th edn (Emond Montgomery, 2010) (approx. 1400 pages) (non-peer reviewed).

Articles in Law Journals, Reviews, and Yearbooks

"Arbitrator Behaviour in Asymmetrical Adjudication" Osgoode Hall Law Journal (forthcoming 2012) (67 pages) (peer reviewed).

"Reply to Franck, Garbin, and Perkins" *Columbia Yearbook on Investment Law 2010-2011* (2011) (21 pages) (peer reviewed).

***"The Use of Quantitative Methods to Examine Possible Bias in Investment Arbitration" *Columbia Yearbook on Investment Law 2010-2011* (2011) (35 pages) (peer reviewed).

"TWAIL and the Dabhol Arbitration" *Trade, Law and Development* (forthcoming 2011) (28 pages) (peer reviewed).

"Investment Rules and the Denial of Change" (2010) 60 *University of Toronto Law Journal* 893 (12 pages) (non-peer reviewed).

"Five Justifications for Investment Treaties: A Critical Discussion" (2010) 2(1) *Trade, Law and Development* 19 (40 pages) (peer reviewed).

***"Weaknesses of Adjudication in the Face of Secret Evidence" (2009) 13 *International Journal of Evidence and Proof* 1 (30 pages) (peer reviewed).

"*Charkaoui* and Secret Evidence" (2008) 42 *Supreme Court Law Review* 251 (28 pages) (non-peer reviewed).

***"The Public-Private Distinction in the International Arbitration of Individual Claims Against the State" (2007) 56 *International & Comparative Law Quarterly* 371 (24 pages) (peer reviewed).

with Martin Loughlin (80% Van Harten/ 20% Loughlin), "Investment Treaty Arbitration as a Species of Global Administrative Law" (2006) 17 *European Journal of International Law* 121 (30 pages) (peer reviewed).

***"Private Authority and Transnational Governance: The Contours of the International System of Investor Protection" (2005) 12 *Review of International Political Economy* 600 (24 pages) (peer reviewed).

"Judicial Supervision of NAFTA Chapter 11 Tribunals" (2005) 21 *Arbitration International* 493 (15 pages) (non-peer reviewed).

"NAFTA Investor-State Dispute Resolution: *Pope & Talbot* and the Minimum Standard of Treatment" (2003) 9 *International Trade Law and Regulation* 139 (6 pages) (non-peer reviewed).

***"Truth Before Punishment: A Defence of Public Inquiries" (2003) 29 *Queen's Law Journal* 242 (41 pages) (peer reviewed).

"Guatemala's Peace Accords in a Free Trade Area of the Americas" (2000) 3 *Yale Human Rights and Development Law Journal* 113 (non-peer reviewed).

Book Chapters

"Public Inquiries: Independence is the key" in Sasha Bagley and Laverne Jacobs (eds.) *Inquisitorial Processes in Administrative Regimes: Global Perspectives* (forthcoming Ashgate 2013) (23 pages) (peer reviewed).

"Investment Treaties as a Constraining Framework" in J. Christiensen, S. Khan, and E. Paus (eds.) *Markets as Means or Master: Towards New Developmentalism* (Routledge, 2010) (28 pages) (peer reviewed).

***"Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law" in T. Wälde and S. Schill (eds.) *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) (28 pages) (peer reviewed).

"Perceived Bias in Investment Treaty Arbitration" in M. Waibel *et al* (eds.) *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) (peer reviewed).

***"Investment Treaty Arbitration and the Policy Implications for Capital-Importing Countries" in D. Sanchez-Ancochea and K. Shadlen (eds.) *The Political Economy of Hemispheric Integration* (Palgrave Macmillan, 2008) (34 pages) (peer reviewed).

Other Papers and Commentary

Numerous short articles and interviews on the Canada-China Foreign Investment Promotion and Protection Agreement across various media.

"The (Lack of) Women Arbitrators in Investment Treaty Arbitration" (February 2012) *Columbia FDI Perspectives* (3 pages) (peer reviewed).

"Targeted reform of investor-state arbitration: Toward an independent rules-based system of trade and investment" Macdonald Laurier Institute for Public Policy (forthcoming 2011) (14 pages) (peer reviewed).

"Contributions and Limitations of Empirical Research on Independence and Impartiality in International Investment Arbitration" *Onati Socio-Legal Paper Series* (2011) (46 pages) (peer reviewed).

"Policy Linkages of Investor-State Dispute Settlement" Commonwealth Trade Hot Topics, Issue 82 (February 2011) (5 pages).

"Fairness and independence in investment arbitration: A critique of 'Development and Outcomes in Investment Treaty Arbitration'" 1(2) *ITN Quarterly* 7 (December 2010) (18 pages).

with David Schneiderman, "Comment on Draft Text of the Canada-EU CETA Investment Chapter" (November 2010).

"Academic Experts Call for Reform of Investment Treaties" (October 2010), guest blog on triplecrisis.com.

"Thinking twice about a gold rush: *Pacific Rim v El Salvador*" (May 2010) *Columbia FDI Perspectives* (3 pages) (peer reviewed).

Sun TV interview on the judicial review of the Minister's decision to bar George Galloway from entry to Canada, April 26, 2010.

"Reforming the NAFTA Investment Regime" in *The Future of North American Trade Policy: Lessons from NAFTA*, Pardee Center Task Force Report (November 2009) (10 pages) (non-peer reviewed).

Written comment to the U.S. State Department Public Hearing on Bilateral Investment Treaty Reform (July 2009) (22 pages) (non-peer-reviewed).

Interviews, *American Lawyer* (April 2009, May 2009, and April 2010).

On-line interview, *Investment Treaty News* (February 2009).

"Counterpoint: Danny Chavez" *Financial Post* (8 January 2009).

***"Policy Impacts of Investment Agreements for Andean States", Research Report for Oxfam Spain (September 2008) (54 pages) (non-peer reviewed).

"A Case for an International Investment Court", Working Paper No. 22/08 for the Society of International Economic Law Inaugural Conference, Geneva, July 15-17, 2008, available on SSRN: 1153432 (45 pages) (non-peer reviewed).

***"Investment Provisions in Economic Partnership Agreements," Report for Oxfam International (2008) (30 pages).

"*Dunsmuir* and the quixotic quest for certainty", web comment to thecourt.ca (27 March 2008) (available at: www.thecourt.ca/2008/03/27/dunsmuir-and-the-quixotic-quest-for-certainty/ (4 pages).

"Chapter 11 and the *Francovich* Doctrine: Comparing State Liability Under NAFTA and EC Law," Cahier de recherche 03-04, Centre Études internationales et Mondialisation, Université du Québec à Montréal, 2003 (18 pages).

"Potential Implications of Future WTO Negotiations for North American Broadcasting Policies: An Overview," Discussion paper prepared for the North American National Broadcasters Association (NANBA), 1998 (40 pages).

"Indigenous Rights to Land and Natural Resources," Research paper prepared in Spanish and English with support from the Canadian International Development Agency and the Latin American Faculty of Social Sciences (FLACSO), Guatemala, 1997 (24 pages) (in English and Spanish).

Presentations (since 2006)

"Keynote Speech: Reform Needs of the International Investment Regime", Presentation to a Roundtable Discussion with Members of the German Bundestag, Berlin, 24 May 2012.

"Public Inquiries: Independence is the Key", Presentation to the University of Windsor Faculty of Law conference on Inquisitorial Processes in Administrative Regimes: Global Perspectives, Windsor, May 27, 2011.

Presentation to the Canadian Environmental Law Association Briefing on the Canada-EU Trade Agreement (CETA), Toronto, May 20, 2011.

"Independence and Impartiality", Presentation to the SOAR/ OPD Certificate Program in Administrative Adjudication, Toronto, May 18, 2011.

Discussant for keynote address by Professor Jan Dalhuisen, GLSA conference on Transnational Law and a New Order of Global Governance, Toronto, May 9, 2011.

"Clustering, Accountability, and Governance", Presentation to the Canadian Institute's Fundamentals of Administrative Law and Practice conference, Toronto, April 13, 2011.

"Investment Chapters in FTAs", Presentation to an NGO capacity-building workshop organized by MSF and the Third World Network, Delhi, March 15, 2011.

"Contributions and Limitations of Empirical Research on Independence and Impartiality in International Investment Arbitration", Presentation to Osgoode-Jindal Joint Workshop on Global North and Global South Perspective on Transnational Governance: An Indian-Canadian Perspective, Jindal Global Law School, Delhi, March 13, 2011.

"Comments on the Abitibi Bowater settlement", Presentation to the House of Commons Standing Committee on International Trade, Ottawa, March 8, 2011.

Discussant for three presentations on a panel at the 4th Annual Toronto Group Conference for the Study of International, Transnational, and Comparative Law, Toronto, January 29, 2011.

"Investment Aspects of the Proposed Canada-EU Trade Agreement", Presentation to the Trade and Investment Research Project, Toronto, November 9, 2010.

"Political economy of NAFTA and other investment treaties", Lecture to University of Toronto undergraduate class, Toronto, November 1, 2010.

"Overview of Empirical Research", Presentation to Directors at the Trade Law Bureau, Department of Foreign Affairs and International Trade, Ottawa, October 28, 2010.

"Investment Treaty Arbitration as the 'Rule of Law'", Presentation to the University of Ottawa Faculty of Law, International Law Club, October 28, 2010.

"Meeting the Challenges to Tribunal Independence", Presentation to the Canadian Institute Conference on Advanced Administrative Law & Practice, Ottawa, October 26, 2010.

"Governing Foreign Investment in India: The Evolving Relationship Between Domestic Law and International Treaties", Presentation to the Osgoode-Jindal Joint Workshop on Global North and Global South Perspective on Transnational Governance: An Indian-Canadian Conversation, York University, Toronto, October 25, 2010.

"Public Inquiries: The New Frontier for Procedural Justice", Presentation to the 6th Annual National Forum on Administrative Law & Practice, October 18, 2010.

"Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law", Presentation to McGill Law School, Montreal, October 14, 2010.

"Empirical Study of Potential Bias in Investment Treaty Arbitration", Presentation to the LSE Transnational Law Project workshop, London, UK, September 1, 2010.

"The Use of Quantitative Methods to Study Investment Arbitration", Presentation to the Oñati International Institute for the Study of Law Workshop on Socio-Legal Perspectives on the Adjudication of International Economic Disputes, Oñati, Spain, July 15, 2010.

"Investor-State Arbitration: Implications for Government Decision-making", Presentation to staff of the Ontario Ministry of Economic Development & Trade – International Trade Branch, Toronto, May 27, 2010.

"Investment Issues in RTA Negotiations", Presentation to the Commonwealth Roundtable on Regional Trading & Integration Agreements, London, March 15-16, 2010.

"Empirical Research on Arbitrator Bias – Its Relevance and Its Limitations", Presentation to the Columbia Law School Speaker Series on International Investment Law and Policy, New York, February 11, 2010.

"Elements of an International Investment Regime that Encourages Sustainable International Investment", Presentation to the Fourth Columbia International Investment Conference, New York, November 6, 2009.

"Legal Aspects of the *Pacific Rim* claim against El Salvador", Presentation on El Salvador and CAFTA, York University, Toronto, October 28, 2009.

Respondent to presentation by Martin Valasek on "International Investment Treaty Arbitration" to the Annual Workshop on Commercial and Consumer Law, Faculty of Law, Montreal, October 17, 2009.

"Adjudication and Closed Proceedings", Presentation to the Ontario Bar Association's 7th Charter Conference, Toronto, September 26, 2008.

"A Case for an International Investment Court," Presentation to the Society of International Economic Law, Inaugural Conference on New Horizons of International Economic Law, Geneva, July 15-17, 2008.

"A Pragmatist Approach to the Standard of Review Analysis in *Dunsmuir*," Presentation to the Roundtable on *Dunsmuir*, University of Toronto Faculty of Law, June 4, 2008.

"A Case for an International Investment Court," Presentation to the Law and Society Association and the Canadian Law and Society Association, Joint Annual Meeting, Montreal, May 29-June 1, 2008.

Panel chair, "The Dilemmas of Free Trade: Is World Trade the New Terrain for a Global Constitution?", Osgoode GLSA conference, May 10, 2008.

"Does a Perceived Structural Bias Undermine the Legitimacy of Arbitration?" Presentation to the Harvard Law School conference on the Backlash Against Investment Arbitration, Cambridge, April 19, 2008.

"Secret Evidence, National Security, and the Courts," Presentation to the Osgoode Professional Development conference on 2007 Constitutional Cases, Toronto, April 18, 2008.

"A Primer on Investment Arbitration," Presentation to the National Critical Lawyers Group conference on Human Rights and Human Wrongs, University of Kent, Canterbury, February 24-25, 2007.

"The Investor Rights Approach in Investment Treaty Arbitration," Presentation to the Queen Mary Centre for Commercial Law Studies conference on Human Rights and Capitalism: A Multi-Disciplinary Perspective on Globalization, London, September 18-19, 2006.

"Private Adjudication of Regulatory Disputes," Presentation to the Institute for Advanced Legal Studies WG Hart Legal Workshop on The Retreat of the State: Challenges to Law and Lawyers, June 27-29, 2006.

"A Return to the Gay Nineties? The Political Economy of Investment Arbitration", Presentation to the Institute for the Study of the Americas/ LSE conference on Responding to Globalization in the Americas, June 1-2, 2006.

External funding applications

Co-applicant, SSHRC Insight Grant on the role and impacts of litigation risk in regulatory decision-making, 2012-2015 (successful, $113,000 total).

Co-applicant, SSHRC Partnership Development Grant on decision-making and dispute resolution in the mining sector in Ecuador, Lead applicant: Prof. James Rochlin, 2012-2015 (successful, $200,000 total).

Lead Applicant, SSHRC Insight Development Grant on the role and impacts of litigation risk in regulatory decision-making, 2011 (recommended for funding but not ranked high enough to permit an award from available funds).

Co-applicant, SSHCR Major Collaborative Research Initiative on decision-making and dispute resolution in the mining sector in Ecuador, Lead applicant: Prof. James Rochlin, 2009-2010 (unsuccessful).

Peer reviews

Alberta Law Review
UBC Law Review
Cambridge Journal of Economics
Cambridge University Press
Canadian Council for International Cooperation
Canadian Public Administration (2)
Columbia FDI Perspectives
European Law Journal (2)
Forum on Democracy & Trade
Global Governance
Manitoba Law Journal
McGill Law Journal
National Research Foundation of South Africa
Osgoode Hall Law Journal
Osgoode Hall Review of Law and Policy
Oxford University Press (2)
Policy & Society
Queen's Law Journal (2)
Refuge
Review of International Political Economy
Routledge (Books)

Social Sciences and Humanities Research Council of Canada
Sydney Law Review
Vale Columbia Center on Sustainable International Investment
World Bank
Yearbook on International Investment Law and Policy

SELECTED AWARDS

2012	SSHRC Insight Grant
2010	Osgoode Hall Law School Teaching Award
2010	Osgoode Hall Law School Research Fellowship
2006	William Robson Memorial Prize, LSE
2003-2005	Overseas Research Award, Universities UK
2002-2005	Doctoral Fellowship, SSHRC
1999	Michael Baptista Essay Prize, York University
1997	John Graham Fellowship, Osgoode Hall Law School
1996-1997	Ontario Graduate Scholarship
1996	Research Award, Canadian International Development Agency
1994	DC Masters Graduation Award, University of Guelph

LANGUAGES

Spanish (intermediate spoken and comprehension; basic written).

OSGOODE
OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY

OSGOODE HALL
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CANADA M3J 1P3
T 416 736 5030
F 416 736 5736
www.osgoode.yorku.ca

Gus Van Harten
Associate Professor

416 650 8419
gvanharten@osgoode.yorku.ca

13 February 2013

THIS IS EXHIBIT "C" REFERRED TO IN THE AFFIDAVIT OF GUS VAN HARTEN SWORN BEFORE ME AT THE CITY OF TORONTO, ONTARIO THIS 13th DAY OF FEBRUARY, 2013.

A COMMISSIONER FOR THE TAKING OF AFFIDAVITS IN ONTARIO.

Mr. Mark Underhill
Underhill, Boies Parker
440 - 355 Burrard Street
Vancouver, B.C. V6C 2G8
604-696-9828

Dear Mr. Underhill,

Re: Canada-China FIPPA – Request for Expert Opinion

I reply to your letter of 7 February 2013. You have asked these questions:

1. How does the Canada-China Foreign Investment Promotion and Protection Agreement (FIPPA) differ from other international treaties to which Canada is a party?

2. What obligations does the FIPPA impose on Canada?

3. How will the FIPPA apply to federal and provincial government action and legislation, and domestic court decisions, which affect land and resources subject to aboriginal or treaty rights claims?

4. Will principles of domestic Canadian law, including the constitutional obligations imposed on governments under s. 35 of the *Constitution Act, 1982*, be taken into account by arbitrators applying the FIPPA?

5. Could action taken or legislation passed by First Nations Governments potentially put Canada out of compliance with the FIPPA?

I respond to these questions below after providing background on my expertise and activities in the field both in general and related to the Canada-China FIPPA.

A. Background

This opinion is based on my knowledge of (a) the terms of the Canada-China FIPPA and like treaties that provide for investor-state arbitration and (b) publicly-available awards and other materials in about 200 known investor-state arbitration

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cases under investment treaties, including approximately 20 cases brought against Canada under the NAFTA investor-state arbitration mechanism. I have attached an extensive but non-exhaustive list of documents arising from known investor-state arbitrations and of other materials.

I am an Associate Professor at Osgoode Hall Law School. I have been a tenure-stream faculty member at Osgoode since 2007. Previously I was a tenure-stream Lecturer at the London School of Economics' Law Department. I obtained my doctorate in international investment law from the University of London in 2006. My research specialization since 2002 has been international investment law and arbitration. I have published numerous academic articles and a book, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007), on this subject. The book, based on my doctoral work, is widely cited. For example, it generated reviews in the American Journal of International Law, Houston Journal of International Law, Manchester Journal of International Economic Law, Modern Law Review, and Stanford Journal of International Law. I am presently under contract for a second book with Oxford University Press on the general absence and potential role of judicial restraint in investment treaty arbitration; the manuscript is due at the end of February 2013.

I am engaged in an ongoing major empirical project to collect and code known investment treaty arbitration cases. As part of the project, I have reviewed existing empirical literature in the field. The project has generated several publications on my part. For example, it led to an extended academic exchange in the Yearbook of International Investment Law and Policy. I have also presented empirical findings to, for example, Directors at the Trade Law Bureau of the Department of Foreign Affairs and International Trade (Ottawa, October 2010), academic researchers at the Oñati International Institute for the Study of Law (Oñati, July 2010), academics and practitioners invited to a workshop of the London School of Economics Transnational Law Project (London, September 2010), academics at Jindal Global Law School (Delhi, March 2011), and academics and professionals at a Columbia Law School conference (February 2010).

As part of this project, I have developed a database of known investment treaty cases (under NAFTA, CAFTA, the Energy Charter Treaty, and bilateral investment treaties such as the Canada-China FIPPA) that is publicly available at www.iiapp.org. The database includes information on the types of state measures challenged under investment treaties and on the affected levels of government as well as other aggregate information on investment treaty claims and awards. The main source for the database is publicly-accessible awards and other materials in known investment treaty cases. Notably, there are varying degrees of confidentiality in investment treaty arbitration which complicate the collection of data in the field.

I have produced a series of research and knowledge mobilization publications aimed at encouraging reform in investment law and arbitration, focusing especially on the case for greater judicialization of the adjudicative process. In connection with this, I have made formal submissions by invitation to the U.S. State Department Public Hearing on Bilateral Investment Treaty (BIT) Reform, Norway's Model BIT Review, the Organization for Economic Cooperation and Development, and the Australian Productivity Commission. I have also been invited to present on aspects of investment treaties at meetings of the House of Commons Standing Committee on International Trade (Ottawa, March 2011), the Canadian Environmental Law Association (Toronto, May 2011), the Canadian Trade and Investment Research Project (Toronto, November 2010), the Ontario Ministry of

Economic Development & Trade (Toronto, May 2010), and the International Chamber of Commerce (Canada) annual conference on international arbitration (October 2011). I was also invited to present on investment law at meetings organized by the Fourth Columbia International Investment conference (New York, November 2009), the Commonwealth Roundtable on Regional Trading & Integration Agreements (London, March 2010), the U.S. Forum on Trade and Democracy (Pocantico, June 2010), the International Institute for Sustainable Development and South Centre (Barcelona, July 2010; Kampala, October 2011), the Third World Network and Medecins Sans Frontiers (New Delhi, March 2011), the UN Conference on Trade and Development (UNCTAD) (Geneva, October 2011), and a legislative group of the German Bundestag (Berlin, May 2012).

Thus, I am active as an academic expert in the field of international investment law and arbitration and am invited by reputable persons and organizations to conferences, workshops, and consultations on relevant topics. To illustrate, in the past two months or so I have been invited by a Chinese academic colleague to discuss investment law at the Annual Meeting of the Chinese Society of International Economic Law; by the editors and publisher to join the Editorial Board of the *Journal of International Dispute Settlement*; by the Canadian Council on International Law to present at an academic-practitioner panel in Toronto on the Canada-China FIPPA; by the McGill Arbitration Society to debate possible arbitrator bias in investment arbitration; by the Faculty Recruitment Committee at Columbia Law School to do a formal review of scholarship for their consideration of a candidate for lateral hire in the field; by the Land Claims Agreement Coalition of Canada to discuss the Canada-China FIPPA at their Fourth National Conference; and by the Minister of Foreign Affairs of the Government of Finland to participate in a Helsinki Process seminar on improving the international investment regime. This last event was described by the Minister as a meeting of '50 highly experienced experts on investment agreements and policies from relevant institutions, international organisations, regional actors, corporate sector, and selected governments'. Due to family and teaching obligations, I am not in a position to accept all invitations of this nature although I aim to accept as many as possible as part of my responsibilities as a public academic. To preserve my claims of academic objectivity, I have a policy of not taking paid work as a counsel, arbitrator, or expert in investment treaty arbitration and have over the years declined a few unsolicited invitations to work as counsel in actual arbitrations.

I should disclose that, although I support the use of international adjudication to resolve major or sensitive disputes involving the treatment and activities of foreign investors, I have criticized publicly and actively the Canada-China investment treaty (or FIPPA) due to what I see as its problems relative to other investment treaties concluded by Canada and due to my broader concerns about the lack of institutional safeguards of independence in international investor-state arbitration. Briefly, my concerns about the Canada-China FIPPA include the lack of provision for general market access by Canadian investors to China (in contrast to NAFTA and other FIPPAs), the lack of reciprocity in the limited market access that is afforded, the apparently extensive lack of *de facto* reciprocity in the FIPPA's protections against discrimination, the scaled-back transparency in the investor-state arbitration process (relative to NAFTA and other FIPPAs), the *de facto* non-reciprocity of investor protection due to Canada's capital-importing position (relative to other FIPPAs), and the relative fiscal risks and legal constraints assumed by Canada under the treaty's arbitration mechanism (relative to other FIPPAs). That said, I am conscious that a wider set of costs and benefits arising from the FIPPA must be weighed by government decision-makers and thus have focused my own criticism on the need for a thorough, public, and independent review of

claims about the FIPPA to inform decision-makers at all levels before a decision is taken on whether the FIPPA should be finalized long-term by Canada.

B. Response to questions

1. How does the FIPPA differ from other international treaties to which Canada is a party?

a. <u>The FIPPA will apply to a much larger volume of foreign-owned assets (i.e. inward investment) than other investment treaties concluded by Canada, with the exception of NAFTA</u>

Canada has concluded approximately 25 treaties that provide for investor-state arbitration. The most significant is NAFTA (via its investment chapter, Chapter 11). The others are FIPPAs – known also as bilateral investment treaties (BITs) – concluded between Canada and another country.

Relative to Canada's other FIPPAs, the Canada-China FIPPA is by far the most significant due to the amount of foreign-owned assets that would be covered by the treaty and the corresponding risks and liabilities assumed by Canada. Statistics Canada data on foreign ownership of assets in Canada is not available for many countries, especially smaller ones, with whom Canada has concluded FIPPAs. However, it is almost certainly the case that the Canada-China FIPPA is the first treaty signed by Canada, since NAFTA, that incorporates an investor-state arbitration mechanism and that would apply to billions of dollars of foreign-owned assets in Canada.[1] As a result, the risks and liabilities that the Canada-China FIPPA establishes for Canada are of a different order from Canada's other FIPPAs.

The FIPPA is like NAFTA in that it commits Canada to investor-state arbitration in relation to large volumes of foreign-owned assets in Canada. However, the FIPPA also differs from NAFTA in important respects. For example, it is not part of a broader trade agreement but rather a stand-alone investment treaty (like other FIPPAs), it does not incorporate a NAFTA-style carve-out for performance requirements on investors imposed by provincial governments, it does not apply to any existing non-discriminatory measures maintained by the states parties, and it allows a different group of major investors – who may or may not conduct themselves in a similar way to U.S. investors in Canada – to bring investor-state arbitration claims against Canada.

b. <u>The obligations imposed by the FIPPA (and other investment treaties) are more effective than Canada's other international obligations, due to the treaties' unique arbitration and enforcement mechanism</u>

Normally, international adjudication takes place between states. Investment treaties are different because they give foreign owners of assets – usually companies – the right to bring claims directly against states. There is no screening process or need for representation by the home state. This reflects a major development in international adjudication.

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[1] Chinese ownership of assets in Canada is reported in various sectors. According to Statistics Canada, total inward investment from China was approximately $10.9 billion at the end of 2011; Statistics Canada, *Foreign Direct Investment (Stocks) in Canada*, Table 376-0051 (August 2012). This amount has risen substantially since the federal government's approval of the Nexen takeover by the Chinese National Offshore Oil Corporation (CNOOC).

As a result, unlike other international legal obligations of Canada, the obligations established by the FIPPA (and similar investment treaties) would be actionable directly by Chinese investors in Canada – whether they owned the relevant assets wholly or in part – and would be subject to binding and highly-enforceable investor-state arbitration. This enhances dramatically the scope and effectiveness of the FIPPA's obligations relative to all other international obligations assumed by Canada.

Investor claims under the FIPPA – whether by a Chinese investor against Canada or vice versa – would be resolved through *ad hoc* arbitration. The arbitration tribunal would have three members. One would be appointed by the claimant investor, one by the state, and – failing agreement between the parties or the party-appointed arbitrators (depending on the arbitration rules under which the investor chose to file its FIPPA claim; see FIPPA Article 22(1)) – a third presiding arbitrator by the outside appointing authority designated under the treaty.

Under the FIPPA, arbitrators have the authority to issue compensation orders for potentially enormous sums in favour of foreign investors for a FIPPA violation. Awards to date under NAFTA and other treaties that provide for investor-state arbitration have ranged from tens of thousands to billions of dollars. In a few cases, arbitrators have also issued non-monetary orders against states, such as an order for authorities of the state not to enforce a domestic judicial decision against a foreign investor.

c. <u>The FIPPA's obligations carry a more potent remedy than, for example, Canada's WTO obligations</u>

Unlike in state-state adjudication at the World Trade Organization, investment treaty arbitrators typically award compensation to foreign investors, upon finding a treaty violation, from the date at which the respondent state's legislature, executive, or judicial decision-maker engaged in the conduct found to have violated the treaty. Thus, unlike at the WTO, the state does not have an opportunity to correct the illegality before being ordered to pay retrospective compensation. This raises the prospect of uncertain but potentially very onerous fiscal liability for governments at the time of any decision that affects foreign-owned assets, especially in the case of major projects. From the perspective of Canadian public law and policy, it raises issues about the use of monetary compensation as a primary remedy for unlawful sovereign conduct, especially for legislative and judicial decision-making and general policies of government.

d. <u>Uniquely under the FIPPA (and other investment treaties), investors may proceed to arbitration without resorting to domestic courts</u>

Unlike other treaties that allow individual claims against states in their sovereign capacity, the FIPPA (and many other investment treaties) do not require foreign investors to resort to domestic remedies of the host state, where reasonably available, as a procedural precondition for an international claim. As a result, investment treaty arbitrators often review legislative or government decisions that remain open to adjudication in domestic courts. Also, they may adjudicative disputes involving domestic courts in situations where domestic court decisions remain subject to appeal domestically.

e. The arbitrators' awards are more widely and easily enforceable than other international adjudicative processes

Unlike in other international adjudicative processes that apply to states in their sovereign capacity, investment treaty arbitrators' awards are enforceable against state assets in Canada and in any foreign state that is party to the *New York Convention* or the *ICSID Convention* (depending on the arbitration rules under which the investor's claim is filed) according to that state's domestic law implementing the relevant Convention for the purpose of enforcement of foreign arbitration awards (see FIPPA Article 32(2) to (4)). Although this would depend on each state's domestic law, it likely that assets of Canada abroad would be subject to enforcement if the assets were put to a commercial purpose and owned by any entity of Canada, whether a federal entity or a provincial or other sub-national entity.

f. Other contexts in which individuals can bring international claims against states, in their sovereign capacity, are subject to a judicial process rather than arbitration

Unlike the few international courts that have the authority to hear individual claims against states in their sovereign capacity, investment treaty arbitrators are not judges and the arbitration process is not characterized by institutional safeguards of judicial independence such as security of tenure, a set salary, bars on concurrent work as an arbitrator and counsel, and an objective method of appointment to specific cases. For instance, many arbitrators work as counsel while also working as arbitrators. Also, the arbitrators' decisions are insulated – largely or entirely, depending on the applicable arbitration rules under which the investor chooses to bring a claim – from judicial review in any domestic or international court.

g. Unlike other forms of international arbitration that involve states, investor-state arbitration is asymmetrical

Investor-state arbitration under the FIPPA and other investment treaties is asymmetrical in that actionable obligations are imposed on states but not on foreign investors. This informs in part the concerns about the use of arbitration, instead of a judicial process (modelled on international courts or the WTO Appellate Body, for example), to resolve investor-state disputes.

h. Investment treaty arbitration is a relatively recent phenomenon that continues to expand

Although the earliest known award under an investment treaty dates to 1990, treaty-based investor-state arbitration was put into widespread use by foreign investors about fifteen years ago. It continues to evolve and expand, sometimes in dramatic ways. For example, the largest known award under an investment treaty – for about $1.8 billion plus pre-award interest – was issued in September 2012.[2] In another recent award (*Abaclat v Argentina*), a majority of the tribunal incorporated a mass claims/ class action mechanism into an investment treaty in the context of a sovereign bonds dispute involving tens of billions of dollars. In September 2012, the Chinese firm Ping An reportedly brought the largest known claim by a Chinese investor to date, against Belgium,

[2] The award, for about $1.77 billion plus pre-award interest compounded from 16 May 2006, was issued in *Occidental v Ecuador*, Award of 5 October 2012, U.S.-Ecuador investment treaty.

for between $2 billion and $3 billion.[3] Finally, there are various ongoing cases, especially in the resource sector, that involve disputes over assets valued in the tens of billions of dollars.

2. What obligations does the FIPPA impose on Canada?

a. The FIPPA puts various obligations on legislative, executive, and judicial decision-makers in Canada in their treatment of Chinese investors

The FIPPA's obligations include, among others:

- a minimum standard of treatment (including 'fair and equitable treatment' and 'full protection and security') (FIPPA Article 4(1)),
- limits on performance requirements such are requirements to use local suppliers (FIPPA Article 9),
- a requirement for compensation for direct or indirect expropriation (FIPPA Article 10),
- a national treatment obligation (FIPPA Article 5), and
- a most-favoured-nation treatment obligation (FIPPA Article 6)

The first three of these obligations are absolute standards. The last two are relative (i.e. non-discrimination) standards. All of the obligations may be subject to various limitations, exceptions, or reservations, some of which are discussed below. To be clear, a violation of any one of the FIPPA's obligations gives a basis for a full compensation order in favour of a foreign investor.

b. The FIPPAs' obligations have been interpreted in different ways under similar investment treaties. Some tribunals' interpretations have been expansive relative to customary international law and to Canadian domestic law.

Obligations established by the FIPPA have been interpreted in different ways by arbitrators acting under similar investment treaties. Some interpretations are more expansive than others. That said, there are many cases in which arbitrators have taken the obligations in a distinctly expansive direction, thus enhancing the risk of liability for states.

For example, some tribunals have incorporated broad conceptions of indirect takings into the treaties' expropriation standard. Also, many tribunals have read into concepts of 'fair and equitable treatment' or 'full protection and security' a requirement for states to satisfy legitimate expectations of foreign investors and to maintain a stable legal or regulatory framework for foreign investors.[4] These requirements may sound benign. However, because the treaties apply to the conduct of any branch or level of the state, the implications can be profound for parliamentary sovereignty, policy discretion, and judicial finality. Essentially, the requirements may be applied to limit the fundamental capacity of the state to change its legislative, policy, or legal framework (including judicial requirements, such as an order to revoke a permit for failure to consult with

[3] S. McCarthy, 'China turns to courts in business disputes with western governments' *The Globe and Mail* (4 October 2012).
[4] e.g. *Biwater Gauff v Tanzania* (Award of 24 July 2008; U.K.-Tanzania investment treaty), para 729; *Tecmed v Mexico* (Award of 29 May 2003; Spain-Mexico investment treaty), para 154; *Santa Elena v Costa Rica* (Award of 17 February 2000; post-dispute investor-state agreement to arbitrate), para 72; *Metalclad v Mexico* (Award of 30 August 2000, NAFTA), para 103.

aboriginal peoples) over the lifespan of a foreign investment, unless compensation is paid by the state to the foreign investor.

Incidentally, these novel requirements were developed by arbitrators. They were not laid out expressly in the treaties or in customary international law. Some arbitrators have justified expansive approaches to investment treaties on the basis that the treaties' purpose is to protect investors and that ambiguity should therefore be resolved in favour of investors.

c. The FIPPA's obligations go beyond Canadian law in important respects

The FIPPA's obligations go beyond Canadian law in important respects. I would highlight three issues in particular.

First, the FIPPA's obligations apply to legislative and judicial decisions, including at the highest level. This has implications for principles of both parliamentary supremacy and the rule of law.

Second, the obligations have been read under other treaties to include requirements for Canada to satisfy an investor's legitimate expectations and to maintain a stable regulatory framework, backed by the substantive remedy of monetary compensation. This is significant because the Canadian doctrine of legitimate expectations does not allow for substantive remedies, such as a compensation order, for an investor whose legitimate expectations were not satisfied by a government. Instead, the doctrine is limited to procedural remedies (*Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para 26; *Canada (AG)* v. *Mavi*, 2011 SCC 30, para 68). Also, in Canadian law, subject to the Constitution, a legislative or judicial decision would not carry an obligation to compensate investors where the decision altered the regulatory framework for investors in general.

Third, the obligations have been read under other treaties to incorporate a broad notion of indirect expropriation by reviewing the proportionality or appropriateness of general regulation where such regulation caused economic harm to a foreign investor. For examples, the tribunal in *Metalclad v Mexico*, which has been cited by numerous other investment treaty tribunals, defined expropriation in these terms:[5]

> Thus, expropriation... 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 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.

Tysoe J. of the B.C. Supreme Court stated as follows – in a proceeding involving Mexico's application to set aside the *Metalclad v Mexico* award – about the arbitrators' interpretation of indirect expropriation and, incidentally, on the B.C. court's limited ability to review that interpretation:[6]

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[5] *Metalclad v Mexico* (Award of 30 August 2000, NAFTA), para 103.

[6] *United Mexican States* v. *Metalclad Corporation*, 2001 BCSC 664 (2 May 2001), para 99.

> The Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110 [of NAFTA]. In addition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that expropriation under the NAFTA includes 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 of reasonably to be expected economic benefit of property. This definition is sufficiently broad to include a legitimate rezoning by a municipality or other zoning authority. However the definition of expropriation is a question of law with which this Court is not entitled to interfere under the [British Columbia] International Commercial Arbitration Act.

It is difficult to predict how expansively the Canada-China FIPPA's obligations will be interpreted. Based on the experience under NAFTA and other investment treaties, there is at least a reasonable likelihood that arbitrators appointed under the FIPPA would adopt expansive approaches to the minimum standard of treatment and to indirect expropriation, as indicated above. Even if they did not adopt expansive interpretations, the FIPPA's obligations may require payment of monetary compensation for decisions of a legislature or court in Canada in circumstances where Canadian domestic law clearly would not.

d. <u>The FIPPA's obligations are subject to different forms of limiting language, exceptions, or reservations</u>

The FIPPA's obligations are subject to limiting language or exceptions (e.g. FIPPA Article 4(2) and (3); FIPPA Article 33(2); and FIPPA Annex B.10). For example, limiting language is incorporated into the minimum standard of treatment (Article 4). This reflects language that was introduced by Canada and the United States as an apparent response to expansive interpretations adopted by early NAFTA tribunals. Likewise, the limiting language on indirect expropriation (Annex B.10) appears to respond to expansive interpretations adopted by earlier tribunals. In the NAFTA context, such limiting language has gone some way to reduce the expansiveness of the arbitrators' interpretations of the NAFTA minimum standard of treatment, in particular. Yet there remain significant variation in the interpretations given by NAFTA tribunals to the FIPPA-type obligations. Further, outside of NAFTA, many investment treaty tribunals have adopted a more expansive approach. In any event, even a restrictive interpretation of the FIPPA's obligations may lead to fiscal liability for Canada, due to its legislation, executive, or judicial decisions, where Canadian domestic law clearly would not.

The FIPPA contains important, if largely untested, exceptions for health, environmental, and conservation measures (Article 33(2)). These exceptions may offer protection for measures adopted by decision-makers in Canada. However, it is difficult to predict how arbitrators will apply conditional language associated with these exceptions, such as necessity requirements. Some investment treaty tribunals have taken a strict approach to the concept of necessity, for example.

e. The reliability of the FIPPA's limiting language and exceptions is undermined by the FIPPA's most-favoured-nation obligation

The limiting language and exceptions in the FIPPA are open to significant doubt due to the FIPPA's exceptional most-favoured-nation treatment obligation, which extends to any post-1993 investment treaty concluded by Canada (FIPPA Article 8(1)(b)). This approach to most-favoured-nation treatment means that, because not all of the FIPPAs concluded by Canada since 1994 incorporate the same limiting language and exceptions as the Canada-China FIPPA, it is likely that limitations and exceptions in the Canada-China FIPPA would not apply to Chinese investors in Canada. The argument of the Chinese investor, which in my view is a credible one, would be that Chinese investors are entitled to no less favourable treatment than that enjoyed by investors from any third country with which Canada has concluded a FIPPA, such as a minimum standard that is not subject to additional limiting language or exceptions in the Canada-China FIPPA.

To elaborate, the obligation to provide most-favoured-nation treatment has been interpreted expansively by many investment treaty tribunals to incorporate, in the treaty containing the most-favoured-nation treatment clause, more generous provisions on dispute settlement in other investment treaties concluded by the respondent state (as well as such provisions involving substantive treatment). This extension of most-favoured-nation treatment to dispute settlement provisions is contested among tribunals. Yet, even a tribunal that limited most-favoured-nation treatment to substantive treatment provided in other investment treaties concluded by Canada would likely allow Chinese investors to avoid the limiting language in Article 4 and Annex B.10 of the Canada-China FIPPA and, although this is less likely, by not applying the exceptions in Article 33(2). These limiting provisions and exceptions relate to the substantive treatment of Chinese investors by Canada.

f. The FIPPA contains a limited reservation for aboriginal peoples

The FIPPA incorporates a reservation for measures that deny Chinese investors 'any rights or preferences provided to aboriginal peoples' (FIPPA Article 8(3); FIPPA Annex B.8(1); Canada-Peru Annex II). This is important because it allows governments in Canada to continue to provide treatment of aboriginal peoples that is more favourable than that provided to Chinese investors. However, the reservation does not extend to all of the Canada's obligations under the FIPPA. In particular, it does not extend to the minimum standard of treatment (FIPPA Article 4) and to the expropriation standard (FIPPA Article 10). Notably, in known cases under other treaties, these are the two obligations relied on most frequently by arbitrators to find a treaty violation and award compensation to a foreign investor.

g. The FIPPA also limits the ability of governments in Canada, especially at the sub-national level, to restrict market access by Chinese investors

The FIPPA provides a broad carve-out of the federal government's ability to block market access (purchases of assets) by Chinese investors via a review under the *Investment Canada Act* (Annex D.34). This preserves the federal government's authority to block market access under the *Investment Canada Act*, which provides for the review of foreign takeovers of Canadian assets over a threshold of about $344 million (and with no threshold on national security grounds). Notably, for

Canada (but not China), this carve-out does not extend to decisions of provincial or other sub-national governments. Thus, the FIPPA would preclude any government other than the federal government taking steps to block market access by Chinese investors.

h. The FIPPA will impose obligations on Canada only after the FIPPA is ratified and has come into effect

The FIPPA has been signed by Canada and China. However, it will not come into effect only after it has been ratified by both states (FIPPA Article 35(1)). Ratification by Canada involves the sending of a diplomatic note (i.e. letter) by the federal government to China indicating that the FIPPA has been ratified by Canada according to its domestic laws and procedures. Following this notification, the FIPPA would come into effect on the first day of the next month following ratification by both Canada and China. Thus, the coming into effect of the FIPPA is beyond Canada's unilateral control once Canada notifies China that Canada has ratified the FIPPA. Thus, it appears that the last remaining step that lies exclusively within the authority of a Canadian decision-maker, prior to entry into force of the FIPPA, is the decision of the federal government (presumably the Governor-in-Council) whether or not to notify China that Canada has ratified the FIPPA.

i. Once it is in effect, the FIPPA's obligations for Canada will endure for at least 31 years unless both China and Canada agree otherwise

After it comes into effect, the FIPPA has a minimum term of 15 years, it requires an additional one-year's notice to terminate the treaty after expiry of the minimum term, and it would continue to apply to all existing Chinese investments in Canada for another 15 years after termination (FIPPA Article 35 (1) to (3)). Thus, the FIPPA's obligations for Canada – including most the right of Chinese investors to bring claims against Canada and the authority of the arbitrators to review legislative, executive, and judicial decisions and to order compensation against Canada – will be beyond the authority of any Canadian legislature, government, or court for at least 31 years.

3. How will the FIPPA apply to federal and provincial government action and legislation, and domestic court decisions, which affect land and resources subject to aboriginal or treaty rights claims?

a. The FIPPA will apply to legislative, executive, and judicial decisions at any level of the Canadian state

There is no doubt that the FIPPA will apply to any legislative, executive, or judicial act of any federal, provincial, municipal, or other sub-national decision-maker of the Canadian state. Thus, the exercise of sovereignty authority by any actor in Canada may lead to a claim and to liability for Canada under the FIPPA.

Reflecting other investment treaties, the FIPPA's obligations to protect and compensate foreign investors apply broadly to any sovereign conduct that affects investors. Thus, the obligations apply to any act of Canada, at any level or branch of the state, including any decision of a legislature, executive actor, or court in Canada. From the perspective of international law, all such actors (including First Nations authorities) form part of the unified entity of Canada as a state.

This is also indicated by the FIPPA itself, which states that it applies to 'any entity whenever that entity exercises any regulatory, administrative or other government authority delegated to it by [Canada], such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges' (FIPPA Article 2(2)). As well, the FIPPA will apply to 'measures adopted or maintained' by Canada (FIPPA Article 2(1)) and it defines 'measure' to include 'any law, regulation, rule, procedure, decision, requirement, administrative action, or practice' (FIPPA Article 1(6)). Finally, the FIPPA defines 'investment' (FIPPA Article 1(1)) and 'investor' (FIPPA Article 1(2)) broadly and applies to existing as well as future Chinese investors in Canada (FIPPA Article 1(2)).

As discussed further below, the point is illustrated by Canada's experience under NAFTA, which has demonstrated that Canada may face liability for provincial or municipal as well as federal measures (e.g. *Dow AgroSciences v Canada*, *AbitibiBowater v Canada*, *Murphy/ Mobil Oil v Canada*, *Metalclad v Mexico*). Although there apparently have been no NAFTA claims to date arising from a decision taken directly by a First Nations authority, First Nations authorities would be subject to the obligations under the FIPPA (and NAFTA) on the same principle of international law that a First Nations, like a province or municipality, is an emanation of Canada as a unified state.

The wide-ranging applicability of the FIPPA to any state decision-maker in Canada is also illustrated by the investment treaty case of *MTD Equity v Chile*. In that case, an investment in a housing development project had been approved at the federal level but ran afoul of municipal zoning policies. The tribunal ordered compensation for the investor on the basis that Chilean officials did not inform the investor, at an early stage, that zoning policies would not be changed to accommodate the project. The tribunal referred to the principle of unity of the state in the course of rejecting Chile's claim that the investors 'should have found out by themselves what the regulations and policies of the country were' [emphasis added]:[7]

> The Tribunal agrees with [Chile's] statement as a matter of principle, but Chile also has an obligation to act coherently and apply its policies consistently, independently of how diligent an investor is. Under international law (the law that this Tribunal has to apply to a dispute under the [investment treaty]), the State of Chile needs to be considered by the Tribunal as a unit.

The principle is also demonstrated by the statement of the tribunal in *Eastern Sugar v Czech Republic*, where the tribunal reviewed a domestic law that had been struck down twice and then upheld by the national constitutional court. According to the tribunal, the Czech Republic's liability remained the same regardless of whether its actions were attributable to its legislature, government, or constitutional court:[8]

> In any event, the Arbitral Tribunal has the Czech Republic in front of it, not its government nor its constitutional court. As far as the Arbitral Tribunal is concerned, these are both state organs which determine the Czech Republic's actions.

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[7] *MTD Equity v Republic of Chile* (Award of 25 May 2004) para 165-6.
[8] *Eastern Sugar v Czech Republic* (Award of 27 March 2007) para 310.

Thus, a Canadian legislative, executive, or judicial decision may trigger liability for Canada under the FIPPA. In the case of judicial decisions, this is indicated by U.S. pharmaceutical company Eli Lilly's recent notice of intent to submit a NAFTA claim against Canada. Eli Lilly's claim alleges that Canadian court decisions and judicial doctrines in domestic patent law amounted to violations of the NAFTA minimum standard of treatment and the NAFTA expropriation standard. The notice argues among other things that:[9]

> In a series of decisions issued since 2005, the Federal Court of Canada and the Federal Court of Appeal have created a new judicial doctrine whereby utility is assessed not by reference to the requirement in the Patent Act that an invention be 'useful', but rather against the 'promise' that the courts derive from the patent specification. This non-statutory 'promise doctrine' is not applied in any other jurisdiction in the world.
> ....
>
> The 'promise doctrine' not only contravenes Canada's treaty obligations, it is also discriminatory, arbitrary, unpredictable and remarkably subjective. A patentee cannot know how the promise will be construed by the Federal Courts....

Whether or not this claim proceeds to a tribunal and to a finding of a violation of NAFTA, it makes clear that the obligations imposed by the Canada-China FIPPA and other investment treaties apply broadly to any state decision-maker in Canada.

b. <u>It is realistic to expect that disputes will arise with Chinese investors, that claims will be brought, and that orders for compensation will be issued in situations involving land or resources subject to aboriginal or treaty rights claims</u>.

Virtually any area of decision-making in Canada may lead to a FIPPA claim, although the risk of claims would rise according to, among other things, the amount of Chinese-owned assets at stake. Under other investment treaties, claims by foreign investors have most commonly involved decision-making about natural resources; major utilities or infrastructure; health or environmental regulation; administration of justice; taxation, financial regulation, or the monetary system; or planning and permitting decisions.

For example, under other treaties, investors have brought claims against governments on the following topics. Only some of these claims led to a finding of a treaty violation and a compensation order against the respondent state or, alternatively, to payment of compensation pursuant to a settlement. Also, many cases are ongoing (these are underlined below).

- Moratoriums on gas or mining activities and the corresponding non-approval or freezing of permits (<u>*Lone Pine Resources v Canada*</u>; <u>*Pac Rim v El Salvador*</u>).

- Refusals of a proposed project such as a quarry or power project following an environmental assessment, public opposition, or the election of a new government (<u>*Clayton/ Bilcon v Canada*</u>; <u>*St. Marys v Canada*</u>; *Vattenfall v Germany No. 1*).

[9] *Eli Lilly v Government of Canada* (Notice of intent to submit claim, 7 November 2012) para 37, 43, and 87.

- Local opposition to a major project such as a pipeline or waste disposal site (*Saipem v Bangladesh*; *Metalclad v Mexico*; *Tecmed v Mexico*; *Aguas del Tunari v Bolivia*).

- Local opposition, including by indigenous peoples, to resource exploration/ exploitation activities (*Burlington Resources v Ecuador*).

- New laws or regulations on the content of gasoline, exports of hazardous wastes, pesticide use, or anti-tobacco measures (*Ethyl v Canada*; *SD Myers v Canada*; *Dow AgroSciences v Canada*; *Chemtura v Canada*; *Philip Morris v Australia*).

- New mining remediation requirements to protect environmental or Native sites (*Glamis v U.S.A*).

- Implementation or revision of rules on power generation, such as under the Ontario *Green Energy Act* (*Mesa Power v Canada*; *Windstream Energy v Canada*; *Mercer v Canada*).

- Hunting and fishing restrictions such as the re-issuance of Caribou tags (apparently as a conservation measure). Incidentally, on this topic, three NAFTA claims have been brought by U.S. investors against Canada (*Andre v Canada*; *Bishop v Canada*; Greiner v Canada). None of the claims led to the establishment of a tribunal and all are described by the federal government as withdrawn or inactive. An open question in these and some other NAFTA cases is how the claims were resolved; for example, did the claimant run out of funds or was the claim settled off the public record?

- Reversal of a privatization decision (*Eureko v Poland*; *Parkerings v Lithuania*).

- Expropriation of properties (*AbitibiBowater v Canada*; *Gallo v Canada*).

- New taxes or royalties, such as in the resource sector (*Occidental v Ecuador No. 1*; *Paushok v Mongolia*; *Gottlieb v Canada*).

These examples are intended to provide an indication of areas of decision-making that may lead to claims or awards against Canada under the FIPPA, where a decision affects Chinese-owned assets as well as land and resources subject to aboriginal or treaty rights claims.

c. Many cases under investment treaties involve resource disputes

To date, about 34 known cases under investment treaties appeared to involve conflicts over resources, including oil and gas, gold, lumber, fisheries, and water. Many involved large sums. Arbitrators in these cases sometimes faced issues of investor access to resources, the allocation of benefits and risks of resource extraction, and associated social and environmental consequences. The cases engaged a range of constituencies besides the foreign resource company and the national government. Other constituencies might include sub-national governments, local landowners, and indigenous peoples.

d. Canada's experience under NAFTA highlights that legislatures, governments, and courts at all levels in Canada would be subject to the FIPPA's obligations

Among other things, the NAFTA experience with investor-state arbitration under NAFTA Chapter 11 indicates that:

a. Canada may face liability for provincial or municipal as well as federal measures (e.g. *Dow AgroSciences v Canada, AbitibiBowater v Canada, Murphy/ Mobil Oil v Canada, Metalclad v Mexico*).

b. A government in Canada may withdraw a measure due to the threat or filing of an investor claim (e.g. *Ethyl v Canada*) and, under the Canada-China FIPPA, this may not be a matter of public record, even after the claim is filed, unless an award is issued in the case.

c. A FIPPA tribunal may adopt an interpretation of the treaty that contradicts the joint submissions of the states parties to the treaty, including the investor's home state (e.g. *Pope & Talbot v Canada, GAMI v Canada*).

d. A foreign minority shareholder of a domestic company may bring a claim against Canada for its treatment of the domestic company and is not limited to asserting its minority interest only (*GAMI v Mexico*).

e. A government may be ordered to pay tens or hundreds of millions in compensation to an investor (e.g. *Mobil/ Murphy Oil v Canada; Archer Daniels Midland v Mexico*).

e. As an aside, in known cases, the win-loss experience of Canada, when sued under NAFTA, has been mixed and the experience of Canadian investors, when suing under NAFTA or FIPPAs, has been very poor

Under the NAFTA investment chapter, which provides for investor-state arbitration, Canada has been sued by U.S. investors in 34 cases. Of these, 11 cases have led to a verifiable outcome on payment of compensation to the foreign investor following the disposal of the claim by an arbitration tribunal.[10] In those 11 cases, Canada paid about $160 million in compensation, either via a settlement or an award, in four cases.[11] A fifth case, *Mobil/ Murphy Oil v Canada*, was lost by Canada in May 2012 and the award was released publicly in November 2012. In a sixth case, *Dow AgroSciences v Canada*, Quebec was able to maintain its impugned pesticide ban and Canada did not pay compensation, although Quebec as part of the settlement of the NAFTA claim was stated that the chemical 2,4-D does not pose an unacceptable risk to human or environmental health. Approximately 9 cases are ongoing and 15 cases are described by the federal government as

[10] *AbitibiBowater v Canada, Chemtura v Canada, Dow v Canada, Ethyl v Canada, Gallo v Canada, Gottlieb v Canada, Merrill and Ring Forestry v Canada, Mobil/ Murphy Oil v Canada, Pope & Talbot v Canada, SD Myers v Canada, UPS v Canada.*

[11] Notably, it is a matter of debate whether Canada should have been required to pay compensation in these cases. Some Canadian supporters of the NAFTA arbitration process take the position that Canada deserved to pay compensation in many or all of the cases that it has lost or settled under NAFTA.

withdrawn or inactive. Overall, the Canada's experience as a respondent in NAFTA investor-state arbitration has been mixed.

On the other hand, Canadian investors have lost all 17 of the known cases which they have brought under NAFTA and under FIPPAs.[12] This includes nine cases lost against the U.S. and eight cases lost against other countries. Overall, the success rate for claimants from other countries in known investment treaty cases is about 50%.

4. Will principles of domestic Canadian law, including the constitutional obligations imposed on governments under s. 35 of the *Constitution Act, 1982*, be taken into account by arbitrators applying the FIPPA?

a. Arbitrators may examine Canadian domestic law, including the Constitution, in their decisions. However, the FIPPA's obligations would take precedence over Canadian domestic law including the Constitution.

The effect of the FIPPA on legislature, governments, and courts in Canada does not depend on whether a decision in Canada was taken in relation to an obligation under the Constitution or any other source of law in Canada. As a matter of international law, Canada would not be able to rely on its own domestic law and Constitution to avoid its obligations under the FIPPA. According to Brownlie:[13]

> The law in this respect is well settled. A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law.

According to Article 27 of the *Vienna Convention on the Law of Treaties*:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

According to Article 3 of the International Law Commission's Draft Articles on the Responsibility of States:

> The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

The commentary to this Article states:

> .... a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a

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[12] *Anderson v Costa Rica, Ulemek v Croatia, Frontier Petroleum v Czech Republic, Encana v Ecuador, International Thunderbird v Mexico, Mihaly v Sri Lanka, ADF v USA, Loewen v USA, Methanex v USA, Canfor v USA, Mondev v USA, Glamis Gold v USA, CCFT v USA, Tembec v USA, Terminal v USA, Nova Scotia Power v Venezuela, Vannessa Ventures v Venezuela.*

[13] I. Brownlie, *Principles of Public International Law*, 6th edn (OUP, 2003) at 34.

> State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law and even if, under that law the State was actually bound to act in that way.

These provisions make clear that, while arbitrators may evaluate Canadian domestic law, including constitutional law or customary aboriginal law, in their decision-making, Canada's FIPPA obligations take precedence. Canada could not argue that it was relieved of a FIPPA obligation due to its responsibilities under the Constitution.

b. The point is illustrated by decisions of investment treaty tribunals

This issue has arisen in some investment treaty cases. For example, the tribunal in *EDF v Argentina* concluded that:[14]

> ... the legality of Respondent's acts under national law does not determine their lawfulness under international legal principles. The fact that the Argentine Supreme court has vested Respondent with robust authority during national economic crises does not change the Tribunal's analysis.
>
> The Tribunal notes that arbitrators in other cases have reached a similar conclusion. The *LG&E* Decision on Liability at paragraph 94 finds that 'international law overrides domestic law when there is a contradiction since a State cannot justify non-compliance of its international obligations by asserting the provisions of its domestic law'. Similarly, in the Decision on Liability in *Suez v Argentina*, the tribunal stated, 'Argentina may not avoid its treaty commitments with respect to the treatment to be accorded the Claimants by invoking the provisions of its internal law, regulations or administrative acts'. See paragraph 65....

The tribunal in *Saba Fakes v Turkey* stated:[15]

> .... In the event that an investor breaches a requirement of domestic law, a host State can take appropriate action against such investor within the framework of its domestic legislation. However, unless specifically stated in the investment treaty under consideration, a host State should not be in a position to rely on its domestic legislation beyond the sphere of investment regime to escape its international undertakings vis-a-vis investments made in its territory.

As a further illustration, the NAFTA tribunal in *Metalclad v Mexico* stated:[16]

> ... the acts of the State and the Municipality – and therefore the acts of Mexico – fail to comply with or adhere to the requirements of NAFTA... that each Party accord to investments of investors of another Party treatment in accordance with international law,

[14] *EDF International et al v Argentine Republic* (Award of 11 June 2012), para 907-8.
[15] *Saba Fakes v Republic of Turkey* (Award of 14 July 2010), para 119.
[16] *Metalclad v Mexico* (Award of 30 August 2000, NAFTA), para 100.

including fair and equitable treatment. This is so particularly in light of the governing principle that internal law (such as the Municipality's state permit requirements) does not justify failure to perform a treaty.

Thus, it is clear that Canada would not be excused from its FIPPA obligations, as interpreted and applied by the arbitrators, on the basis that a government's conduct complied with, or was required by a court pursuant to, the Constitution.

Likewise, Canada could not argue that its obligations under other sources of international law, such as international human rights law or international environmental law, provided a defence to obligations owed under the FIPPA. States have on occasion argued, without success, that their conduct was aimed at promoting or protecting international human rights or environmental norms and that this should preclude a finding of an investment treaty violation (e.g. *EDF v Argentina*; *SD Myers v Canada*).

5. Could action taken or legislation passed by First Nations Governments potentially put Canada out of compliance with the FIPPA?

a. Action taken or legislation passed by a First Nation may potentially put Canada out of compliance with the FIPPA

Because the FIPPA applies to the exercise of First Nations powers generally, the exercise of such powers in areas such as regulation of resource use, conservation of land and resources, and licensing and approvals of business activity may put Canada out of compliance with the FIPPA. This is especially so for the FIPPA's minimum standard of treatment (Article 4) and expropriation standard (Article 10) because, as mentioned earlier, the FIPPA's reservation for aboriginal people does not apply to these standards and these standards are invoked most often by arbitrators when finding a violation of an investment treaty.

You have advised me that First Nations have law-making powers in these areas in modern Aboriginal treaties and other agreements.

a. *zoning and land-use planning*;
b. *renewable and non-renewable resource use on First Nations lands*;
c. *protection and conservation of the environment*;
d. agriculture, public works and local services;
e. management, administration, and granting of interests in land;
f. community parks, recreation, and amusements;
g. *business licensing and regulation*; and
h. community economic development.

Decisions in any of these areas may lead to a claim under the FIPPA and, in turn, to a finding by the arbitrators that Canada did not comply with its FIPPA obligations. Some of these areas have led to claims and awards under other investment treaties, including in cases against Canada. I have italicized in the list above those areas that appear most likely to lead to a FIPPA claim, based on the experience under other investment treaties.

b. The following are potential scenarios that may lead to dispute under the FIPPA if Chinese-owned assets were affected

A few examples of decisions that may lead to a claim and, potentially, an award under the FIPPA are indicated below. The examples are based on the factual background of arbitrations under other treaties.

- A significant oil, gas, mining, or logging activity involving Chinese investors, especially if the activity was subject to a significant change – such as a moratorium; new conservation measures; or a court order cancelling or suspending a permit pending consultation with Aboriginal peoples – after the issuance of a permit or licence.

- A new or reinvigorated health or environmental law that applied to Chinese investors, such as a requirement to use local workers or suppliers or to satisfy added environmental requirements, especially where the investment was made in connection with government commitments linked to the existing regulatory framework.

- A controversial major project with Chinese ownership, such as the Northern Gateway pipeline[17], especially if it was approved at the federal level and then subject to new or revised rules at the provincial level or frustrated by serious public opposition.

These are intended as illustrations based on known cases under other investment treaties. Closer assessment would be required to assess the risk of liability in any specific case. That said, in all cases there would be significant uncertainty due to the variable interpretations adopted by tribunals acting under other investment treaties.

c. Contracts concluded by First Nations authorities may also lead to FIPPA litigation

Under the FIPPA, a contract concluded between a First Nation authority and a Chinese company may lead to a FIPPA claim. The claim would likely be subject to parallel FIPPA litigation even if the contract had an exclusive jurisdiction clause that referred disputes to another forum, such as domestic courts. I say this based on the observation that, in most cases under other investment treaties, arbitrators have allowed parallel treaty claims to proceed where there was an exclusive jurisdiction clause in a contract that was apparently related to the dispute before the arbitrators.

d. It is unclear who ultimately would have to pay a FIPPA compensation order against Canada that arose from a decision by a provincial, municipal, or First Nations authority

An outstanding question for Canada in investor-state arbitration is how the responsibility for an award against Canada is to be allocated among governments in Canada, especially where the acts

[17] According to data collected by the Alberta Federation of Labour from the National Energy Board hearings on the Enbridge Northern Gateway project, several funding partners for the project – including Sinopec, Nexen, and Suncor – are wholly or minority-owned by Chinese investors. Alberta Federation of Labour, *China's Gas Tank* (10 December 2012) at 17.

leading to the award were not acts of the Parliament of Canada, the federal government, or a federal court.

To illustrate, in the *Murphy/ Mobil Oil* NAFTA award against Canada, a majority of the arbitrators decided among other things that Canada has an ongoing financial liability due to research and development expenditure requirements – imposed on U.S. companies in the Hibernia and Terra Nova offshore oil projects – that were found to have been unlawful (although they had previously been upheld in Canadian courts and remain applicable under Canadian law).[18] The compensation owed by Canada to the U.S. companies has not yet been determined by the tribunal in a publicly-available award. However, the case illustrates that, where a sub-national government decision triggers liability for Canada under an investment treaty, then the federal government may face financial liability for a decision beyond its jurisdiction and control. Alternatively, the federal government could seek to recover the costs from other levels of government. However, this would raise constitutional issues because the federal government did not seek the consent of other levels of government in Canada before ratifying NAFTA or any FIPPA.

Also, in 2010, the federal government paid about $130 million as part of a NAFTA settlement in *AbitibiBowater v Canada*. Prime Minister Harper stated publicly at the time that provincial government should in future have to pay the cost, where Canada's liability under NAFTA arose from a provincial decision.[19] The Prime Minister stated that the federal government would 'create a mechanism so that it can reclaim monies' from provinces in such circumstances, although it was unclear how the federal government would proceed and it appears that no mechanism has been introduced since that time.

e. <u>It is reasonable to expect that First Nations may be expected to cover all or part of the liability arising from an award against Canada under the FIPPA or to alter their decisions due to a concern about potential non-compliance with the FIPPA</u>

Because the conduct of a First Nation may put Canada out of compliance with the FIPPA, it appears reasonable to expect that the federal government may request a First Nation to change its conduct to reduce a risk of non-compliance with the FIPPA. Also, if arbitrators under the FIPPA found that Canada violated the FIPPA due to the conduct of a First Nation in Canada, then the issue arises as to whether the federal government will cover the financial liabilities or whether it would look to the First Nation to cover Canada's liabilities.

This concludes my reply to your questions.

Yours very truly,

Gus Van Harten
Associate Professor

[18] S. McCarthy, 'NAFTA ruling puts another Newfoundland thorn in Harper's side' *The Globe and Mail* (8 June 2012).
[19] 'Provinces should pay for NAFTA loses: PM', CBC News (26 August 2010).

LIST OF DOCUMENTS (OPINION LETTER, GUS VAN HARTEN)

THIS IS EXHIBIT "D" REFERRED TO IN THE AFFIDAVIT OF GUS VAN HARTEN SWORN BEFORE ME AT THE CITY OF TORONTO, ONTARIO THIS 13th DAY OF FEBRUARY, 2013.

A COMMISSIONER FOR THE TAKING OF AFFIDAVITS IN ONTARIO.

Investment treaty cases

Albania

Pantechniki S.A. Contractors & Engineers v Republic of Albania (Award) (30 July 2009) ICSID Case No. ARB/07/21, online: IIC 383, ITA Law.

Tradex Hellas S.A. v Albania (Award) (29 April 1999) 14 ICSID Rev - FILJ 197, 5 ICSID Rep 70, online: ITA Law, IIC 263.

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Algeria

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