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SETTLEMENT OF INTERNATIONAL TRADE DISPUTES –
CHALLENGES TO SOVEREIGNTY - A CANADIAN
PERSPECTIVE

Lawrence L. Herman

I. INTRODUCTION

Until the latter part of this century and the advent of the NAFTA, the
annals of Canada-U.S. dispute settlement were surprisingly thin. There were
some well-known arbitrations that dealt with important sovereignty-type
issues, such as the Alaska Boundary Commission award,¹ the I’m Alone arbi-
tration,² the Trail Smelter arbitration,³ the Gulf of Maine case,⁴ and a few
notable others. But there is surprisingly little case law involving Canada-U.S.
disputes until we get into the modern era of trade relations.

The lack of instances of third-party settlement reflects the fact that, in
much of the Canada-U.S. relationship, dispute resolution was based on good
offices and effective diplomacy. Yet from Canada’s perspective, the lack of
firm rules for settling disputes legally was a cause for some disquietude. Al-
ways the smaller partner, Canada had the most to lose by being at the mercy
of power politics and sheer economic power to determine the outcome of any
particular difference. This concern for a rules-based relationship was one of
the motivating forces that led to the Canadian proposals for a free trade
agreement with the United States in the early 1980s – to enter into a legally
binding contract where the substantive and procedural rules are laid down
and where a properly constructed legal mechanism could ensure the fair,
expeditious, and binding resolution of differences. The United States may not
have shared the same anxieties as Canada, but the notion of a bilateral dis-
pute settlement regime for dealing with trade disputes struck a responsive
chord in the Reagan and Bush administrations.

³ United States v. Canada, Arbitral Tribunal, Montreal, Apr. 16, 1938 and Mar. 11, 1941;

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While consummation of the Canada-U.S. Free Trade Agreement (FTA) was fraught with many difficulties along the way, the main ingredients for bilateral State-to-State dispute settlement were quite readily agreed to by both governments. In essence, the FTA reflected the laudable parts of the GATT process and was built on common goals, the belief in the rule of law, and the need for certainty in commercial, economic, and human relations. Notwithstanding controversy in the Chapter 19 process for private trade remedies, Canada and the United States had little difficulty constructing the FTA dispute settlement mechanism for State-to-State disputes, which was subsequently incorporated into the NAFTA.

That new system was also born from a general dissatisfaction with much of the old GATT process, which lacked clear rules of procedure and relied heavily on consensus as the primary value. There were some improvements effected in the Tokyo Round and in the 1979 Codes, but that system was coming under increasing criticism by the mid-1980s as the FTA negotiations were underway. Ultimately, the GATT consensus-based system was radically changed by the Uruguay Round, which neared completion at about the same time as the Canada-United States-Mexico negotiations on the NAFTA regime were being settled. The Uruguay Round system alters the consensus-based approach of the GATT and replaces it with a mechanism that, in broad strokes, is very much akin to that contained in the FTA and the NAFTA.

The issue for discussion here is the effect that dispute settlement in the international arena has on the sovereignty of States, with particular reference to the new mechanisms in the WTO Agreement and the NAFTA. Of course, in the broad sense, neither treaty affects or limits sovereignty, if that term is used to mean the right to exercise the range of State functions within defined geographic boundaries, to the exclusion of any other State.

Viewed in traditional public international law terms, adherence to these international treaties is, by its very nature, an affirmation of sovereignty and not a denial or limitation of it. On the other hand, there is no doubt that, as treaty parties, the contracting States have accepted international obligations that bind them contractually and thus affect their traditional freedom of action. In important respects, the WTO dispute process has left little room for

5 The so-called private party track, under FTA Chapter 19, in cases of determinations of dumping and/or subsidization and of injury by national trade remedy agencies, however, was more controversial. That controversy continues today, as will be noted below.

6 The objectives in Article 102 of the NAFTA make it clear that the treaty is based on the rule of law and the common objective of establishing a legal framework to settle disputes. There are many, many articles written on the FTA and NAFTA dispute settlement mechanisms. For a good overview, see Jeffrey P. Bialos & Deborah E. Siegel, Dispute Resolution Under the NAFTA: The Newer and Improved Model, 27 INT'L LAW. 603 (1993).

national governments to manoeuver, as we shall see. It is this aspect of dispute settlement that this Article addresses. 8

This Article also looks at a different but related issue: the relationship between investor-State dispute settlement and sovereignty. Under NAFTA Chapter 11, investors from a NAFTA Party can bring binding arbitration proceedings against another Party directly, claiming that such Party has breached its obligations under that Chapter. The disputing investor can submit the claim under the provisions of the International Convention for the Settlement of Investment Disputes 9 (including the ICSID Additional Facility) or under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. An arbitration award is enforceable in the territory of the NAFTA member to the same extent as a court judgment. 10

The NAFTA investor-State provisions were seen as useful and progressive, providing a rare case in public international law where persons were given direct access to dispute settlement and entitled to claim directly against States for failure to live up to treaty obligations.

This whole area of the law remained quiescent over the years, but has recently come to the fore in the recent controversies surrounding the negotiation of the Multilateral Agreement on Investment (MAI) among Organization for Economic Cooperation and Development (OECD) members. Perhaps more than any other issue, the proposals for settling investment disputes in the draft MAI — modeled after Chapter 11 of the NAFTA — have raised the concerns over the limitations this system implies on States' sovereignty.

II. "LEGALIZATION" OF DISPUTE SETTLEMENT AND ITS EFFECT ON SOVEREIGNTY

The purposes of the WTO and NAFTA regimes are to reform the GATT system, weed out the consensus-based political aspects of it, and "legalize" dispute resolution in a highly refined (at least for an international treaty) judicial process. A carefully crafted and fully transparent regime of conflict

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8 This Article does not directly address the issues raised in the U.S. courts by a group called the American Coalition for Competitive Trade, challenging U.S. adherence to the binational panel process under Chapter 19 of the NAFTA on the grounds that it unconstitutionally limits the sovereign powers of the Congress and subjects U.S. persons to non-U.S. judges in NAFTA panels. The Coalition's constitutional challenge was dismissed by the U.S. Court of Appeals, D.C. Circuit, on Nov. 14, 1997: American Coalition for Competitive Trade Inc. v. Clinton, CADC, No. 97-10036, Nov. 14, 1997. The Court said that the petitioner failed to prove standing, leaving the doors open on a further constitutional challenge. See Court Dismisses Constitutional Challenge to NAFTA's Binational Panel System, 14 INT'L TRADE REP. 2000 (Nov. 19, 1997).


10 NAFTA, art. 1136.
adjudication through the new Dispute Settlement Understanding (DSU)\(^{11}\) is the result. This exposes national legislation to a procedure that is both automatic and non-avoidable, as well as a seriously improved examination process by impartial legal experts to determine its consistency with the treaty regimes.

This degree of examination of State measures, arguably, is unparalleled in the vast history of international relations. Combined with the DSU's reverse consensus rule, it has in turn limited the freedom of WTO members to legislate as freely as they wish and, in this sense, has resulted in a diminution of sovereignty. This is not necessarily a bad thing, but the ramifications are only now being felt by national governments.

The changes under the new system are apparent in two respects. First, there is now a vast number of cases on the WTO roster, over 100 active files at latest count.\(^{12}\) It can be expected that use by WTO members of this more user-friendly system will continue. This is to be compared with the far smaller number of cases per year during the former GATT era, when, for example, many developing countries stayed out of the process or only entered it as intervenors and not as the chief protagonists. Illustrating this is the fact that, for the 1960s and 1970s, the GATT annals contain relatively few adopted panel reports. Even in the 1980s, the number of reported GATT cases was comparatively limited, as opposed to the charged agenda in the barely three years since the WTO Agreement came into force.\(^{13}\)

Not only were there a comparatively small number of cases in the pre-Uruguay Round era, but the degree of detail of examination of national measures and the extent of analysis in many of the panel reports was often meagre. Some of the later GATT panel reports of the 1980s and early 1990s may run to several hundred paragraphs, but many of these simply repeat in detail the various arguments advanced by the Parties (a hallmark of GATT panel findings), offering relatively little analysis in the findings portions.

It is instructive to examine these panel reports of the 1960s and 1970s – even into the early 1980s – to recognize the broad-brush treatment given to complaints. The thickness (or lack thereof) of the volumes in the GATT Ba-


\(^{13}\) In 1977-78, the year before the end of the Tokyo Round, there were only three adopted panel reports: (1977-78) 25S B.I.S.D. In 1982-83, after implementation of the Codes and other Uruguay Round changes, there were still only three adopted reports: (1982-83) 30S B.I.S.D.
sic Instruments tells its tale. Take the case of the U.S. complaint against EEC minimum import prices in 1978.\textsuperscript{14} That case involved an extremely complex regime of minimum import prices administered by the former EEC under its Common Agricultural Policy, where some fundamental GATT obligations were at issue. The entire panel report, however, is only forty pages long, and only twelve pages (a mere twenty paragraphs) are devoted to analysis.

This somewhat cursory treatment began to change in the latter days of the GATT, in the late 1980s, when national measures began to be assessed more scrupulously by panels.\textsuperscript{15} This was aided, in part, by more extensive preparation and more detailed argument by the protagonist governments. However, not all panels approached their task with the same thoroughness and attention to detail.

In the first of the series of cases involving Canada’s liquor boards in 1988,\textsuperscript{16} there are ninety-six background paragraphs repeating the various arguments of the parties, followed by thirty-five paragraphs of analysis. Considering that the complaint of the E.U. involved the details of operation of no less than ten provincial liquor board agencies, this degree of scrutiny seems somewhat thin. However, even here, the panel goes into greater detail in looking at Canada’s internal laws and practices than some of the predecessor panels had done.

A few years later, there were two liquor board cases directly involving Canada and the United States,\textsuperscript{17} and there is the same repetition of the various arguments, extending over many pages. However, in the findings portions, the panels engage in a much more thorough assessment of the impugned measures in relation to GATT obligations, reflecting the greater degree of preparation of the contending governments and the growing trend to greater depth of analysis by the panels themselves.

By the time we reached the Uruguay Round and the WTO DSU, the stage had been set. The Uruguay Round has carried forward this trend to more in-depth analysis by panels. Part of this is due to more extensive preparation of


\textsuperscript{15} Even in the important case of United States - Section 337 of the Tariff Act of 1930 (1988-89) 36 S.B.I.S.D. 345, the report covers 40 pages, only 14 of which actually analyze the measure concerned. This does not mean that these reports are to be assessed on a counting of pages or paragraphs of analysis. However, it does allow parallels to be drawn between the old GATT approach and dispute settlement in the WTO era.


written submissions and argument by legal counsel of the protagonist states. This, in turn, subjects governments to international scrutiny to a degree not approached in the earlier days of the GATT regime. States whose measures are under the lamp are made to seriously squirm before the WTO panels.

A case in point is to compare the 1997 Appellate Body report on *EC Beef Hormones*\(^1\) with the 1978 *EEC Import Prices*\(^2\) panel report referred to earlier. The Appellate Body report is 100 pages long, consisting of 255 paragraphs of detailed analysis. In terms of scrutiny of the measure at issue, it far exceeds the level of detail of the earlier GATT case.

Another illustration is the almost 500-page panel report of December 6, 1997 on Japanese measures in *Photographic Paper*.\(^3\) The case was decided in Japan's favour and against the complaint by the United States. Two aspects are of interest in the present context. First, there is the detailed, point-by-point, detail-by-detail examination by the panel of each of the "measures" about which the Japanese complained.\(^4\)

As already alluded to, some of this reflects the sheer complexity of the measures and the increasing sophistication and detail of arguments before the panel. But this ever-increasing detail is also attributable to the evolution of the system from a largely consensus-based and political one to a judgment and rules-based one. The limiting effect on total freedom of manoeuver — and on the untrammeled right of States to adopt measures deemed to be in the best interest of their citizens — is implicit in the very detail of this examination. It is a fact of life in the post-Uruguay Round era.

Secondly, related to the issue of sovereignty, the Appellate Body has affirmed that a governmental policy need not necessarily have a substantially binding or compulsory nature and that even non-binding, hortatory wording in government statements of policy could have the same "effect on private actors as a legally binding measure or what Japan refers to as regulatory administrative guidance."\(^5\) Thus, the signal by the Appellate Body that policy statements outside the realm of government actual legislation or regulation may be swept into consideration by future WTO panels.

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\(^2\) See *Import Prices*, supra note 14.


\(^4\) The essence of the U.S. case was that various internal measures, consisting of Cabinet policy decisions, nullified and impaired anticipated benefits under Article XXIII:1(B) of the GATT. The panel and the Appellate Body were unable to find specific decisions or measures flowing from these policy decisions that directly affected U.S. rights.

Together with the impact of much closer scrutiny by GATT and WTO panels, there has been a marked tendency by panels to construe exemptions to GATT and WTO obligations very narrowly. The assumption is that, unless there are overriding and compelling reasons, States cannot get around their GATT/WTO obligations by appealing to some of the exceptions or exemptions referred to in those agreements. It means that bound treaty obligations cannot be taken lightly.

This trend toward strict interpretation of GATT obligations was evident in the latter days of the GATT, when panels were increasingly unimpressed with deviations from strict treaty obligations under the pretense of an Article XX exception. A good example is the Tuna-Dolphin case, in which a panel refused to accept the right of the United States to derogate from its GATT obligations to meet what, by objective counts, was a compelling conservation issue. The United States had defended its prohibition on imports of Mexican tuna under the Marine Mammal Protection Act by virtue of the Article XX exceptions, as being “necessary” for the protection of animal life (i.e., dolphins) under sub-paragraph (b). Reflecting the strict approach to GATT obligations:

The panel considered that the United States’ measures, even if Article XX(b) were interpreted to permit extrajurisdictional protection of life and health, would not meet the requirements of necessity set out in that provision. The United States had not demonstrated to the Panel — as required by a party invoking an Article XX exception — that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through negotiation of international cooperative arrangements . . . . Moreover, even assuming that an import prohibition were the only resort reasonably available to the United States, the particular measure chosen by the United States could in the panel’s view not be considered to be necessary within the meaning of Article XX(b). (emphasis added)

Here, the panel was not only construing the exceptions to GATT obligations narrowly, it was also stating that the issue of “necessity” for any trade-
restrictive measure would be assessed on the basis of objective considerations. Simply asserting that the State concerned felt the measure to be “necessary” was not sufficient. There had to be a demonstrable case to show that all other reasonable options had been exhausted.

The second branch of the case by the United States in Tuna-Dolphin was raised under Article XX(g). The United States argued that the import ban was a measure aimed at conserving dolphin stocks and was, therefore, within the scope of this paragraph as “relating to the conservation of exhaustible natural resources.” It was given equally short shrift by the panel. Citing a previous GATT case on Canadian unprocessed salmon and herring restrictions, the panel said that to fit within the exception, such a measure did not only have to “relate” to conservation, it had to be “primarily aimed at” such conservation. Again, this was a very high threshold and a narrow reading of the Article XX exceptions.

The same narrow construction of Article XX exceptions has been applied by panels under the WTO. Re-formulated Gasoline is a good example. At issue in this case were certain U.S. environmental regulations issued under the Clean Air Act of 1990, whereby certain baseline standards for gasoline were applied more favourably in certain cases for domestically refined gasoline as opposed to imported gasoline. The WTO panel had found that this differential treatment contravened GATT obligations and was not justified under any of the Article XX exceptions. The United States appealed.

As in the Tuna-Dolphin and Salmon and Herring cases, the key issues in Re-formulated Gasoline were the scope of the exceptions under paragraph (g) of Article XX and whether a technically discriminatory environmental or conservation measure could nonetheless be saved if it were a measure “relating to the conservation of exhaustible natural resources.” The Appellate Body said no. It upheld the panel finding that the measure did not come within the paragraph (g) exceptions. Even if it was a measure aimed at conservation, even if it was primarily aimed at conservation, it was discriminatory and, for that reason alone, could not be saved. As the Appellate Body stated:

The chapeau is animated by the principle that while the exceptions to Article XX may be invoked as a matter of legal right, they should not

26 Id. at 201.
be so applied as to frustrate the legal obligations of the holder of the right under the substantive rules of the General Agreement. 29

The chapeau to Article XX prevents any trade-restrictive measure that is discriminatory, disguised or not, and cannot save a conservation measure under virtually any circumstances. As the Appellate Body stated:

We consider that ‘disguised restriction,’ whatever else it covers, may be properly read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. The fundamental theme is to be found in the purpose and object of avoiding abuse of illegitimate use of the exceptions to the substantive rules available in Article XX. 30

What the Appellate Body is saying here is that, even if a measure fits squarely within the Article XX exceptions, it fails under the chapeau if it is in the least bit discriminatory. It leaves open to serious questioning whether governments have any room to manoeuver and whether, after Tuna-Dolphin, Unprocessed Herring and Salmon, and Re-formulated Gasoline, there is any meaning left to the Article XX exceptions. If there is not, the ability of governments to legislate for legitimate Article XX purposes has been removed.

The overriding dimension to these cases is the extent to which panels — fortified by the Appellate Body — have upheld the overriding sanctity of GATT and WTO obligations. The limitations on a State’s freedom of action are clear.

IV. NATIONAL TREATMENT

Compounding the limitations placed on the freedom of action by WTO Members by the narrow constructions of the exceptions is the strict approach to national treatment applied through successive GATT and WTO panel interpretations. Canada ran up against the strict application of GATT obligations in the Periodicals case. 31

The United States took Canada to court over the excise tax Canada applied to advertising revenues earned from advertisements place in so-called “split-run” editions of U.S. magazines. No such tax was applied to non-split-runs, imported or domestic. At issue was whether this tax applied in a dis-

29 Id. at 22.
30 Id. at 25.
criminatory fashion to imported U.S. split-run magazines, which would be contrary to GATT Article III. Both the panel and the Appellate Body found against Canada. The case has become somewhat of a cause célèbre, given the sensitivity of Canadians to the whole cultural issue.

The Periodicals case was, of course, argued on purely legal grounds. Canada defended the measure as one aimed at protecting Canadian advertising revenues, not magazines per se, and hence was outside of the GATT. It also argued that the measure applied to revenues earned on split-runs, whether produced inside or outside of Canada, that it did not have a disproportionate impact on imported magazines and that, in any case, the Canadian market for all magazines, imported and domestic, was a fully open one.

The panel rejected the Canadian defense. Having found that the imported magazines were the same as the domestic ones, it observed that "the only remaining question is whether imported 'split-run' periodicals are subject to an internal tax in excess of that applied to domestic non-'split-run' periodicals."32 The "only remaining question" was whether the tax applied differentially to imported goods.

This is fairly tough, although entirely consistent with the strict reading given to Article III by previous panels, such as the panel that examined the Section 337 of the U.S. Tariff Act of 1930 case.33 That panel held that there was an absolute obligation under GATT Article III to guaranty full equality of treatment between imported and domestic goods. The overriding objective of this requirement, the Section 337 panel held, was to ensure "effective equality of opportunities" for imported goods vis-à-vis domestic ones.34 The same rationale was followed scrupulously in succeeding cases in the GATT and in the WTO, a recent example being the Japan Alcoholic Beverages case.35

The Periodicals case, the Section 337 case, the Japan Alcoholic Beverages case and a number of other cases show the dangers governments face in deviating from strict compliance with the GATT national treatment rule. But it also reveals the rule's shortcomings, in that it fails to countenance any circumstances where less than full adherence to this obligation will be tolerated. This strict approach to national treatment, in the broad sense, constrains the ability of States to legislate and, viewed from that perspective, has an impact on their sovereignty.

32 Id. ¶ 4.27.
34 Id. ¶ 5.11.
Thus, in the Periodicals case, the broader issue of the open access to the Canadian market enjoyed by U.S. magazines was irrelevant to the WTO panel's deliberation. The panel was not impressed with the extent to which U.S. magazines had access to the Canadian market at large or the fact that these were freely available at Canadian newsstands. The only issue, according to the panel, was whether there was less than fully equivalent treatment accorded to Sports Illustrated over that given to Canadian magazines.

In Re-formulated Gasoline, the same product-specific approach enunciated in the Section 337 case was followed, the panel stating the words “treatment no less favourable” in Article III:4:

[ ] Call for the effective equality of competitive opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution and use of products. The Panel found therefore that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefiting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline.\(^{36}\) (emphasis added)

The panel went on to reject the U.S. “comparability” defense that imported gasoline was treated similarly to gasoline from similarly situated domestic refiners, pointing out that Article III:4 essentially allows no variation as to type or level of treatment or considerations beyond an assessment of the measure at issue in light of the absolute rule of equality of treatment.

The national treatment rule is a cornerstone of international trade law. It has, as we have seen, served the international community well in a series of important trade cases. No one could reasonably suggest that this foundation principle be watered down as a standard of international behaviour. This being said, maybe it is time to re-examine the rigid application of the national treatment requirement on a product-specific basis. It was drafted fifty years ago, under much different circumstances, when issues were less complex. Could there be a broader legal test, one that maintains the sanctity of national treatment but legitimizes limited, permissible deviations from the rule, assessed by looking at the broader market picture for that product in the importing country?

A possible approach would be for panels to apply the “effective equality of competitive opportunities” against the market at large, as opposed to the effect of a given measure on an individual product. This would mean that

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\(^{36}\) Re-formulated Gasoline, supra note 27, at ¶ 6.10.
effective equality of competitive opportunities would not necessarily entail exact equality in all cases. The extent of commercial opportunity to compete in the import market, and not simply the effect of a measure on the imported product per se, would be the issue.

This implies a change in the technical, product-based application of GATT Article III to the application of broader criteria. It would not be a retraction from the primary rule of non-discriminatory treatment. It would, however, allow measures to be defended by States demonstrating the overall ability of a given product to contest that the import market was not materially impaired.

If these “contestability” criteria had been available in the Periodicals case, they might have allowed Canada to defend its excise tax measures by showing that, notwithstanding the more favourable treatment accorded Canadian periodicals, the measure was sustainable because foreign (that is, U.S.) periodicals were not materially prevented from competing in (or “contesting”) the Canadian market and, in fact, enjoyed wide success in that market. The same defense would have permitted the United States to demonstrate that imported reformulated gasoline was not denied effective market participation, notwithstanding the difference in technical baseline standards.

There is, of course, some heresy in this proposal. Often overlooked in the zealous pursuit of national treatment is that it was designed, first and foremost, to maintain open markets, allow the forces of comparative advantage free play, and prevent distortions through discriminatory national laws and policies. The underlying WTO theory, like the GATT before it, is market-based.

Is there not some room for manoeuvering? Can governments not depart from strict non-discrimination obligations on a product-by-product basis by showing that their markets for that product remain open and freely contestable? This would be a way of addressing legitimate, national policy objectives without weakening one of the main pillars of the global trading system.

V. DISPUTE SETTLEMENT WITH PRIVATE PARTIES

Prior to the NAFTA, direct litigation between persons and States was a rarity. Consensual facilities had been developed through international agreement for the resolution of these kinds of disputes. Some of these agreements were of a purely commercial nature as part of lex mercatoria, such as the arbitration facilities of the International Chamber of Commerce in Paris. At the level of public international law, under the auspices of the World Bank, the International Convention for the Settlement of Investment Disputes be-
between States and Nationals of Other States (ICSID)\(^\text{37}\) provides for agreements to be settled by third-party arbitration. Bilateral foreign investment agreements followed the same pattern. However, the hallmark of these bilateral mechanisms and the ICSID was that a pre-existing *compromise* or arbitration agreement had to be in place.\(^\text{38}\)

The NAFTA broke new ground in this area. Chapter 11 provides that, in any such investment dispute, any person can bring action directly against a NAFTA host government, whether there is a prior arbitration agreement or not.\(^\text{39}\) Thus, NAFTA Article 1116 provides that an investor may submit to binding arbitration a claim that a NAFTA state has breached its obligations under the investment protection obligations of Chapter 11 whether or not there is a prior arbitration agreement in place.

Those Chapter 11 obligations are broad in scope. They include the obligation to provide national and most-favoured-nation (MFN) treatment and the obligation to ensure treatment in accordance with international law, including "fair and equitable treatment and full protection and security."\(^\text{40}\) Together with these general requirements, NAFTA Article 1110 provides that, "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure *tantamount to* nationalization or expropriation of such investment,"\(^\text{41}\) except for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and on payment of prompt and fair market value payment. These Chapter 11 provisions followed largely from Bilateral Investment Treaties (BITs) that Canada and the United States had concluded with other governments and those established the treatment standard in this respect. The overriding difference, of course, was that these bilateral treaties left it to the governments to arbitrate any alleged failure to comply with treaty requirements. They did not provide a direct right to investors themselves to litigate.

Chapter 11 of the NAFTA went largely unnoticed for several years, with little controversy over what appeared to be a fairly straightforward applica-

\(^{37}\) See supra note 9.

\(^{38}\) Under Article 25 of the ICSID, the jurisdiction of the Centre extends to any legal dispute arising directly out of an investment between a Contracting State and an investor "which the parties to the dispute consent in writing to submit to the Centre."


\(^{41}\) NAFTA, art. 1110.
tion of acceptable international standards of treatment to the realm of private rights. Aside from two disputes — one of which has been moving steadily through the system — little was heard in Canada of Chapter 11 until the OECD negotiations on the Multilateral Agreement on Investment (MAI) began to gather momentum in the spring and summer of 1997.

The MAI is an effort on the part of the OECD members to conclude a high-standard investment agreement that will set rules and standards for host-State behaviour. It is only in draft form, and the negotiations are set to proceed in the spring of 1998 to see if a final agreement can be achieved. The framework of the successive OECD drafts have followed NAFTA Chapter 11, including the investor-State provisions on dispute settlement.

The MAI, and in particular the investor-State provisions, has now become the centrepiece of an intense public debate in Canada. The claim made by detractors of the MAI is that the various draft provisions represent a dangerous diminution of sovereignty on the one hand, and the conferring of inordinately extensive rights on large international corporations and multinational enterprises on the other. Singled out, but not alone in this opprobrium, are the provisions in investor-State dispute settlement. These provisions follow the NAFTA framework and provide that an investor can seek binding and enforceable arbitration in any dispute “concerning an alleged breach of an obligation” of the host-State under the Agreement.

The claim is made that these provisions will provide foreign corporations with the freedom to challenge virtually any legitimate domestic law, regulation, or policy on the basis that such measure is tantamount to or, in the words of the MAI draft test, has “equivalent effect” to nationalization or expropriation.

The basis for such a challenge under the MAI, it should be noted, would not be that there was an element of discrimination or a failure to accord national treatment to that foreign investment, but simply that the value of an asset has been negatively affected by such a measure and that this is, or can be, of “equivalent effect” to nationalization or expropriation. This, it is fur-

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42 While there had been a degree of momentum to conclude negotiations in the spring of 1998 and to open up the agreement for signature among OECD and non-OECD members, there remain many unsettled issues, including the need to effect some sort of arrangement on the U.S. Helms-Burton legislation. Together with this, the U.S. government has recently expressed dissatisfaction with the lack of progress in other areas and has expressed concern with the insistence by many participants on reservations or exceptions to the MAI’s provisions. The U.S. position is that there is not enough on the negotiating table to make a deal possible, and further progress is needed.

43 Draft MAI text, Daffe/MAI/NM97/2, Part V, D.2.
ther argued, represents one of the greatest threats to governments' abilities to govern and, thus, is a threat to State sovereignty.

As a case in point, critics in Canada have referred to the current proceedings initiated by the Ethyl Corporation in the United States under NAFTA Chapter 11. The case concerns the prohibition enacted by the federal government (Bill C-29) over the importation of and inter-provincial trade in a gasoline additive known as MMT. The rationale for the ban is that the substance is environmentally harmful and is a health hazard. Ethyl claims that, among other matters, this is a measure "tantamount to" expropriation, since it has effectively reduced the value of its Canadian distribution assets to zero. The case has been used to underscore the possibility of a range of national, "sovereign" measures likewise being subjected to binding arbitration.

Opposition to the MAI appears rampant among not only Canadian interest groups, but in the United States, a coalition of U.S. environmental groups have launched a campaign to defeat the MAI, claiming, like their Canadian counterparts, that it will make foreign corporations into "super citizens," enjoying rights that ordinary American citizens do not have. Non-governmental organizations such as Greenpeace International strongly oppose the MAI for fear that it will limit State sovereignty in dealing with a range of environmental, social, and human health and safety measures.

The issues raised in Canada, the United States, and elsewhere concern the issue of sovereignty and international dispute resolution, bringing what was seen as a fairly technical legal issue to the forefront of policy debate. Can there be a mechanism where foreign persons bring actions directly against governments that does not, somehow, have a theoretical limitation on the

44 There is nothing in the draft text or in the commentary that clarifies what is meant by the draft wording "having equivalent effect," other than that it is intended to cover, among other things, "creeping expropriation." Id. at 122.

45 See Groups See Danger from Ethyl Suit, 14 INT'L TRADE REP. 1248 (July 16, 1997).

46 Ethyl imports MMT, a gasoline additive, into Canada and distributes it to refiners for blending with gasoline. MMT has not been accepted for use in the United States due to a ban imposed by the EPA, although this is currently under litigation.

47 See U.S. Environmental Groups Announce Campaign to Defeat OECD Investment Pact, 15 INT'L TRADE REP. 263 (Feb. 18, 1998). NGOs have been relentless in their quest against the MAI. The issues have become highly politicized. A recent speech by the GATT Director-General contained a mere suggestion that the WTO might be prepared to look at the MAI once the OECD negotiations concluded. This comment was taken out of context by a number of special interest groups who claimed that the WTO Director-General was associating the WTO with the MAI exercise. He was forced to issue an unprecedented press release denying any such linkage. WTO Denies Claims by Special Interest Groups Linking Ruggiero to MAI, Press/91 Feb. 17, 1998.

sovereign power of the State? Is it objectionable to provide for foreign persons to have the right to litigate, where nationals do not? Are there overarching dangers here that lawyers and negotiators have not foreseen?

Given the intense controversy surrounding the MAI and the investor-State provisions in particular, it may be necessary to calmly consider these criticisms and re-think the rationale behind these provisions.

VI. CONCLUSIONS

There are many unanswered questions about international dispute settlement in the trade area and its longer-term effect on national sovereignty. Oddly, in some bizarre twist, the debate has put some parties that would appear to share little common ideological ground on the same side of the argument. In the United States, for example, conservative opponents of the NAFTA, and of international dispute settlement generally, are sharing the podium with environmental and other interest groups that oppose the MAI. One would think the latter would be in favour of international engagement by the United States and of the progressive development of international law through enhanced settlement processes and procedures, but such is not the case.

Insofar as the MAI is concerned, the notion that allowing private parties the right to sue governments will create “super citizens” seems over-drawn. And yet, there is some nagging doubt that the issues here cannot be easily dismissed. One solution would be to draft into the MAI a series of safeguard provisions, like those in the 1994 GATT, which set down interpretative notes to make it clear that investment measures that can be challenged must involve an element of “taking” or of confiscation and that mere changes to laws, regulations, or policies that have a direct or indirect effect on the value of an asset are not sufficient. Another may be to abandon the notion of investor-State dispute settlement and return to the more traditional means of dispute settlement. That would mean that any such investment dispute would be arbitrated between governments only.

Insofar as the WTO is concerned, there is no likelihood that the trend will change. Aided by a more rapid and effective system of dispute resolution, States are turning more and more to the DSU process to deal with unresolved differences. Together with this, governments are more diligently preparing cases and are presenting exhaustive pleadings and arguments. The panels, particularly the specialized Appellate Body, have much better factual bases for their decision-making and are more versed in trade law then ever before. This combination of factors means that national measures will increasingly come under challenge and international scrutiny. It is part of globalization from which no government can escape.
There are no easy answers to these questions for lawyers. The challenges are there. They will continue to bedevil legislators. The strict application of trade obligations and the newly found ability of persons, possibly, to challenge State measures has brought new and daunting issues to the forefront.