

**The London School of Economics and Political Science**

*A Chilling Effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment*

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# Abstract

The plain packaging of tobacco products, the disposal of hazardous waste and the management of toxic chemicals are all areas of health, safety and environmental (HSE) regulation which have faced legal challenges by private corporations under international investment agreements established as a means of promoting and protecting inward investment. How these legal challenges are made possible by the international trade and investment regime, and what lasting impact they are having on the regulatory autonomy of governments is the focus of this research.

This empirical work seeks to understand the impact of International Investment Agreements (IIAs) on national regulatory autonomy. By probing trends in regulation as well as the level of awareness of IIAs by government regulators, this research aims to identify the likelihood of constrained regulatory decision making or 'regulatory chill' amongst those governments who have faced challenges, or the threat of challenges, to their regulatory measures under IIAs. It will also consider whether any chilling effect is more likely in a developing country versus a developed country environment.

This research engages with the relevant international relations literature which looks at the impact of the international integration of markets and trends in globalization on the policy autonomy of national governments. More particularly it looks not only at whether globalization leads to the erosion of national policy autonomy, but whether this manifestation of globalization (ie: increasing numbers of negotiated IIAs with private corporate access to binding investor-state arbitration) leads to the erosion of national policy autonomy in the form of forced regulatory restraint or chill.

There has been a proliferation of bilateral and regional rules on investment and with worldwide levels of investment expected to reach \$1.8 Trillion by 2015, these agreements are arguably relevant to the overall trade and investment system. In this context, this research will contribute to existing academic literature with respect to the impact of trade and investment agreements on state policymaking autonomy within both developed and developing countries and will make recommendations in the area of trade and investment policy development and negotiations, including the role of investment provisions and investor-state dispute settlement in future bilateral and multilateral trade agreements.

## **Acknowledgements**

This research project has been at times an all-consuming one, but at its end marks the culmination of an amazing experience which would not have been possible without the support and help of many people. I am grateful to my supervisor Stephen Woolcock for his advice and guidance over these last four years, as well as his unwavering support. This project would not have been possible without the trust and participation of all those dedicated government regulators from Canada and around the world who agreed to speak with me and share their experiences and insights on the regulatory development process. The assistance of Ionna Gouseti from the LSE Methodology institute also helped enormously with my endeavour to use statistics to tell some of my story despite my relative inexperience in this regard. Finally, a huge debt of gratitude to my friends and family who have provided encouragement and support as proof readers and generally by agreeing to put up with my absence or distraction on numerous occasions, particularly my husband Ulf Quellmann and my three boys Maximilian, Benjamin and Blake who will be happy to finally have me back.

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## Acronyms and Abbreviations

CEAA	Canadian Environmental Assessment Agency
CETA	Comprehensive Economic and Trade Agreement (Canada-EU)
CFIA	Canadian Food Inspection Agency
CNSC	Canadian Nuclear Safety Commission
DFO	Department of Fisheries and Oceans
EC	Environment Canada
EFTA	European Free Trade Association
FET	Fair and Equitable Treatment
FCTC	Framework Convention on Tobacco Control
FIPA	Foreign Investment Protection Agreement
FTA	Free Trade Agreement
GHG	Green House Gases
HC	Health Canada
HSE	Health, Safety and Environmental
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreements
IISD	International Institute for Sustainable Development
IPCC	Intergovernmental Panel on Climate Change
ISDS	Investor State Dispute Settlement
NAFTA	North American Free Trade Agreement
NIMBY	Not In My Backyard
OECD	Organization for Economic Cooperation and Development
PMRA	Pest Management Review Agency
PTIA	Preferential Trade and Investment Agreement
SCC	Stockholm Chamber of Commerce
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TC	Transport Canada
TPP	Trans Pacific Partnership
TRIMS	Trade Related Investment Measures
TRIPS	Trade Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership (US-EU)

UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
WHO	World Health Organization
WTO	World Trade Organization

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## Executive Summary

The plain packaging of tobacco products, the disposal of hazardous waste and the management of toxic chemicals are all areas of health, safety and environmental (HSE) regulation which have faced legal challenges by private corporations under international investment agreements established as a means of promoting and protecting inward investment. How these legal challenges are made possible by the international trade and investment regime, and what lasting impact they are having on the regulatory autonomy of governments is the focus of this research.

As investment flows have increased under globalization, foreign investors have been concerned with ensuring legal security with respect to the enforcement of their property rights when investing in countries with weak institutions. With many investors lacking confidence in the legal recourses available within the developing host countries in which they are investing, the attraction of international agreements as a means of ensuring and enforcing this protection has been appealing. The attractiveness of international investment agreements (IIAs) versus the reliance on domestic host legal systems has been enhanced by the unique access private investors have had through these agreements, to investor-state dispute settlement provisions and impartial international arbitration.<sup>1</sup>

These agreements take the form of investment chapters in preferential trade and investment agreements (PTIAs) or stand- alone bilateral investment treaties (BITs). Modern day IIAs aim to ensure among other things, non-discriminatory and minimum levels of treatment for investors, the protection of investments through guarantees of compensation for legitimate cases of expropriation of investor assets, as well as operational flexibility through the free transfer of funds between countries. There has been a proliferation of bilateral and regional rules on investment and with worldwide levels of investment expected to reach \$1.8 Trillion by 2015, these agreements are arguably relevant to the overall trade and investment system.

The negotiation of the North American Free Trade Agreement's (NAFTA) Chapter 11 on investment represented the first time that such a sophisticated investment protection agreement had been negotiated between developed countries. NAFTA's Chapter 11 also

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<sup>1</sup>Investor-state dispute settlement provisions allow private corporate investors to sue host governments for breaches of investment provisions under PTIAs or BITS.

served to highlight the concerns of civil society and non-governmental organizations (NGOs) regarding the rights granted under the agreement, which were seen as giving foreign investors rights that unduly constrained national policy autonomy, especially in the areas of health, safety and environmental regulation. More specifically, the private access to international arbitration provided for in Chapter 11 resulted in unprecedented challenges to Mexican, Canadian and US regulatory measures in these sensitive areas by private investors, addressing what they perceived as regulatory takings.<sup>2</sup> This in turn raised concerns that these challenges could lead to *regulatory chill*<sup>3</sup>, as governments curtailed or amended their regulatory initiatives in an effort to avoid multi-million dollar lawsuits. This view was further reinforced by the increasing number of investor-state dispute challenges arising within emerging market countries under bilateral investment treaties (BITs).<sup>4</sup>

Through this empirical work we have sought to understand the impact of International Investment Agreements (IIAs) on national regulatory autonomy. By probing trends in regulation as well as the level of awareness of IIAs by government regulators, this research aimed to identify the likelihood of constrained regulatory decision making or 'regulatory chill' amongst those governments who have faced challenges, or the threat of challenges, to their regulatory measures under IIAs. It has also considered whether any chilling effect is more likely in a developing country versus a developed country environment.

This research engaged with the relevant international relations literature which looks at the impact of the international integration of markets and trends in globalization on the policy autonomy of national governments. More particularly it looked not only at whether globalization leads to the erosion of national policy autonomy, but whether this manifestation of globalization (ie: increasing numbers of negotiated IIAs with private corporate access to binding investor-state arbitration) has led to the erosion of national policy autonomy in the form of forced regulatory restraint or chill.

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<sup>2</sup> The OECD 2004 Working Paper on International Investment entitled 'Indirect Expropriation and the Right to Regulate in International Investment Law' outlines that the concept of regulatory taking applies to the 'misuse of otherwise lawful regulation to deprive an owner of the substance of his rights' and is meant to cover such things as 'creeping nationalism'. (p.8)

<sup>3</sup> Regulatory Chill is defined by Eric Neumayer in *Greening Trade and Investment*, as a situation where developed countries might either lower environmental standards or fail to raise them for fear that internationally mobile capital will move to countries with lower standards (p.68). Kevin Grey & Duncan Brack in the OECD Report of the Working Party on Global and Structural Policies on Environmental Issue in Policy-Based Competition for Investment, outline a situation 'where countries refrain from enacting stricter environmental standards in response to fears of losing a competitive edge' (p.8). Kyla Tienhaara argues in *The Expropriation of Environmental Governance* that this notion of regulatory chill has been further extended to address concerns regarding international investment arbitration such that regulators with knowledge of investor state challenges to regulatory measures or the threat of such challenges will curtail regulations or be reticent to pursue more stringent regulations in these areas. This extension of the meaning of regulatory chill has also been advanced by scholars such as Gray 2002 and Peterson 2004 (p.25)

<sup>4</sup> According to the May 2012 UNCTAD report *Recent Developments in Investor-State Dispute Settlement*, 66% of new cases have been launched against developing or transition economies. To date 61 developing countries and 16 countries with economies in transition 'have responded to one or more investment treaty arbitration.' p. 4. 'Argentina continues to be the most frequent respondent (53 cases) followed by Venezuela (34), Ecuador (23) and Mexico (21)

There has been much written on the issue of the impact of IIAs on government regulatory autonomy and the possible chilling impact of the investor state dispute settlement provisions. The literature to date has focussed on a case-by-case analysis and provided primarily anecdotal evidence of regulatory chill. This research will represent the first comprehensive look at the issue of regulatory chill, providing both a unique methodological approach and a consistent set of findings on the issue.

The assumption of this thesis was that if the regulatory chill hypothesis was to hold or to be considered a viable possible outcome of IIA legal challenges, we would expect to find a number of observable outcomes in regulator behaviour and regulatory trends. First, one would have expected trends in HSE regulation to reflect this chilling impact (through a stagnant or weakening regulatory environment or through the degree of uptake in regulatory policy), particularly in policy areas where regulatory measures were challenged under IIAs. Second we would have expected to find a level of awareness and understanding among HSE regulators about the existence and content of IIAs. Any causal link between IIAs and regulatory chill also needed to demonstrate that beyond awareness, that IIAs had an influential role on regulators in the HSE regulatory development process.

In order to test the expectations of the research hypothesis, this thesis used quantitative and qualitative tools within a comparative case study analysis. This included statistical analysis and the qualitative coding and analysis of in-depth interviews and an electronic survey, as well as the statistical and qualitative analysis of government information such as regulatory databases, policy pronouncements and government reports and studies. Case studies focused first on NAFTA Chapter 11 on Investment's impact on the regulatory policy development process in Canada in the area of health, safety and the environment and second on the impact of IIAs on tobacco control regulation globally.<sup>5</sup>

Overall this research found that the empirical evidence does not support the hypothesis on regulatory chill. While there are some findings which raise the possibility of influence by IIA ISDS cases on the regulatory development process or trends in regulation, there is no consistent observable evidence to support the possibility of regulatory chill.

In the case of the Canadian regulatory environment the analysis found a downward trend in the growth rate of new HSE regulations or regulatory changes but did not find evidence of a

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<sup>5</sup> Chapter 3 gives a detailed outline of the methodology

trend of stagnant or weakening regulations in the wake of NAFTA Chapter 11 challenges which would suggest possible regulatory chill. Rather, HSE regulation demonstrated an increasing trend in the stringency and comprehensiveness of new regulations and regulatory changes. There was some evidence of a statistical correlation between NAFTA Chapter 11 investor state dispute settlement challenges to government environment and health measures and the likely adoption of environmental and health regulations during a few years between 1998-2013. Most importantly, the empirical evidence found a low level of awareness among HSE regulators regarding NAFTA Chapter 11 and the potential threat of an ISDS challenge to regulation. The research revealed regulators rarely take Canada's trade and investment commitments into consideration when developing regulations, but when they do, they are more likely to be concerned about trade commitments under the World Trade Organization (WTO) Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) agreements than NAFTA Chapter 11.

The case study on tobacco control found a growing trend in the level of uptake of tobacco control regulations among countries worldwide, including in regions which were facing ISDS challenges under IIAs. Additionally the empirical evidence found a low level of awareness among tobacco control regulators regarding IIAs and the potential threat of an ISDS challenge to tobacco regulation. In line with the Canadian Case Study, the research revealed that tobacco regulators rarely take trade and investment commitments into consideration when developing regulations and when they do, they are more likely to be concerned about trade commitments under the WTO SPS and TBT agreements than commitments under IIAs. At the same time regulators from developed and developing countries see the influence of the WTO challenge against Australia's plain packaging legislation as an influencing factor in their own 'wait and see' approach on this issue.

The key themes to emerge from this analysis were that the absence of regulatory chill suggests globalization has not prevented policy divergence with respect to IIAs. However there was evidence that policy diffusion and emulation were leading to an upward policy convergence in the area of HSE. Furthermore there was evidence in the case of Canada of re-regulation not de-regulation as illustrated by the focus on efficiency, modernization and streamlining and at the same time the increasing stringency and comprehensiveness in HSE regulations over a fifteen year period. Moreover the extent to which regulators considered trade in the regulatory development process, was generally with respect to the WTO and SPS and TBT agreements suggesting that future scholars will need any consideration of regulatory chill to do so in the broader trade and investment context.

The regulatory development process in developing countries was driven by similar factors to those in developed countries however regulators faced greater challenges in the pursuit of HSE regulations as a result of the weakness of domestic institutions, the increased financial burden of any potential IIA ISDS challenge and a general lack of trade and investment expertise and experience.

Finally, while the goal of this research has been to explore the impact of IIAs on government regulatory autonomy with a view to assessing the likelihood of regulatory chill through observation of regulatory trends and awareness of regulators, it has also sought to provide a comprehensive methodological approach which might be used to guide future research on this issue.

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# Chapter 1: Globalization and national policy autonomy: A theoretical framework

*The golden straitjacket is the defining political economic garment of globalization. The tighter you wear it, the more gold it produces.*

Thomas L. Friedman

## 1. INTRODUCTION

The last three decades have seen an increasing trend towards the integration of markets. The establishment of global production chains, the explosion of trade and investment flows as well as the development of the international institutional framework to support these trends, have resulted in what is commonly referred to as globalization. As globalization has taken hold, concern regarding its impact on the welfare of nations and the policy autonomy of governments has increased. This concern reached public consciousness during the popular uprisings and civil society demonstrations in opposition to the proposed Multilateral Agreement on Investment (MAI) within the auspices of the Organization for Economic Cooperation and Development (OECD) in 1998 and against the World Trade Organization (WTO) at its 1999 ministerial meeting in Seattle, aimed at launching the new millennium round of trade negotiations. Currently these issues are being debated in the context of regional trade and investment negotiations under the Trans Pacific Partnership (TPP) and bilateral negotiations such as the US-EU Transatlantic Trade and Investment Partnership (TTIP). The questions these demonstrations and debates have raised, and which continue to challenge scholars are whether globalization is having a negative impact on the ability of governments to set domestic policy and whether private actors are playing an ever increasing role in this equation. There is a strand of international relations theory which has grappled with these questions by trying to determine the impact of globalization on government policy autonomy.

The literature on the impact of the integration of markets is nothing new and has its origins in historical work as far back as Adam Smith's *The Wealth of Nations*, in which he considered the links between the imposition of taxes and capital flight.<sup>6</sup> More contemporary literature

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<sup>6</sup> Layna Mosely makes this point in her book *Capital and National Government* 2003. Cambridge University Press, p.4.

has looked at whether globalization or market integration has led to either a *convergence* or *divergence* of government policy making across nations. Those arguing *convergence* have claimed that market integration has eroded national autonomy, reduced social welfare alternatives to the market, created interdependence among governments in policy making or led generally to the strengthening of markets and private actors at the expense of governments. They claim that *convergence* is the result of a regulatory race-to-the-bottom as the exit threats of multinational enterprises (MNEs) lead countries to lower standards as they compete for capital. While anecdotal evidence abounds, there is limited empirical evidence to support these claims. On the opposite end of the spectrum, those globalization proponents arguing *divergence* reject this view and through their empirical work demonstrate that globalization has not prevented different approaches to national policies, hindered national policy autonomy or resulted in a decline in social welfare policies, at least in the case of developed countries. Even the biggest proponents of globalization however, suggest that the impact on developing countries is likely more problematic.

As a subset, this research explores globalization and its impact with respect to international investment. International investment represents one important aspect of the overall trend towards globalization, with a growing body of bilateral and regional rules in the form of international investment agreements (IIAs) <sup>7</sup>, providing the institutional framework to support it. There have been many claims that IIAs impose constraints on signatory governments, as they provide for a unique mechanism by which national policy decisions can be challenged by private actors.<sup>8</sup> Over the last two decades government regulatory measures in the areas of health, safety and the environment have been the subject of challenges by private corporations under IIAs signed by countries worldwide, but particularly under NAFTA Chapter 11 on investment.<sup>9</sup>

Just as scholars have linked the exit threats of MNEs to the weakening of regulation<sup>10</sup>, there is a belief that IIAs can cause regulatory chill<sup>11</sup>, as governments respond to the threat of

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<sup>7</sup> International Investment Agreements (IIAs) refer to bilateral investment treaties (BITs) and preferential trade and investment agreements (PTIAs), but do not include investment agreements or stabilisation agreements signed between MNEs and host countries.

<sup>8</sup> Chapter 2 details the arguments made to this effect by scholars and civil society.

<sup>9</sup> Reference is often made to landmark cases such as *S.D. Meyers v. Government of Canada*, *Ethyl Corporation v. Government of Canada*, *Metalclad Corporation v. United States of Mexico* and *Methanex v. United State* as examples of corporate challenges to health, safety and environmental regulations. This is discussed in further detail in Chapter 2.

<sup>10</sup> The threat of exit has been addressed by scholars such as Vernon (1971), Hirschman (1971), Dunning (1993), Bartik (1988), Stopford and Strange (1991), Vogel (1995), Bartlett and Seleny (1998)

<sup>11</sup> Regulatory Chill is defined by Eric Neumayer in *Greening Trade and Investment*, as a situation where developed countries might either lower environmental standards or fail to raise them for fear that internationally mobile capital will move to countries with lower standards (p.68). Kevin Grey & Duncan Brack in the OECD Report of the Working Party on Global and Structural Policies on Environmental Issue in Policy-Based Competition for Investment, outline a situation 'where countries refrain from enacting stricter environmental standards in response to fears of losing a competitive edge' (p.8). Kyla Tienhaara argues in *The Expropriation of Environmental Governance* that this notion of regulatory chill has been further extended to address concerns

litigation and curtail or amend their regulatory initiatives in an effort to avoid expensive international arbitration cases brought by disgruntled corporate investors. This regulatory chill is seen as evidence of weakened national policy autonomy in the context of the debate on globalization. Moreover, the belief is that these regulatory challenges are likely to prove more difficult for developing or emerging market countries which are under more pressure to attract and retain international investment and whose ability to deal with the expense of investor state litigation is limited.<sup>12</sup>

This chapter will outline in more detail the strand of international relations theory which looks at the impact of globalization on government policy autonomy. It will show how this doctoral thesis will engage with the theory and more broadly why it is relevant to the on-going debate. It will also give an overview of the research question, hypothesis and methodology and describe the layout of the remainder of the thesis.

## 2. THE IMPACT OF GLOBALIZATION ON NATIONAL POLICY AUTONOMY

The empirical literature concerned with the issue of globalization or the integration of markets and its impact on government policy autonomy is vast. In fact there are numerous theories of globalization which each involve different balances of authority between the actors, be they states, NGOs or MNEs. At the same time, global economic pressures, ideational influences and institutional pressures such as those created by regionalism, play varying roles in the many theories.<sup>13</sup> The theories on globalization today however are best understood in their historical context.

Historical and contemporary literature has addressed this issue beginning with Adam Smith's *Wealth of Nations* through to the 1970s *structural dependence theorists* who considered the influence on government policy of the demands made by domestic businesses as well as patterns of investment, and whether low rates of investment were likely to lead to changes in corporate tax policy.<sup>14</sup> Furthermore while the globalization debate seems to suggest a new phenomenon, it has been of concern for more than two hundred years. 'David Hume, Charles Louis Montesquieu, and Adam Smith all believed that capital mobility would restrain the

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regarding international investment arbitration such that regulators with knowledge of investor state challenges to regulatory measures or the threat of such challenges will curtail regulations or be reticent to pursue more stringent regulations in these areas. This extension of the meaning of regulatory chill has also been advanced by scholars such as Gray 2002 and Peterson 2004 (p.25)

<sup>12</sup> There is a whole host of literature dealing with the issue of the cost burden of investor-state arbitration for developing countries including Eric Gottwald's 2007 entitled 'Levelling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?' published in the *American University International Law Review*, 22:237, pp237-275

<sup>13</sup> Higgott, Underhill and Bieler make this argument and refer to four different understandings of globalization in the introduction to their book *Non-State Actors and Authority in the Global System*. Routledge (2000).

<sup>14</sup> Layna Mosely makes this point in her 2003 book *Capital and National Government*.

growth of the state'.<sup>15</sup> The 1960s and 1970s saw concern about the nation-state rise again with Charles Kindleberger claiming that 'the state is about through as an economic unit' and Raymond Vernon penning a book entitled 'Sovereignty at Bay' which looked at the role played by multinational firms in the development of public policy . Themes which governed concerns at that time, namely 'transnational relations and interdependence and dependency and underdevelopment' while separate spheres of scholarship in the 1970s have been blurred in contemporary debates about globalization.<sup>16</sup> Later, theories of 'interdependence' as espoused by Keohane and Nye looked at the diminishing influence of national policymakers.<sup>17</sup>

Influential work by John Gerard Ruggie has suggested that the Bretton Woods system contained an 'embedded liberalism' compromise characterized by trade liberalization alongside national government policies aimed at softening any negative impact that might result.<sup>18</sup> Following Ruggie, Dani Rodrik's work showed how this relationship continued to hold throughout the world.<sup>19</sup> This theory supported the fact that trade liberalization was good for society but argued that in the short term it could cause social inequalities and dislocations which would necessitate government policies to soften the blow. It is broadly held today that this compromise of embedded liberalism can no longer be sustained due in large part to the mobility of production and capital which is leading to a reduction in the ability of government to deliver on its side of the compromise. These two strong voices in international political economy – Ruggie and Rodrik accept the core proposition of conventional wisdom on globalization, that the 'exit threats of mobile producers and investors has tilted the balance of power strongly in favour of the market, over politics at the national level'.<sup>20</sup>

This brings us to contemporary literature which has looked extensively at the impact of globalization on national policy autonomy, arguing either *convergence* or *divergence*, with the balance of empirical weight on the side of *divergence* despite popular consensus to the contrary.

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<sup>15</sup> Garrett, Geoffrey. 1998. "Global Market and National Politics: Collision Course or Virtuous Circle?" *International Organization* 52: P.793

<sup>16</sup> *Ibid*, P.793

<sup>17</sup> Layna Mosely makes this point in her 2003 book *Capital and National Government* . Details outlined in Keohane, Robert O. and Joseph S. Nye Jr.. 1997. *Power and Interdependence*. Longman Classics in Political Science (Pearson)

<sup>18</sup>Ruggie, John Gerard. 1998. *Constructing the World Polity*. The New International Relations Series. Routledge

<sup>19</sup> Rodrik, Dani. 1997. *Has Globalization Gone too Far*. Institute for International Economics

<sup>20</sup> Garrett, Geoffrey. 1998. "Global Market and National Politics: Collision Course or Virtuous Circle?" *International Organization* 52: 787-824

**a. Convergence vs divergence: Is the MNE threat of exit causing a regulatory race to the bottom (RTB)**

The view that globalization is negatively impacting government policy autonomy is widely held within policymaking, civil society and some academic circles and often rests on the arguments of competition for production and capital or the diffusion of ideational values. Susan Strange argues that government authority has been universally weakened or diffused as a result of global economic integration and as a result many state responsibilities are no longer being discharged, leaving a 'yawning hole of non-authority' or 'non-governance'.<sup>21</sup> According to Layna Mosley, anti-globalization protestors consistently make claims that globalization and the economic institutions which underpin it are controlled by investors, corporations and political elites. There is a supporting body of scholarship which suggests that the integration of national capital markets is leading to the death of social democratic welfare policies and more specifically that capital markets are not compatible with distributive, welfare policies or an active public sector.<sup>22</sup>

**Convergence theory suggests markets drive national policies through the 'threat of exit' of MNEs**

The *convergence* theorists claim that the globalization of trade and finance has severely hindered national policy autonomy. The key driver for them is efficiency, where traditional welfare policies are considered uncompetitive and unjustifiable. This theory suggests that markets drive national policies and lead to a race to the bottom, which in turn represents 'a transfer of authority from national governments to private actors.'<sup>23</sup> This authority manifests itself through the threat of exit by asset holders, which forces government policy makers to consider financial market participants preferences when setting policies. Proponents of this theory suggest a convergence in national policies 'toward smaller governments, reduced government provision of social services, lower levels of taxation, lower levels of regulation, and lower levels of unionization.'<sup>24</sup> In effect, under *convergence*, governments will adopt market oriented policies rather than pay the market's price for more social democratic alternatives. Furthermore, this view claims that markets dominate politics and that the 'threat of "exit" by mobile asset holders has supplanted the "voice" of citizens as the primary

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<sup>21</sup> Strange, Susan. 1996. *The Retreat of the State: The Diffusion of Power in the World Economy*. Cambridge University Press. p. 14

<sup>22</sup> A number of authors make this claim including Andrews 1994, Cerny 1999, Dryzek, Rodrik 1997, Schwartz 1994.

<sup>23</sup> Mosley, Layna. 2003. *Global Capital and National Government*. Cambridge University Press. p.7

<sup>24</sup> *Ibid.* p.8

determinant of public policy in the era of globalized markets.’<sup>25</sup> The market it is argued has put constraints on leftist public policy choices and governments will pursue policies that attract investors and limit interventions or redistributive policies – driving out leftist parties and policies. This situation is made worse by market integration which gives capital the option of exiting the national economy and seeking higher returns abroad. The easier it is for asset holders to exit the more governments must seek to encourage them to stay.<sup>26</sup>

These arguments are developed in the 2008 empirical study by Simmons, Dobbin and Garrett which concludes that convergence in national policy is being driven by both *competition* between nations and policy *emulation*. They argue that national policy choices are interdependent in that they are influenced by the policy choices of other governments in the global economy, sometimes with involvement by international organizations or private actors (MNEs).<sup>27</sup> The empirical analysis undertaken by Simmons, Dobbin and Garrett suggests strong support for what they define as *emulation* and *competition* theories of policy diffusion.<sup>28</sup> In describing *emulation*, the authors argue that the global consensus emerging on what are appropriate social actions, goals and means for achieving them is creating a norm which diffuses from country to country. *Emulation* is characterized by the voluntary adoption of policies put forward by experts and international organizations, rather than their adoption through coercion. This diffusion often appears as a result of the rhetorical power of these policies or physical proximity to countries which are adopting them.<sup>29</sup>

The causal mechanism of *competition* reflects the whole race to the bottom literature. Under this perspective governments are seeking to make their country most attractive (vis-a-vis other countries) to investors and to remain competitive in important markets and will therefore pursue policies which help them achieve this. Policies which typically reflect this approach include reducing investment risk, regulatory or tax burdens. This theory assumes governments adopt these policies in order to compete for a fixed level of investment or trade and that if given the choice would pursue far more interventionist policies. ‘The expense of complying with environmental regulations has fuelled a debate over whether, and to what extent, increasingly mobile firms’ exit threats can reduce environmental regulations in wealthy jurisdictions and account for the ‘dumping’ of dirty production activities in

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<sup>25</sup> Garrett, Geoffrey. 1998. *Partisan Politics in the Global Economy*. Cambridge University Press. p.129

<sup>26</sup> Ibid. The author argues that Charles Lindblom (1977) was an early proponent of this argument. p. 30

<sup>27</sup> Simmons, Beth A., Franck Dobbin and Geoffrey Garrett. 2008. *The Global Diffusion of Markets and Democracy*. Cambridge University Press.

<sup>28</sup> Ibid. The authors claim ‘international policy diffusion occurs when government policy decisions in a given country are systematically conditioned by prior policy choices made in other countries.’

<sup>29</sup> Ibid

developing countries and emerging markets with lax regulations.’<sup>30</sup> There is vast literature on this<sup>31</sup> and some of the studies demonstrate that the regulatory races to the bottom increase as the number of competing countries, locations and exit threats by MNEs also increase. Simmons, Dobbin and Garrett point to studies which suggest that this competition for investment and markets impacts the level of government spending, particularly on social programs. While results are not unambiguous, these studies suggest that there is pressure to reduce regulation and social policies in an effort to keep the costs of investment competitive.<sup>32</sup>

Gareth Porter argues that the race to the bottom debate extends beyond the environment, to a whole host of regulatory issues impacting firms. His argument is that it is not the OECD countries that we should be looking to but rather the rapidly industrializing countries which face the greatest impact from competitive pressures. According to him it is among these rapidly industrializing countries that competitive pressures are most serious and are creating a situation where the slow response of political institutions are resulting in regulatory levels which are ‘stuck at the bottom’.<sup>33</sup>

### **Divergence theory finds little empirical support for mobility or threat of exit as driver for FDI Regulation**

Proponents of globalization however make a collection of convincing arguments to refute this view also supported by the weight of empirical evidence. They argue quite convincingly that there is little empirical support for the view that the mobility or threat of exit of MNEs drives FDI regulation or that lower environmental standards attract FDI. They argue that MNE’s motivations are broader than ‘lowest cost production’, that ideational forces play a role in government policy decisions and that globalization has actually led to re-regulation not deregulation. Finally, this camp argues that the ‘compensation hypothesis’<sup>34</sup> actually leads to greater regulation to offset the negative impact of globalization but that institutional strength is a defining factor in how governments respond to private interests.

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<sup>30</sup> Simmons, Beth A., Franck Dobbin and Geoffrey Garrett. 2008. *The Global Diffusion of Markets and Democracy*. Cambridge University Press.

<sup>31</sup> Stewart (1993), Esty (1994 & 1996), Bhagwati & Srinivasan (1996), Klevorick (1996), Levison (1996), Wilson (1996), Vogel (1995), Rodrik (1997) are among those that have written on this issue.

<sup>32</sup> As Mosely 2003 argues, a number of authors make this claim including Andrews 1994, Cerny 1999, Dryzek, Rodrik 1997, Schwartz 1994.

<sup>33</sup> Porter, Gareth. 1999. Trade Competition and Pollution Standards: ‘Race to the Bottom’ or Stuck at the Bottom’. *The Journal of Environment & Development*. 8: (2): p. 134

<sup>34</sup> This term is defined later in the chapter

Andrew Walter's work looks at whether the mobility of MNEs give them the power to force the convergence of national policies to reflect their preferences? He looks at the question strictly with respect to the rules related to the regulation of inward FDI and does not address whether globalization is responsible for 'the claimed erosion of environmental or labour standards'.<sup>35</sup> Further his study does not address the issue of 'voice' or political lobbying. He claims that while it can be argued that the threat of exit may be supplemented by lobbying (or voice), the threat of exit is most powerful and therefore precludes the additional benefit of lobbying, particularly given the cost. He therefore claims that exit and voice are largely substitutes.

His assumption is that if the convergence hypothesis were to hold one would expect to see a 'link between actual FDI inflows and policy liberalisation in capital-importing states.' His findings however are that the empirical evidence does not support the convergence hypothesis regarding mobility or threat of exit (or of political lobbying). In fact he finds that many important developing host countries have received FDI while maintaining policies which do not reflect the clear preferences of MNCs. While he suggests there are 'some examples of considerable convergence' there is 'little evidence of systematic bias of FDI flows towards countries with investment regimes favoured by TNCs.'<sup>36</sup> He claims that FDI has increased in some developing countries in spite of domestic policies towards FDI rather than because of those policies. He also suggests that firms may not base their investment decisions on host country investment regimes but rather on other factors such as size of market, growth potential, political stability and infrastructure. This view is supported by a wealth of empirical work on the determinants of FDI.<sup>37</sup> He also claims that any argument that liberalisation might be driven by competition between countries for investment or that it might be ideologically driven is not supported by evidence. Ultimately he claims that globalization theory has exaggerated the degree of mobility and power of the threat of exit of MNCs.<sup>38</sup>

Geoffrey Garrett makes a similar argument regarding the motivation of firms in making their investment decisions. Garret suggests that market integration is believed to impact national policy autonomy via 'trade competitiveness pressures, the multinationalization of production

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<sup>35</sup> Walter, Andrew. Globalization and policy convergence. The case of direct investment rules. Chapter 3 in Higgott, Underhill and Bieler. (eds). 2000. *Non-State Actors and Authority in the Global System*. Routledge p.52

<sup>36</sup> Ibid.P.64 TNC transnational corporation here is used interchangeably with our term MNC multinational corporation.

<sup>37</sup> Literature on the determinants of FDI includes work by Dunning (1999, 2004), Henderson and Vernon (1992), Nunnenkap and Spatz (2002), Driffield and Love (2007), Bevan and Estrin (2004) and Henisz (2000) as well as Blonigen's 2005 survey of the empirical literature on FDI determinants which further identifies institutional quality as a determining factor.

<sup>38</sup> Walter, Andrew. Globalization and policy convergence. The case of direct investment rules. Chapter 3 in Higgott, Underhill and Bieler. (eds). 2000. *Non-State Actors and Authority in the Global System*. Routledge

and the integration of financial markets'. While the conventional view is for multinationals to seek to produce in the lowest cost location and thus exit countries where policies raise the costs of production, he argues that multinational behaviour is more complex. He claims MNEs take into account such things as productivity not just costs, access to technology, distribution channels and markets as well as the benefits of international diversification to hedge risk. In summary the pressures on governments to constrain spending as a result of the threat of exit of investors is offset by the provision of collective goods attractive to investors.<sup>39</sup>

### **Divergence theory finds no empirical support for lower environmental standards attracting FDI**

The fear among globalization critics is that these constraints will lead to a 'race to the bottom' in standards pertaining to labour and the environment as well as impact levels of taxation and levels of subsidies required to retain mobile firms. Proponents of globalization see the integration of markets leading to a 'beneficial 'race to the top' in regulatory and policy standards.'<sup>40</sup> Rachel Massey explores the question of whether industry mobility poses challenges to environmental protection. There is a view that as industry mobility or the exit threats of MNEs increase, 'states' autonomy to determine domestic environmental policy diminishes'. In an effort to attract foreign investment, states pursue a 'race to the bottom' by competitively lowering standards.<sup>41</sup> Massey claims that empirical studies which have examined the 'race to the bottom' issue have determined that stringent environmental standards in developed countries have not impacted location decisions of polluting industries and that there is no evidence that developing countries which lower standards will be successful in attracting industry.<sup>42</sup> She argues however that there are glaring gaps in the research that has been done and the questions being asked in policy circles. The more pertinent research would be to investigate the concept of a 'natural resource depletion haven' as well as 'industrial flight' out of developing countries. She claims that it would be useful to test for evidence of regulatory chill in industries where exit threats would be more credible, such as those that 'enjoy low fixed costs, face high costs of environmental impact abatement and low levels of product differentiation and rely upon a local, exhaustible natural resource. These represent gaps in empirical work on this issue.

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<sup>39</sup> Garrett, Geoffrey. 1998. "Global Market and National Politics: Collision Course or Virtuous Circle?" *International Organization* 52: 787-82

<sup>40</sup> Walter, Andrew. Globalization and policy convergence. The case of direct investment rules. Chapter 3 in Higgott, Underhill and Bieler. (eds). 2000. *Non-State Actors and Authority in the Global System*. Routledge.P.51

<sup>41</sup> Massey explains that most of the empirical studies have found no evidence to support these theories including (Bartik 1988, Dean 1992, Engel 1997, Eskeland and Harrison 1997, Kopp et al. 1990, Lucas et al. 1992, Tobey 1990 and Dunning 1993) to make this point

<sup>42</sup> Ibid

Daniel W. Drezner also undertook a reappraisal of the evidence regarding how globalization affects convergence of regulatory policies, particularly labour and the environment. His analysis suggests that there has been a tendency towards policy convergence but that this has been driven more by what he terms 'ideational forces'<sup>43</sup> rather than competition for capital. Like Massey he also claims, there appears to be little consistent evidence to support the race-to-the bottom argument. Rather, policy convergence has tended to move regulatory levels upwards rather than to the lowest common denominator.<sup>44</sup> In other words, he claims there has been an 'upward convergence among OECD countries and a slow and erratic upswing towards more protection in the developing world'.<sup>45</sup> He also makes the argument that today's levels of market integration are surpassed by those experienced in the nineteenth century, and that this earlier globalization did not result in constraints on state policy autonomy but rather diverging national responses to economic issues and regulatory standards.<sup>46</sup>

### **Divergence theory argues that strong markets have resulted in re-regulation rather than deregulation**

Steven Vogel in his 1996 book *Freer Markets, More Rules* argues against the belief that privatization, globalization and deregulation trends have resulted in strong markets and weak governments with firms triumphing over governments, suggesting that strong markets exist but not weaker governments or any evidence of the loss of government control. Even in very global industries such as telecommunications and financial services, these integrated markets are not resulting in weaker governments. Vogel's main arguments are first, that the forces of globalization have resulted not in deregulation but 're-regulation' where governments 'reorganized their control of private sector behaviour, but not substantially reduced the level of regulation.'<sup>47</sup> He believes that generally governments have tended to liberalize and then re-regulate rather than deregulate resulting in 'freer markets and more rules'.<sup>48</sup> He does not believe there is a zero-sum trade off in the relationship between governments and markets. Second, he argues that there has not been one common approach to liberalization and re-regulation but rather very different approaches amongst developed

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<sup>43</sup> According to Drezner, the term 'ideational' refers to the fact that 'states alter institutions and regulations because a set of beliefs has developed sufficient normative power that leaders fear looking like laggards if they do not adopt similar policies.' Drezner, Daniel W. 2001. "Globalization and Policy Convergence." *International Studies Review* 3: p. 57

<sup>44</sup> Drezner, Daniel W. 2001. "Globalization and Policy Convergence." *International Studies Review* 3: p.75-76

<sup>45</sup> Ibid. p.75

<sup>46</sup> Ibid. p.76. Drezner refers to studies by Hirst and Thompson, Kevin O'Rourke and Jeffrey Williamson and Polanyi to make this point.

<sup>47</sup> Vogel, Steven. 1996. *Freer Markets, More Rules. Regulatory Reform in Advanced Industrial Countries*. Cornell University Press.

<sup>48</sup> Ibid.

countries suggesting policy divergence. Third he claims that it has been governments which have been driving these changes rather than markets or private actors and their interests.

Vogel argues that reregulation is the reorganization of government control. Distinct national patterns of reregulation are driven by state institutions rather than simply market forces and interest groups. He sees market forces as a 'stimuli to which states respond' while interest groups can 'constrain state actors'. Finally Vogel argues that regulatory reform has increased due to three factors which echo some of the arguments being made by Garrett. First he argues that 'market change, driven largely by technological developments' is undermining existing regulatory systems. Second it is driven by 'theory and ideology of deregulation' by the US through competition, imitation and direct pressure and third it is driven by 'macroeconomic shifts' which have made it an attractive policy. Vogel claims 'the evidence does in fact contradict popular wisdom that the overwhelming power of international markets has forced national regulators in a common direction.'<sup>49</sup>

### **The 'compensation hypothesis' and role of institutions as factors in the debate between convergence & divergence**

While globalization opponents focus on exit threats of mobile asset holders they neglect the fact that there has been increased demand for policies which deal with the inequalities arising under market integration or globalization (those focussed on assisting the losers of globalization). In other words 'market integration increases the portion of the population vulnerable to market dislocations' and 'generates a bias in favour of distributional politics.'<sup>50</sup> Because elections happen at short term intervals the focus of policies will be short term and the need to address distributional issues in the short term will be great. Furthermore when you have left-wing governments as well as 'powerful labour market institutions that can coordinate the behaviour of most of the labour force,'<sup>51</sup> you will get political and economic stability which is attractive to investors and will prevent their exit threat.

Geoffrey Garrett's primary claim through his empirical work is that 'globalization and national autonomy are not mutually exclusive options. The benefits of globalization can be reaped without undermining the economic sovereignty of nations, and without reducing the ability of citizens to choose how to distribute the benefits – and the costs – of the market.'<sup>52</sup>

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<sup>49</sup> Vogel, Steven. 1996. *Freer Markets, More Rules. Regulatory Reform in Advanced Industrial Countries*. Cornell University Press.

<sup>50</sup> Garrett, Geoffrey. 1998. *Partisan Politics in the Global Economy*. Cambridge University Press.p.31

<sup>51</sup> Ibid.

<sup>52</sup> Ibid. p.6

His three main propositions are first that globalization has created support for left of centre parties amongst those most economically disadvantaged by integration. Second, globalization has not weakened the link between left labour power and big government but increased incentives for left wing parties to pursue redistributive policies which favour those immediately impacted by integration.<sup>53</sup> Third, globalization has increased the importance of economic political and social stability for investment decisions of mobile asset holders.<sup>54</sup>

This 'compensation hypothesis' is also addressed by Mosley who argues that there are many reasons to assume that cross national diversity in policy making will persist. Her main arguments are that the effectiveness of domestic institutions in dealing with pressures from the global economy is high and economic openness may actually increase domestic demand for public sector intervention in order to deal with the impact of globalisation. Mosely claims that among developed countries, diversity or divergence remains in many national policy areas such as 'government consumption spending, government transfer payments, public employment and public taxation, yet shows substantial convergence in fiscal and monetary policy. Overall however, Mosely claims that 'domestic politics and institutions continue to be the most important determinants of the overall size of government, the distribution of government spending across programmatic areas and the structure of taxation.'<sup>55</sup> There is she notes, greater pressure for convergence towards neo-liberal reform in developing countries, however even here governments retain some autonomy to pursue diverse approaches. The 'compensation hypothesis' appears to hold in developing countries where studies have confirmed a 'positive association between trade openness and the size of the public sector.'<sup>56</sup>

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<sup>53</sup>In *Partisan Politics in the Global Economy*, Garret has found that the data does not support the notion that the political left and labour market movement have been greatly weakened by globalization. Although trade and capital mobility increased steadily from 1960s-1990s there was no clear shift to the political right during the same period. While a few countries saw such a shift others did not. There has tended to be stability within countries and differences across them. The 1960s-1990s did not see an across the board weakening of the power of the labour movement. The average union density in countries studied fell by 1% over 20 years from 1970 however the average number of unions fell by 14%. Differences were great across countries, with some showing significant increases in union membership during this period. A general trend was towards consolidation, arguably making it easier to organize. He has also found that the relationship between left labour power and big government has strengthened under globalization due to the fact that political incentives for left parties to redistribute wealth has grown with the economic insecurity brought about by integration. Evidence shows that big government, countercyclical fiscal policies and progressive tax systems became increasingly popular in the 1980s despite the globalization of markets. According to Garrett the data supports his argument that 'the relationship between left-labour power and redistributive and interventionist government policies increased – rather than decreased – both with heightened exposure to trade and with greater capital mobility.' (p.6) Globalization or market integration did constrain left governments in their ability to raise taxes at the same pace that they raised spending which ultimately led to greater budget deficits. This in turn led to higher interest rate premiums imposed on these governments by the financial markets in conditions of high capital mobility. Garrett argues that the constraining effects of market integration were more clearly manifested in the 1990s in Europe with the elimination of capital controls, the rise in unemployment and a subsequent reduction of the welfare benefits. He also acknowledges challenges to social democratic corporatism but argues they have little to do with globalization and more to do with demographics.

<sup>54</sup> Ibid. p.6

<sup>55</sup> Mosley, Layna. 2005. Globalization and the State: Still Room to Move? *New Political Economy*. Vol. 10, N0.3p.356

<sup>56</sup> Ibid

Dani Rodrik also highlights the importance of institutions in the debate on government autonomy. While he argues that globalization brings opportunities such as greater prosperity, particularly for developing countries as world markets provide them with access to leading technology and inexpensive goods, at the same time globalization benefits countries with strong existing institutions while hindering the ability of nations to build institutions to address both regulatory and redistributive issues.<sup>57</sup> Rodrik argues that because markets are becoming more and more global yet the institutions which support them are national this leads to restrictions in integration and to inefficiency while at the same time weakening 'the institutional base of national economies', resulting in concerns over equity and legitimacy.<sup>58</sup> 'Labour advocates, environmentalists, and consumer safety activists decry the downward pressures on national standards and legislation.'<sup>59</sup> The solution according to Rodrik is to 'combine international harmonization and standard setting with generalized exit schemes, opt-outs, and escape clauses.' This will in effect allow for 'gains from integration' while providing for divergence where national circumstances require.<sup>60</sup>

#### **b. The verdict on policy autonomy and gaps in scholarship**

There does not appear to be a clear consensus among scholars regarding the impact of globalization on government policy autonomy, although the prevailing view among the general populace and policy analysts appears to come down on the side of downward convergence. This therefore begs the question, why does conventional wisdom so strongly espouse the argument of the anti-globalization protestors that globalization is having such a negative impact on government policy autonomy, when the evidence is mixed at best? While multiple empirical studies have argued that there is little evidence of the race to the bottom, downward policy convergence or a subsequent loss of autonomy on the part of national governments, there are a number of reasons which might explain why this perspective still governs the public psyche. According to Layna Mosley this appears to be driven by both ideological and methodological elements. It is ideologically driven in that it affords policy makers a convenient scapegoat with which they might justify policies aimed at reducing the size of government, where the claim is that they cannot intervene in the domestic economy as a result of globalization pressures.<sup>61</sup> With respect to methodology, it is easy to find anecdotal

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<sup>57</sup> Rodrik, Dani. 2007. *One Economics Many Recipes: Globalization, Institutions and Economic Growth*. Princeton University Press p. 195

<sup>58</sup> Ibid p. 196

<sup>59</sup> Ibid

<sup>60</sup> Ibid

<sup>61</sup> This view as articulated by Mosley was also outlined by Colin Crouch and Wolfgang Streeck in their 1997 book *Political Economy of Modern Capitalism*. SAGE Publications Ltd. Crouch and Streeck describe the consequences of globalization, as 'the decline of the governing capacity of the nation-state and its impact on capitalist diversity.' (p.10) They argue that the decline of national economic

evidence of government policies enacted with a view to attracting investment but it is questionable whether such evidence is representative of a broader empirical trend which cannot be explained by another means.<sup>62</sup> While much has been written on this issue there exist gaps in the empirical research done to date. Mosley claims that future research should be asking the correct questions. 'Only by specifying how varying dimensions of globalisation matter for government policy choices can we begin to gauge the overall – and often contending – effects of economic openness on policy making.'<sup>63</sup>

### **3. THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS: DO IIAs IMPACT NATIONAL REGULATORY AUTONTOMY?**

This research seeks to contribute to this debate by doing just that – focussing on one specific dimension of globalization, namely international investment and the international investment agreements (IIAs) which support it, with a view to understanding what impact they are having on government policy choices and national regulatory autonomy in the area of health, safety and the environment. This research is interested more broadly in exploring the links between the institutional infrastructure which has grown up around the flow of FDI and any constraints this might be having on domestic regulatory regimes.

#### **a. The relevance of investment agreements**

As investment flows have increased under globalization, foreign investors have been concerned with ensuring legal security with respect to the enforcement of their property rights when investing in countries with weak institutions. With many investors lacking confidence in the legal recourses available within the developing host countries in which they are investing, the attraction of international agreements as a means of ensuring and enforcing this protection has been appealing. The attractiveness of international investment agreements (IIAs) versus the reliance on domestic host legal systems has been enhanced by

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authority has not resulted in the 'end of national politics, or of the assertion of national interests in the international arena.' (p.10) Governments defend their policies of deregulation and privatization as necessary and rational means of remaining competitive and addressing the constraints imposed by international economic pressures brought on by globalization. (p.11) Furthermore they use rhetoric to perpetuate the 'democratic illusion' to mask their loss of policy control. (p.12) and by attempting to hold on to national sovereignty prevent the establishment of strong supra national governance to effectively address the 'globalized capitalist economy'. (p.12) Crouch and Streeck argue that globalization has led to this weakening of national governments and is likely to reduce a state's institutional capacity to address losses from market integration through appropriate regulation. This is particularly the case they argue for institutional economies (such as 'German style, high-wage, high-cost and high-quality regimes' (p.5)) than for capitalist economies (such as the UK and US) which have operated more openly without the same interventionist approach to governance. (p.14) The key concern they argue is the need to achieve 'public governance of the private economy at the international level' in the wake of declining national authority. (p.17)

<sup>62</sup> Mosley, Layna. 2005. Globalization and the State: Still Room to Move? *New Political Economy*. Vol. 10, N0.3

<sup>63</sup> Ibid. p.361

the unique access private investors have had through these agreements, to investor-state dispute settlement (ISDS) provisions and impartial international arbitration.<sup>64</sup>

As a result, the negotiation of IIAs has historically taken place between developed country governments, eager to help protect their investors as they venture into foreign markets,<sup>65</sup> and developing country governments anxious to attract investment. These agreements take the form of investment chapters in preferential trade and investment agreements (PTIAs) or stand alone bilateral investment treaties (BITs). Modern day IIAs aim to ensure among other things, non-discriminatory and minimum levels of treatment for investors, the protection of investments through guarantees of compensation for legitimate cases of expropriation of investor assets, as well as operational flexibility through the free transfer of funds between countries.

The negotiation of the North American Free Trade Agreement's (NAFTA) Chapter 11 on investment represented the first time that such a sophisticated investment protection agreement had been negotiated between developed countries. NAFTA's Chapter 11 also served to highlight the concerns of civil society and non-governmental organizations (NGOs) regarding the rights granted under the agreement, which were seen as giving foreign investors rights that unduly constrained national policy autonomy, especially in the areas of health, safety and environmental regulation. More specifically, the private access to international arbitration provided for in Chapter 11 resulted in unprecedented challenges to Mexican, Canadian and US regulatory measures in these sensitive areas by private investors, addressing what they perceived as regulatory takings.<sup>66</sup> This in turn raised concerns that these challenges could lead to *regulatory chill*<sup>67</sup>, as governments curtailed or amended their regulatory initiatives in an effort to avoid multi-million dollar lawsuits. This view was further reinforced by the increasing number of investor-state dispute challenges arising within

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<sup>64</sup>Investor-state dispute settlement provisions allow private corporate investors to sue host governments for breaches of investment provisions under PTIAs or BITS.

<sup>65</sup> While the growing number of IIAs argues for their relevance, there is ambiguity as to whether IIAs increase investment to developing countries. Studies by UNCTAD (1989), (Leshner and Miroudot (2007), Selacuse and Sullivan (2005), Neumayer and Spess (2004), Tobin and Rose-Ackerman (2004), Eggar and Pfaffermayr (2003), Hallward-Dreimeier (2003), Buthe and Milner (2004), Gross and Trevino (2006), Egger and Marlo (2007), Swenson (2005), Yackee (2007), Aisbett (2007) and Rose-Ackerman (2008) have looked at this issue and shown mixed results regarding the correlation between BITs and levels of FDI within developing countries. This issue is addressed in Chapter 2

<sup>66</sup>The OECD 2004 Working Paper on International Investment entitled 'Indirect Expropriation and the Right to Regulate in International Investment Law' outlines that the concept of regulatory taking applies to the 'misuse of otherwise lawful regulation to deprive an owner of the substance of his rights' and is meant to cover such things as 'creeping nationalism'. (p.8)

<sup>67</sup> Regulatory Chill is defined by Eric Neumayer in *Greening Trade and Investment*, as a situation where developed countries might either lower environmental standards or fail to raise them for fear that internationally mobile capital will move to countries with lower standards (p.68). Kevin Grey & Duncan Brack in the OECD Report of the Working Party on Global and Structural Policies on Environmental Issue in Policy-Based Competition for Investment, outline a situation 'where countries refrain from enacting stricter environmental standards in response to fears of losing a competitive edge' (p.8). Kyla Tienhaara argues in *The Expropriation of Environmental Governance* that this notion of regulatory chill has been further extended to address concerns regarding international investment arbitration such that regulators with knowledge of investor state challenges to regulatory measures or the threat of such challenges will curtail regulations or be reticent to pursue more stringent regulations in these areas. This extension of the meaning of regulatory chill has also been advanced by scholars such as Gray 2002 and Peterson 2004 (p.25)

emerging market countries under bilateral investment treaties (BITs) <sup>68</sup>, as well as high profile IIA challenges to tobacco control regulations in Uruguay and Australia on health warnings and the plain packaging of cigarettes.

Just as globalization scholars have considered whether competitive pressure and the threat of exit by mobile firms and capital have had constraining influences on national policies, there is a view that the threat of litigation through rights provided private actors by IIAs will constrain the regulatory ability of the state, leading to regulatory chill. Sachs and Sauvant are among those that have highlighted the fact that the exploding landscape of IIAs can serve to ‘limit the regulatory flexibility of host countries to pursue not only economic development policies but other public policies as well.’<sup>69</sup>

### **b. What is this study trying to achieve?**

This research seeks to understand the impact of IIAs on national regulatory autonomy, whether there has been a ‘regulatory chill’ impact amongst governments who have faced challenges to their regulatory measures under IIAs, and whether any chilling effect is more likely in a developing versus a developed country environment. Finally it will look at how governments can balance this important objective of providing protection to foreign investors, while at the same time maintaining autonomy with respect to their ability to regulate in the public interest in areas such as health, safety or the environment. This research will therefore seek to answer the following question:

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**What has been the impact of international investment agreements on national regulatory autonomy in the areas of health, safety and environment? Is there evidence of a “chilling” impact on the regulatory development process?**

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The assumption of this thesis is that if the regulatory chill hypothesis was to hold or to be considered a viable possible outcome of IIA legal challenges, we would expect to find a number of observable outcomes in regulator behaviour and regulatory trends. First, one would expect trends in HSE regulation to reflect this chilling impact (through a stagnant or weakening regulatory environment or through the degree of uptake in regulatory policy), particularly in policy areas where regulatory measures were challenged under IIAs. Second

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<sup>68</sup> According to the May 2012 UNCTAD report *Recent Developments in Investor-State Dispute Settlement*, 66% of new cases have been launched against developing or transition economies. To date 61 developing countries and 16 countries with economies in transition ‘have responded to one or more investment treaty arbitrations’. 4. ‘Argentina continues to be the most frequent respondent (53 cases) followed by Venezuela (34), Ecuador (23) and Mexico (21)

<sup>69</sup> Sachs, Lisa and Karl P. Sauvant. 2009. ‘BITs, DTTs, and FDI Flows: An Overview’ in: Sachs, Lisa and Karl P. Sauvant. (eds). 2009. *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. Oxford University Press P xxxvii

we would expect to find a level of awareness and understanding among HSE regulators about the existence and content of IIAs. Any causal link between IIAs and regulatory chill would also need to demonstrate that beyond awareness, that IIAs have an influential role on regulators in the HSE regulatory development process. These expectations regarding regulatory trends and regulator awareness will be analysed in a consistent and comprehensive way unlike previous studies of regulatory chill which have focussed on anecdotal examples and a case-by-case approach.

In order to test the expectations of the research hypothesis, this thesis uses quantitative and qualitative tools within a comparative case study analysis. These will include statistical analysis and the qualitative coding and analysis of in-depth interviews and an electronic survey, as well as the statistical and qualitative analysis of government information such as regulatory databases, policy pronouncements and government reports and studies. Case studies will focus on the impact of NAFTA Chapter 11 on Investment's impact on the regulatory policy development process in Canada in the area of health, safety and the environment and second on the impact of IIAs on tobacco control regulation globally.<sup>70</sup>

This issue is important given the growing levels of international investment, with worldwide levels expected to reach \$1.8 Trillion by 2015<sup>71</sup>. Additionally, the proliferation of bilateral and regional rules on investment which have followed are arguably relevant to the overall trade and investment system. In this context, this research will contribute to existing academic literature and to public policy formation in a number of ways. It will contribute to international relations theories on globalization as outlined earlier, particularly with respect to the impact of trade and investment agreements on state regulatory autonomy within both developed and developing countries. It will provide a new angle to existing analysis of IIAs and the investor-state disputes arising therein by probing trends in regulation and regulator behaviour with a view to addressing conventional wisdom on regulatory chill. Analysis of this issue to date has predominantly focused on exploring the outcome of specific disputes rather than their systematic impact on the domestic regulatory regime. Finally, it will make recommendations in the area of trade and investment policy development and negotiations including the role of investment provisions and investor-state dispute settlement in future bilateral and multilateral trade agreements.

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<sup>70</sup> Chapter 3 gives a detailed outline of the methodology

<sup>71</sup> UNCTAD World Investment Prospects Survey 2013-2015

#### **4. CONCLUSION**

This chapter has outlined how globalization has raised concerns about the role of private actors in influencing government policy autonomy with scenarios of coerced policy convergence and a regulatory race to the bottom. Although there appears to be limited empirical evidence beyond the anecdotal to support this phenomena the view persists among policy makers and the general public. More specifically of relevance to this study, the emergence of the modern day investment agreement and its unique enforcement mechanism has raised a whole host of issues for signatory governments. While there are conflicting views regarding the effectiveness of these agreements in achieving their stated goals, there are equally concerns about their impact. The remainder of this thesis will seek to determine the extent and nature of the impact of IIAs on governments, whether evidence supports the possibility of a regulatory chilling effect and whether the impact differs between developed or emerging market countries.

More specifically Chapter 2 will look in more detail at IIAs, what they are, what they seek to do and specifically the claims made regarding their impact. Chapter 3 will detail the methodological approach that will be taken both in terms of quantitative and qualitative analysis, while Chapters 4-6 will outline the case studies of the impact of IIAs on government policy autonomy in Canada and globally around the issue of tobacco control. Finally, Chapter 7 will analyse the findings across case studies and apply the result of the research to the future of investment treaty negotiation and the likely impact for policy makers within the context of theories of government policy autonomy under globalization.

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## Chapter 2: The globalization of investment –IIAs and their purported impact on government regulatory autonomy

*'according a private party the right to bring an action in an international tribunal against a sovereign country with respect to an investment dispute is a revolutionary innovation that now seems to be taken for granted.'*

Jesewald Salacuse and Nicholas P. Sullivan<sup>72</sup>

### 1. INTRODUCTION

A major manifestation of globalization and the integration of markets has been the escalating levels of foreign direct investment supported by an increasingly complex institutional framework made up of international investment agreements (IIAs)<sup>73</sup>. Where do they come from and what do they purport to do? Why are the public, scholars and public policy advocates so concerned about their impact? This chapter looks at the rationale and history of IIAs both in the context of chapters in preferential trade and investment agreements (PTIAs) and as stand-alone bilateral investment treaties (BITs), and how they differ across regions in terms of content. Additionally it will look at their content, relevance and effectiveness, explore the history of the investor-state dispute settlement (ISDS) and also look at the growing concerns about the chilling impact of IIAs and particularly NAFTA Chapter 11 on health safety and environmental (HSE) regulations.

### 2. THE INTERNATIONAL INVESTMENT LANDSCAPE

#### a. History of investment agreements

Investors have historically sought to ensure legal security with respect to the enforcement of their property rights. With many investors lacking confidence in the legal recourses available within the developing host countries in which they were investing, the attraction of modern IIAs as a means of ensuring and enforcing this protection has been appealing. The types of provisions found in modern day investment agreements have their origin in international agreements from the late eighteenth century. Vandeveld defines three distinct eras in

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<sup>72</sup> Salacuse, Jesewald W. and Nicholas P. Sullivan. 2005. 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain.' *Harvard International Law Journal*, 46: 67-129

<sup>73</sup> The abbreviation IIAs is used to refer to both Preferential Trade and Investment Agreements (PTIAs) and Bilateral Investment Treaties (BITs). IIAs will be used interchangeably with 'investment agreements'. This chapter will not address investor-state contracts, agreements between foreign investors and host states which often contain similar provisions to IIAs.

international investment history, namely the colonial era, the postcolonial era and the global era.<sup>74</sup>

### *The Colonial Era*

During the Colonial Era, prior to the Second World War, international agreements were mainly focused on establishing trade relations and were not concerned with protecting foreign direct investment per se, although some included provisions on the protection of property.<sup>75</sup>

These early agreements, entered into by several states including the UK, US and Japan,<sup>76</sup> took the form of Friendship, Commerce and Navigation (FCN) agreements and were established as early as the eighteenth century.<sup>77</sup> With a primary purpose of establishing trade relations, such agreements on occasion had provisions protecting the property of each party in the territory of the other. From time to time they provided for compensation in the case of expropriation, for National Treatment, Most Favoured Nation (MFN) treatment for certain business activities, as well as limited protection for currency transfers.<sup>78</sup>

Generally, however, the protection of international investment was achieved through customary international law. The difficulty with this was that there was no common agreement that customary international law bestowed a minimum standard on the treatment of investments, nor even how such a treatment would be defined. Many developing countries at the time supported the 'Calvo Doctrine' which provided that foreign investors should only receive the same level of treatment afforded to domestic investors. Finally, the enforcement of customary international law was primarily through the mechanism of espousal which required the investor's home country to take up the claim in diplomatic dealings with the offending host country, or through outright military action. Not surprisingly this had political implications and was not an avenue frequently pursued and enforcement was therefore weak.<sup>79</sup>

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<sup>74</sup> Vandevelde, Kenneth J. 2005. 'A Brief History of International Investment Agreements'. *U.C. Davis J. Int'l L. & Policy* 157.

<sup>75</sup> *Ibid.*

<sup>76</sup> Newcombe, Andrew and Lluís Paradell. 2009. *Law and Practice of Investment Treaties*. Kluwer Law International.

<sup>77</sup> Vandevelde, Kenneth J. 2005. 'A Brief History of International Investment Agreements'. *U.C. Davis J. Int'l L. & Policy* 157.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

### *The Postcolonial Era*

During the Postcolonial Era, according to Vandeveld, three main events 'shaped the structure and content of international investment agreements'. The first was the creation of the General Agreement on Tariffs and Trade (GATT) by the allies in 1947 with the goal of trade liberalization, but without a mandate in the area of investment.<sup>80</sup> While trade negotiations were to be handled by this new body, investment protection continued to be dealt with under FCN agreements. The investment provisions in these postcolonial era FCN agreements shifted the primary focus away from trade (given it was now being dealt with multilaterally under GATT) and saw the strengthening of dispute resolution provisions.<sup>81</sup>

The second main event according to Vandeveld was the process of decolonialization which created newly independent developing countries which feared the exploitation and control inherent in foreign direct investment. This led to policies of protectionism, expropriation and import substitution.<sup>82</sup>

Finally there was 'the emergence of the socialist bloc led by the Soviet Union'. Both the developing and socialist bloc countries together pursued unprecedented levels of expropriation and nationalization, triumphing state regulation over a market-based approach. This movement would culminate in the 1970s in a succession of initiatives within the United Nations General Assembly aimed at recognizing their control over their domestic resources and their right to expropriate or nationalize without obligation for compensation. The UN General Assembly endorsement for both the New International and Economic Order-NIEO declaration and the Charter of Economic Rights and Duties of States-CERDS, served to exacerbate the tension between capital exporting countries on the one hand and the capital importing countries on the other.<sup>83</sup> At the same time numerous initiatives by developed countries to address their concerns through the establishment of a multilateral framework for investment had failed. The developed country response was the creation of the Bilateral Investment Treaty (BIT) as a means of dealing with the rising problem of expropriations and a desire to receive prompt, adequate, effective and fair market value compensation.<sup>84</sup>

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<sup>80</sup> The Havana Charter of 1948 was a multilateral investment code developed within the International Trade Organization (ITO) but was never ratified.

<sup>81</sup> Vandeveld, Kenneth J. 2005. 'A Brief History of International Investment Agreements'. *U.C. Davis J. Int'l L. & Policy* 157.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

Germany was the first to negotiate an investment agreement, signing its first BIT in 1959 with Pakistan. Many Western European countries followed in the 1960s, Japan in 1976 and finally the US in the 1980s (although it launched its BIT program in 1977).<sup>85</sup> European countries were the most active signing 130 BITs by 1977, well before the US program got underway.<sup>86</sup> These early BITs were consistent, in that they were focussed uniquely on investment and negotiated between developed and developing countries. While developed countries were seeking protection for their investments and the developing countries hoping to attract FDI, these early BITs were based largely on the earlier FCN agreements. A key innovation of these agreements was in the area of dispute settlement where it was no longer required that investors exhaust local legal remedies prior to referring a dispute to international arbitration.<sup>87</sup>

### ***The Global Era***

Beginning at the end of the 1980s, the Global Era as defined by Vandevelde was characterized by the 'intermingling of trade and investment provisions in international agreements'. This was achieved with the completion of the Uruguay round of international trade negotiations, the creation of the World Trade Organization (WTO) to administer the GATT and the conclusion of a number of agreements with investment components, namely the GATS (The General Agreement on Trade in Services), TRIMs (Trade Related Investment Measures) and TRIPS (Trade-Related Intellectual Property Rights).

The GATS investment component arises as a result of commitments to allow trade in a service sector through a commercial presence. With the growing importance of investment in the service sector vis-a-vis the manufacturing sector, the GATS has a potentially large impact on foreign investment. The reality is slightly different with the effective coverage of the GATS constrained by the very limited commitments made by member states to date.<sup>88</sup> As Vandevelde explains, TRIMs 'prohibits the imposition on foreign investment of certain trade distorting performance requirements', while TRIPS 'obligates the parties to provide certain protection for intellectual property, a form of investment'.<sup>89</sup>

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<sup>85</sup>Vandevelde, Kenneth J. 2005. 'A Brief History of International Investment Agreements'. *U.C. Davis J. Int'l L. & Policy* 157.

<sup>86</sup>Salacuse, Jeswald W. and Nicholas P. Sullivan. 2005. 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain.' *Harvard International Law Journal*, 46: 67-129.

<sup>87</sup>Vandevelde, Kenneth J. 2005. 'A Brief History of International Investment Agreements'. *U.C. Davis J. Int'l L. & Policy* 157.

<sup>88</sup>The impact on foreign investment under GATS is further limited by the structure of the agreement itself. The 'positive list' approach commits countries to liberalize only in the areas that they have explicitly listed in the agreement.

<sup>89</sup>Vandevelde, Kenneth J. 2005. 'A Brief History of International Investment Agreements'. *U.C. Davis J. Int'l L. & Policy* 157.

This era also witnessed a huge increase in the number of BITs negotiated as developing countries became more open to the benefits of FDI, following the failure of their policies of import substitution and the exemplary success of numerous Asian countries which had espoused investment and free market policies. With the limited availability of private lending in the wake of the 1980s debt crisis, developing countries looked to FDI as a source of capital. The BIT provided a means of signalling both their desire for investment as well as providing security regarding their investment climate.<sup>90</sup>

Another phenomenon of this period has been the emergence of BIT style investment provisions in bilateral and regional preferential trade agreements. While NAFTA was a watershed in this regard, a number of countries have been at the forefront of this trend, predominantly in Latin America, the Caribbean, North America and Asia.<sup>91</sup>

### **The proliferation of investment agreements**

While the first BIT was signed in 1959, the number of BITs signed in the 1980s and 1990s greatly increased, exploding by the early 2000s.<sup>92</sup> While 309 had been concluded by 1988, the number reached 2181 by 2002.<sup>93</sup> The total number of BITs rose to 2,857 by the end of 2012.<sup>94</sup> The top ten total signatories of BITs up to the end of 2013 were Germany, China, Switzerland, UK, Romania, Italy, France, Netherlands, Belgium and Luxemburg.<sup>95</sup>

As noted above, countries began to pursue bilateral and regional preferential trade agreements which incorporated BIT style investment components, including most notably the NAFTA.<sup>96</sup> Vandeveldel points out that in the ten years following NAFTA, 39% of all preferential trade agreements would contain investment provisions.<sup>97</sup> 339 International agreements with investment provisions were concluded by the end of 2012 with the balance shifting from bilateral to regional treaty making with respect to investment.<sup>98</sup> Additionally more and more of these agreements were being negotiated between developing countries – more than one forth by 2006.<sup>99</sup> South-South BITs accounted for 26% of all BITs in 2009.<sup>100</sup>

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<sup>90</sup> Vandeveldel, Kenneth J. 2005. 'A Brief History of International Investment Agreements'. *U.C. Davis J. Int'l L. & Policy* 157

<sup>91</sup>The US, Canada, Japan, South Korea and Singapore have been particularly active PTIA programs.

<sup>92</sup> Vandeveldel, Kenneth J. 2005. 'A Brief History of International Investment Agreements'. *U.C. Davis J. Int'l L. & Policy* 157.

<sup>93</sup> Salacuse, jeswald W. And Nicholas P. Sullivan. Do BITs Really Work:: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain.' *Harvard International Law Journal*, 46: 67-129.

<sup>94</sup> UNCTAD World Investment Report 2013.

<http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Research-and-Policy-Analysis.aspx>

<sup>95</sup> Ibid. p.3

<sup>96</sup> Vandeveldel, Kenneth J. 2005. 'A Brief History of International Investment Agreements'. *U.C. Davis J. Int'l L. & Policy* 157.

<sup>97</sup> Ibid.

<sup>98</sup> UNCTAD World Investment Report 2013.

<http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Research-and-Policy-Analysis.aspx>

<sup>99</sup> Vandeveldel, Kenneth J. 2005. 'A Brief History of International Investment Agreements'. *U.C. Davis J. Int'l L. & Policy* 157.

China for example had signed 145 BITs with both developed and developing countries by June 2013.<sup>101</sup>

## **b. Content of investment agreements**

### **Key provisions and their meaning**

IAs are broadly aimed at investment protection, promotion and liberalization achieved by ensuring non-discriminatory treatment for foreign investors, ensuring appropriate levels of protection and operating flexibility as well as a means of enforcing such commitments. These objectives are achieved through a series of provisions which are standard in most agreements. Generally speaking an investment agreement will include provisions dealing with the *treatment* of investors which is non-discriminatory and provides a minimum standard, the *protection* of the investor aimed at ensuring due process and compensation for legitimate expropriation and *operational flexibility* through provisions on the free transfer of funds. Finally, most IAs will provide recourse to international arbitration through provisions on investor-state dispute settlement.

### ***Definition of investment***

The modern IIA raises multiple issues between negotiating countries. One of the initial decisions that countries will face in negotiating an IIA involves the definition of investment covered by the agreement. According to Muchlinski, the aim is 'to ensure sufficient flexibility to encompass not only equity, but also non-equity investments and to allow for the evolution of new forms of investment'.<sup>102</sup> Decisions need to be made by contracting parties as to the limits of coverage of any definition, such as whether or not to include portfolio investment, given concerns about its stability.<sup>103</sup>

### ***Standards of treatment***

There are a number of standards of treatment and protection provisions contained in IIAs. General Standards of Treatment include national treatment, most favoured nation treatment

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<sup>100</sup> UNCTAD – Recent Developments in International Investment Agreements (2008-June 2009)p.5

<sup>101</sup> UNCTAD World Investment Report 2013.

<http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Research-and-Policy-Analysis.aspx>

<sup>102</sup> Muchlinski, Peter. *The Framework of Investment Protection: The Content of BITS* – derived from Peter T. Muchlinski *Multinational Enterprises and the Law* (Oxford, Oxford University Press, 2<sup>nd</sup> Ed, 2007).

<sup>103</sup> This has consistently been a concern of developing countries who fear the short term nature of portfolio investment. The concern was exacerbated during the Asian Financial Crisis of 1997

and fair and equitable treatment. *Fair and equitable treatment* (FET) is an important though ill-defined standard often subsumed in North American style agreements under the minimum standard of treatment, and seen as providing ‘a floor below which treatment of foreign investors must not fall.’<sup>104</sup> According to Newcombe and Paradell this ‘more recent approach is to define fair and equitable treatment expressly as the customary international minimum standard of treatment applicable to aliens and their property.’<sup>105</sup>

*National treatment* is a relative standard aimed at providing foreign investors operating in a host country with treatment which is no less favourable to domestic nationals engaged in comparable business activity.<sup>106</sup> In defining National Treatment, the contracting parties will need to establish a number of issues such as whether National Treatment covers the pre or post establishment stages of the investment and whether it applies to all levels of government. Because National Treatment involves a comparison between the treatment of domestic and foreign investors, there are often issues regarding how to determine what constitutes ‘like’ or ‘similar circumstances.’ A final concern might be whether it will be subject to exceptions for issues such as ‘national security, public health, industry specific or development exceptions’<sup>107</sup>

The *most-favoured nation* standard ‘means that a host country must extend to investors from one foreign country treatment no less favourable than it accords to investors from any other foreign country in like cases.’<sup>108</sup> This serves to prevent discrimination and to ensure that all foreign investors are treated equally within the host country and allows for equality of competitive conditions. Again, contracting parties will be concerned about whether such a provision should be subject to exceptions.

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<sup>104</sup> The IIA tribunal outlined this baseline in *S.D. Myers, Inc. v. Canada* (Partial Award, 13 Nov. 2000) para 259

<sup>105</sup> Newcombe, Andrew and Lluís Paradell. 2009. *Law and Practice of Investment Treaties*. Kluwer Law International. p. 258. In the wake of a number of divergent rulings under NAFTA Chapter 11 which raised concern amongst signatory countries, the NAFTA Free Trade Commission sought to clarify their intent with respect to provisions dealing with the minimum standard of treatment and indirect expropriation. <http://www.state.gov/documents/organization/38790.pdf>

<sup>106</sup> United Nations Conference on Trade and Development (UNCTAD), *National Treatment*, UNCTAD Series on issues in international investment agreements (New York and Geneva: United Nations, 1999) (UNCTAD/ITE/IIT/11)

<sup>107</sup> Muchlinski, Peter. *The Framework of Investment Protection: The Content of BITS – derived from Peter T. Muchlinski* *Multinational Enterprises and the Law* (Oxford, Oxford University Press, 2<sup>nd</sup> Ed, 2007).

<sup>108</sup> United Nations Conference on Trade and Development (UNCTAD), *Most-Favoured-Nation Treatment*, UNCTAD Series on issues in international investment agreements (New York and Geneva: United Nations, 1999) (UNCTAD/ITE/IIT/10)

### *Protection and operational flexibility*

Provisions dealing with protection and operational flexibility include such things as the free transfer of funds in relation to the investment out of the host country and compensation for losses due to expropriation, armed conflict or internal disorder.<sup>109</sup>

The *free transfer of funds* provisions help 'ensure that investors can reap the financial rewards of a successful investment or exit the host state if an investment is unsuccessful.'<sup>110</sup> Any restrictions on this free movement may have a negative impact on the value of the investment. Often of concern will be whether limits should be placed on this with respect to balance of payment issues, as well as the time frame, currency and exchange rate.<sup>111</sup>

The *compensation for losses due to armed conflict or internal disorder* usually 'lay down that the investor shall be treated in accordance with the national treatment and or MFN standard in the matter of such compensation.'<sup>112</sup> *Compensation for expropriation* is one of the most controversial provisions in IIAs. Under international law states have the sovereign right to the nationalization or expropriation of property owned by nationals or aliens 'for economic, political, social or other reasons.'<sup>113</sup> The majority of IIAs have provisions which permit the expropriation of assets owned by the investor from the other contracting country where this is done for a public purpose, under due process of law, without discrimination, and upon the payment of compensation.<sup>114</sup> Under some agreements, such compensation is often required to be 'prompt adequate and effective' as well as in accordance with the fair market value of assets immediately before expropriation. Additionally 'the majority of IIAs cover not only direct expropriation but also indirect measures that have the effect of neutralizing the value of the investor's assets, while leaving their formal ownership intact'. Determining whether an indirect expropriation is a legitimate government regulatory measure or a compensable taking is controversial and often ill-defined in agreements. Efforts have been made in the North American context to clarify this issue.<sup>115</sup> The issue of whether or not to refer to the market value when determining compensation has also been an issue, with differing views

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<sup>109</sup> Muchlinski, Peter. *The Framework of Investment Projection: The Content of BITS* – derived from Peter T. Muchlinski *Multinational Enterprises and the Law* (Oxford, Oxford University Press, 2<sup>nd</sup> Ed, 2007).

<sup>110</sup> Newcombe, Andrew and Lluís Paradell. 2009. *Law and Practice of Investment Treaties*. Kluwer Law International. p. 399

<sup>111</sup> Muchlinski, Peter. *The Framework of Investment Projection: The Content of BITS* – derived from Peter T. Muchlinski *Multinational Enterprises and the Law* (Oxford, Oxford University Press, 2<sup>nd</sup> Ed, 2007)

<sup>112</sup> *Ibid.*

<sup>113</sup> United Nations Conference on Trade and Development (UNCTAD), *Expropriation*, UNCTAD Series on issues in international investment agreements II (New York and Geneva: United Nations, 2012) (UNCTAD/DIA/IA/2011/7)

<sup>114</sup> Newcombe, Andrew and Lluís Paradell. 2009. *Law and Practice of Investment Treaties*. Kluwer Law International. p. 321

<sup>115</sup> Muchlinski, Peter. *The Framework of Investment Projection: The Content of BITS* – derived from Peter T. Muchlinski *Multinational Enterprises and the Law* (Oxford, Oxford University Press, 2<sup>nd</sup> Ed, 2007)

amongst countries. Such an issue poses an obvious challenge for state economies such as China.

Other specific provisions found in IIAs include provisions protecting the right of entry and sojourn of individuals in connection with the investment', 'restrictions on the imposition of performance requirements on investors by the host country', 'provisions asserting that it is inappropriate for host countries to seek investment through the lowering of environmental and labour standards' as well as those dealing with health and safety<sup>116</sup> and a 'general exceptions clause protecting the rights of the contracting parties to regulate in certain fields' such as health safety and the environment.<sup>117</sup>

### ***Dispute settlement provisions***

Finally, virtually all modern day IIAs have provisions dealing with the settlement of disputes under the agreement, both those arising between the contracting parties and disputes between the host state and the investor. With respect to disputes between the contracting parties, 'the usual procedure is for a dispute to be settled by negotiation between the contracting countries, or, if this is not possible, to go to arbitration.'<sup>118</sup>

More contentious are the disputes between the host state and foreign investor which is covered in more detail later in this chapter. According to Muchlinski, the earlier IIAs did not cover these types of disputes. Moreover, some recent BITs have 'included detailed provisions of dispute settlement that seek to tailor procedures to the specific concerns of these countries, for more effective and transparent arbitral procedures'.<sup>119</sup>

### **Regional variations in IIAs (European vs. North American models)**

There have historically been key differences in breadth and depth of coverage afforded by IIAs. Lisa Sachs and Karl P. Sauvant define three broad approaches to IIAs namely the

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<sup>116</sup> These clauses have become standard in IIAs negotiated by Canada and the US and form part of their Model Bilateral Investment Treaties

<sup>117</sup> Muchlinski, Peter. *The Framework of Investment Protection: The Content of BITS – derived from Peter T. Muchlinski Multinational Enterprises and the Law* (Oxford, Oxford University Press, 2<sup>nd</sup> Ed, 2007).

<sup>118</sup> *Ibid.* Arbitration is usually handled by a tribunal comprised of three members, with one each chosen by each contracting party and the final member chosen by the first two panel members.

<sup>119</sup> *Ibid.*

*liberalization approach* (mainly North America, Japan, Korea), the *protection approach* (European countries), more *qualified approach* (between developing countries).<sup>120</sup>

Differences between the North American liberalization approach to IIAs and other mainly European IIAs, were that National Treatment and MFN protection were granted at the pre-establishment phase (granting market access) and restrictions were placed on the use of performance requirements.<sup>121</sup> Generally market access provisions were subject to reservations which limit their coverage. The European BITs have tended to cover the post-establishment phase exclusively (and therefore do not deal with market access). This difference has narrowed in recent years with the convergence of approaches towards the North American model as seen in the recent EU-Columbia, EU-Chile and EU-Canada investment negotiations.<sup>122</sup>

The final category of IIAs between developing countries, resemble the old European style but tend to have more of an emphasis on reservations and exceptions. They often also require a choice to be made between the use of domestic litigation to solve disputes and reference to international arbitration.

### **3. WHAT IS THE EFFECTIVENESS OF THESE AGREEMENTS? ARE THEY RELEVANT?**

As previously mentioned, the negotiation of investment protection agreements has historically taken place between developed country governments, eager to open new markets for their investors while affording appropriate protection in these foreign locations, and developing country governments anxious to attract investment. IIAs have consistently been touted as the most appropriate vehicle for achieving these goals of investment *protection*, *promotion* and *liberalization*. However, questions remain as to whether they actually achieve these stated objectives. The following section looks at this issue in some detail.

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<sup>120</sup> Sachs, Lisa and Karl P. Sauvant. 2009. 'BITs, DTTs, and FDI Flows: An Overview' in: Sachs, Lisa and Karl P. Sauvant. 2009. *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. Oxford University Press

<sup>121</sup> The provisions restricting the use of performance requirements are very similar to those outlined under the WTO TRIMS agreement. The reason for their inclusion in the more liberalizing IIAs is to subject them to investor-state dispute settlement. This enforcement mechanism is not available under the WTO.

<sup>122</sup> European Commission website, [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151918.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf).  
<http://trade.ec.europa.eu/doclib/press/index.cfm?id=973>

**a. Do investment agreements have an impact on FDI to developing countries? Do they *promote* investment?**

**Review of empirical evidence regarding the impact of BITs on FDI**

There have been numerous empirical studies undertaken over the last fifteen years which have looked at the impact of BITs on developing countries with a view to determining whether they have actually succeeded in promoting investment and raising levels of FDI. The findings have been mixed.

According to a 2009 UNCTAD report which undertook an extensive survey of the literature regarding the impact of BITs on FDI, 'the findings of early empirical studies on the impact of BITs on FDI flows were ambiguous, with some showing weak or considerable impact, and one or two no impact at all.' The report goes on to say however that 'studies published between 2005 and 2008 – based on much larger data samples, improved econometric models and more tests – have shifted the balance towards concurring that BITs do have some influence on FDI inflows from developed countries into developing countries.'<sup>123</sup> While the UNCTAD report seems to come down on the side of a positive impact, this conclusion remains questionable. A handful of recent studies continue to question both the magnitude and positive nature of these findings, raising the issue of reverse causality. The overall conclusion is ambiguity with respect to the impact.

A 1998 UNCTAD report<sup>124</sup>, along with studies by Hallward-Dreimier (2003)<sup>125</sup> and Tobin and Rose-Ackerman (2005)<sup>126</sup> all found little or no evidence that BITS had a positive impact on

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<sup>123</sup> UNCTAD The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries 2009. p xiii

<sup>124</sup> The 1998 UNCTAD report finds that 'following the signing of a BIT, it is more likely than not that the host country will marginally increase its share in the outward FDI of the home country'. The effect is usually small. The response of foreign investors is most likely to occur three years following the signing of the BIT. In UNCTAD's cross-country comparison of FDI determinants, they concluded that 'BITS appear to play a minor and secondary role in influencing FDI inflows'. The most important determinant is market size. (UNCTAD. 1998. 'The Impact on Foreign Direct Investment of BITS' UNCTAD *Bilateral Investment Treaties in the Mid-1990s* Chapter IV (New York and Geneva: United Nations, 1989). According to Hallward-Dreimeier 'An analysis of twenty years of bilateral FDI flows from the OECD to developing countries finds little evidence that BITS have stimulated additional investment'. She finds no evidence that BITS act as substitutes for weak institutions, but rather that 'those countries that are reforming and already have reasonably strong domestic institutions are most likely to gain from ratifying a treaty.' She sees BITS acting more as complements to domestic institutions. ( Hallward-Dreimeier. M. 2003. 'Do Bilateral Investment Treaties Attract FDI: Only a Bit....And They Could Bite'. World Bank Policy Research Paper 3121 – 2003, Washington, DC.

<sup>125</sup> According to Hallward-Dreimeier 'An analysis of twenty years of bilateral FDI flows from the OECD to developing countries finds little evidence that BITS have stimulated additional investment'. She finds no evidence that BITS act as substitutes for weak institutions, but rather that 'those countries that are reforming and already have reasonably strong domestic institutions are most likely to gain from ratifying a treaty.' She sees BITS acting more as complements to domestic institutions. ( Hallward-Dreimeier. M. 2003. 'Do Bilateral Investment Treaties Attract FDI: Only a Bit....And They Could Bite'. World Bank Policy Research Paper 3121 – 2003, Washington, DC.

FDI. The second wave of studies from 2004-2008 seemed to solve issues of methodology such as poor data or small sample size. Studies by Buthe and Milner (2004)<sup>127</sup>, Egger and Pfaffermayr (2004)<sup>128</sup>, Salacuse and Sullivan (2005)<sup>129</sup>, Neumayer and Spess (2005)<sup>130</sup>, Gross and Trevino (2005)<sup>131</sup>, Gallagher and Birch (2006)<sup>132</sup>, Egger and Merlo (2007)<sup>133</sup> and a 2008 study by Rose-Ackerman<sup>134</sup> all claimed to demonstrate a positive impact of BITS on FDI.

While on balance the more recent studies have confirmed a positive impact of BITS on FDI, a number of studies continue to challenge either the magnitude or causal relationship of this outcome. Swenson (2005), Yackee (2007) and Aisbett (2007) challenged the methodological

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<sup>126</sup>Rose-Ackerman and Tobin study looked at the impact of BITS on FDI inflows from 1980-2000 in 63 countries and found that 'the number of BITS seems to have little impact on a country's ability to attract FDI.' They also found that risky countries appear to attract more FDI by signing BITS than their safer counterparts. Finally they found no statistically significant relationship between US BITS and levels of US FDI and therefore conclude that 'signing a BIT with the United States does not correspond to increased FDI inflows'. Tobin, Jennifer and Susan Rose-Ackerman. 2004. 'Foreign Direct Investment and the Business Environment in Developing countries: The Impact of Bilateral Investment Treaties' Yale Law School Center for Law, Economics and Public Policy, Research Paper No. 293, June 4, 2004

<sup>127</sup>Buthe and Milner undertook a 'statistical analysis of inward FDI flows into 122 developing countries with a population of more than 1 million from 1970-2000' and found that 1) 'BITS have a substantial effect on FDI that is independent of the relative power of the signatories and 2) BITS signed with powerful FDI home states have a substantial additional effect. In other words, BITS alone are a credible commitment mechanism and signing more of them improves the credibility of this commitment since it means more countries can punish and monitor behaviour.' They argue BITS should increase FDI in general and not just through the bilateral relationship. Buthe, (Tim and Helen V. Milner. Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis – Revised version of 2004 paper presented at the Annual Meeting of the American Political Science Association.

<sup>128</sup>Egger and Pfaffermayr undertook 'an empirical assessment of the impact of BITS on FDI stocks' and found a 'significant and positive impact of ratified BITS throughout'. They argue that 'BITS exert a positive and significant effect on real stocks of outward FDI with a lower bound of 15%'. (Egger, Peter and Michael Pfaffermayr. 2004. 'The Impact of Bilateral Investment Treaties on Foreign Direct Investment'. *Journal of Comparative Economics*.

<sup>129</sup>The Salacuse and Sullivan considered whether BITS signed between the US and a developing country would have a positive impact of flows of FDI between the two. Their study concludes that there is 'strong evidence that BITS have, to a significant extent, attained their stated goal of promoting investment'. Specifically the authors found that a US BIT is more likely than not to exert a strong and positive role in promoting US investment, overall investment and more likely to do so than other OECD BITS. (Salacuse, jeswald W. and Nicholas P. Sullivan. 2005. 'Do BITS Really Work:: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain.' *Harvard International Law Journal*, 46: 67-129.

<sup>130</sup>Neumayer and Spess also studied the impact of BITS on FDI over the period of 1970-2001 covering up to 119 countries and found 'a positive effect of BITS on FDI inflows that is consistent and robust'. 'The effect is sometimes conditional on institutional quality, but is always positive and statistically significantly different from zero at all levels on institutional quality'. They argue that their results provide some evidence that BITS can serve as substitutes for 'good institutional quality'. (Neumayer, Tim and Laura Spess. 2005. 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' *World Development*, 33(10): 1567-85.

<sup>131</sup>Grosse and Trevino sought to demonstrate that institutions were important for attracting FDI to the economies of Central and Eastern Europe (CEE). They saw BITS as a key element of institutional reform that signalled the regions' move towards a market-based economy. Their study considered whether the number of BITS signed served to lower investor uncertainty in the region and resulted in increased levels of FDI. They found that 'the number of bilateral investment treaties that CEE countries had signed was highly significant in attracting FDI to the region.' They also argue that BITS, together with enterprise reform and rules on repatriation, work together to stimulate FDI. At the same time factors such as political risk and government corruption levels can constrain FDI. (Grosse, Robert and Len J. Trevino. 2005. 'New Institutional Economics and FDI Location in Central and Eastern Europe'. *Management International Review*.

<sup>132</sup>The Gallagher and Birch study of the determinants of FDI in Latin America found that the most important determinants of FDI were market size, trade orientation and macro-economic stability. However, they also found that 'the total number of BITS that a country has signed does have an independent effect and positive effect on FDI flows'. Contrary to the findings by Salacuse and Sullivan however, their analysis showed that a BIT with the US did 'not independently attract FDI'. (Gallagher, Kevin P. and Melissa Birch. 2006. 'Do Investment Agreements Attract Investment?: Evidence from Latine America.' *Journal of World Investment and Trade*. 7(6): 961-74.

<sup>133</sup>The Egger and Merlo study looked at the impact of BITS on bilateral stock of FDI over the long-term arguing that previous studies were more concerned about analysing effects in the short term. The authors found 'that the contemporaneous (short-run) impact of BITS is substantially lower than the long-run effect. (Egger, P. and Merlo, V. (2007). The impact of bilateral investment treaties on foreign direct investment. *Journal of Comparative Economics, Elsevier*. Vol. 32(4): 788-804. December.)

<sup>134</sup>In her 2008 study, Rose-Ackerman suggests that BITS do stimulate FDI inflows but only under certain conditions. The impact of BITS will depend on the overall global BIT regime, given the existence of a competitive environment for attracting investment. She also found that the 'marginal impact of country's own BITS on its ability to attract FDI falls as the global coverage of BITS grows' Finally she argues that BITS can't fully compensate for a weak investment environment with the impact greater the better the existing economic and legal environment. (Rose-Ackerman, Susan. 2009. 'The Global BITS Regime and the Domestic Environment for Investment'. Chapter 11 in: Sachs, Lisa and Karl P. Sauvant. 2009. *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. Oxford University Press. p. 311-321)

approach of previous studies and all asked whether previous results reflected cases of reverse causality.

In her study, Swenson shows a backward-looking element to investment treaties such that 'countries that had already received larger stocks of foreign investment were more likely to sign BITs than were countries that had been less successful.' She concludes that this implies the signing of BITs was driven by the interests of existing foreign investors. She goes on to argue that the signing of BITs may have either 'allowed countries to retain investments that otherwise might have relocated to another country' or 'to hold onto previous investments'. Finally, however, she argues that once controls are made for issues such as timing, the attractiveness of countries and the type of investor, the data 'suggests that BIT signing did help developing countries attract a larger volume of foreign investment'<sup>135</sup>

Jason Yackee set out to test the results of the 2005 study by Neumayer and Spess which had shown a strong impact of BITs on FDI. Using a similar model (similar dataset, larger sample of years) he is not able to replicate their results. His results suggest an 'opposite conditional relationship, where BITs are statistically significant predictors of FDI share only for low-risk countries and where the magnitude of that effect increases as risk decreases'<sup>136</sup>

Finally, Aisbett demonstrates that BITs are positively and significantly correlated with FDI inflows, but that this appears to be driven by endogeneity rather than any signalling effect of BITs. She believes there is no evidence of BITs effecting FDI and studies that show such an effect she believes do not account for the endogeneity of BIT participation. Her model shows 'potential of reverse causality, where a higher growth rate of FDI leads to increased probability of BITs being formed'. She therefore finds no evidence that BITs have an impact.<sup>137</sup>

The last fifteen years of empirical studies provide a relatively ambiguous conclusion with respect to the impact of BITs on FDI. Sachs and Sauvant attribute this divergence to a number of possible factors. Namely, the poor quality of bilateral FDI stock and flow information, the nature or type of FDI (where the effect of BITs on location decisions differs by sector), the difficulty separating out the causal effect of BITs from the causal effect of other factors such as regulatory changes and differences in the strength and effectiveness of BITs (reflecting the

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<sup>135</sup>Swenson, Deborah. 2005. 'Why Do Developing Countries Sign BITs?'. *U.C. Davis Journal of International Law and Policy*.

<sup>136</sup>Yackee, Jason. 2007. 'Do BITs Really Work?: Revisiting the Empirical Link Between Investment Treaties and Foreign Direct Investment'. Legal Studies Research Paper Series, Paper No. 1054. Wisconsin: University of Wisconsin Law School.

<sup>137</sup>Aisbett, Emma. 2007. 'Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation' CUDARE Working Paper 1032. Berkeley. University of California.

North American vs European model where the liberalizing effect of the North American model can have a greater impact in opening previously closed sectors of the economy to FDI). They also highlight the importance of economic factors in creating an environment favourable to FDI and how their impact will be felt irrespective of whether a BIT has been signed.<sup>138</sup>

While the majority of studies point in the direction of a positive impact, enough questions are raised about the quality of data, the direction of the causal link and differences in methodology to suggest a weak or ambiguous outcome.

### **Review of empirical evidence regarding the impact of PTIAs on FDI**

Because they are a more recent phenomena than BITs, PTIAs which include comprehensive investment provisions have not been analyzed extensively with a view to establishing their impact on FDI. Additionally, a number of these agreements have been negotiated between developed countries and therefore the goal of increasing investment may be secondary to other more important trade related objectives. Having said that, a number of studies have considered this issue in the last decade and found a consistently positive impact of PTIAs on FDI.

A World Bank study published in 2005, while confirming 'the importance of traditional determinants in attracting FDI' also went on to conclude that PTIAs that create larger markets also 'attract more FDI' such that 'the interaction between the establishment of a PTIA and the resulting enlarged market is 'significant and positively related to FDI'. This was not the case with countries with small markets, nor did the study find that PTIAs could act as substitutes for a poor investment climate <sup>139</sup> A 2006 study which looked at the specific provisions of these agreements, by Leshner and Miroudot (2006) found that agreements with substantive investment provisions were 'positively related to both trade and net positive FDI flows'.<sup>140</sup>

A 2009 UNCTAD report looks at early 'black box' econometric studies on the impact of PTIAs on FDI (studies which consider whether or not a membership within a PTIA had an impact on

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<sup>138</sup> Sachs, Lisa and Karl P. Sauvant. 2009. 'BITs, DTTs, and FDI Flows: An Overview' in: Sachs, Lisa and Karl P. Sauvant. 2009. *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. Oxford University Press

<sup>139</sup> World Bank (2005). *Global Economic Prospects. Trade, Regionalism and Development*. Washington, D.C. World Bank. as quoted in <sup>139</sup> UNCTAD – Recent Developments in International Investment Agreements (2008-June 2009) p 79

<sup>140</sup> Leshner, M. and Miroudot, S. (2006). *Analysis of the economic impact of investment provisions in regional trade agreements*. OECD Trade Policy Working Paper No. 36. Paris. OECD. as quoted in <sup>140</sup> UNCTAD – Recent Developments in International Investment Agreements (2008-June 2009) p 89

FDI, rather than the actual content of the investment provisions), as well as later studies which actually analysed the provisions of these agreements and their impact on FDI. In both cases the UNCTAD report suggests that ‘there appears to be consensus in the literature that PTIAs lead to further FDI inflows, including in developing countries that are members of PTIAs.’<sup>141</sup> The UNCTAD report also considered a review of ‘black box’ studies undertaken by Te Velde and Bezemer which concludes that ‘the majority of studies found that most PTIAs increased FDI flows from third countries and in some cases also intraregional FDI.’<sup>142</sup>

## **b. Do investment agreements *protect* investors?**

### **Enforcement as evidence**

In an effort to understand the degree to which IIAs have achieved their stated goals, it is important to consider whether they have been successful at protecting investors. One simple measure of this is to look at the extent to which they are being enforced.

Since 2002 there has been an explosion in the number of investor state dispute settlement cases. While only a few cases were filed between the 1970s-1990s, ‘by the end of 2007, 290 known International treaty-based arbitration cases had been initiated.’<sup>143</sup> The total number of treaty-based investor-state dispute settlement cases reached 514 by end of 2012. Of these 314 were filed under the ICSID<sup>144</sup> Convention and the ICSID Additional Facility Rules, 131 under UNCITRAL<sup>145</sup> rules, 27 under the Stockholm Chamber of Commerce (SCC), and eight with the International Chamber of Commerce (ICC).<sup>146</sup>

To date 95 governments have faced arbitration – 61 developing countries, 18 developed and 16 economies in transition. There were 244 concluded cases by the end of 2012 with 42% decided in favour of the state, 31% in favour of the investor and another 27% settled, with limited public availability of the settlement terms. Argentina tops the list of most claims with

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<sup>141</sup> UNCTAD – Recent Developments in International Investment Agreements (2008-June 2009) p xiv

<sup>142</sup> Te Velde, D.W. and Bezemer, D. (2004). Regional integration and foreign direct investment in developing countries. Overseas Development Institute, mimeo. as quoted in <sup>142</sup> UNCTAD – Recent Developments in International Investment Agreements (2008-June 2009) p 78

<sup>143</sup> Sachs, Lisa and Karl P. Sauvant. 2009. ‘BITs, DTTs, and FDI Flows: An Overview’ in: Sachs, Lisa and Karl P. Sauvant. 2009. *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. Oxford University Press P xxxix

<sup>144</sup> International Centre for Settlement of Investment Disputes

<sup>145</sup> United Nations Commission on International Trade Law

<sup>146</sup> UNCTAD. May 2012. Recent Developments in Investor-State Dispute Settlement. [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf)

52<sup>147</sup>, Venezuela second with 34, Ecuador third with 23, Mexico fourth with 21, Czech Republic fifth with 20 followed by Canada with 19 and Egypt with 17.<sup>148</sup>

Salacuse and Sullivan consider this issue in their 2005 study. Based on a review of BIT provisions and their mechanism for enforcement as well as cases/disputes that have arisen under these agreements the authors conclude ‘that BITs have achieved their first goal of fostering investment protection.’<sup>149</sup>

While there is much support for the claim that IIAs protect investors there is growing concern that the increase in disputes and the nature of these challenges, specifically their interference in the sovereign sphere of domestic policy regulation, need to be better understood and addressed. This is core to the aim of this research and is addressed further at the end of this chapter.

### **Investor awareness**

In the context of whether IIAs protect investors, it is interesting therefore to consider to what extent investors take these agreements into account when making an investment decision. There is not a lot of empirical evidence on this issue and many differences in the interpretation of available survey information.

A 2009 UNCTAD report claims that ‘the possibility that BITs impact on FDI flows into developing countries is confirmed by investor surveys according to which BITS – and other IIAs – are important to transnational corporations (TNCs) in terms of investment protection and enhancing stability and predictability for FDI projects.’<sup>150</sup>

This survey and its conclusions have been criticized by Poulsen (2010) and Sachs (2009) for the small sample size of the feedback and the possibility that some executives questioned may have overestimated the importance of these agreements ‘in order to encourage the granting of such further protections international investment agreements may offer them’.<sup>151</sup>

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<sup>147</sup> The 48 claims against Argentina have arisen as a result of emergency measures taken by the Argentine government following their financial crisis of 2001

<sup>148</sup> UNCTAD. May 2012. Recent Developments in Investor-State Dispute Settlement.

[http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf)

<sup>149</sup> Salacuse, Jeswald W. and Nicholas P. Sullivan. 2005. ‘Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain.’ *Harvard International Law Journal*, 46: 67-129.

<sup>150</sup> UNCTAD (2007b) Worldwide survey of foreign affiliates. Occasional Note. Geneva. 5 November) in UNCTAD The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries 2009 p. xiv

<sup>151</sup> Lisa Sachs, “Bilateral investment treaties and FDI flows.” *World Association of Investment Promotion Agencies (WAIPA) Newsletter* 5 (2009), footnote 5

In a very recent contribution to the 2009/2010 *Yearbook on International Investment Law and Policy*, Poulsen looked at the evidence that BITs attract investment by serving as risk-mitigating instruments from the perspective of investors and political risk insurance providers. He states that the qualitative and quantitative evidence argues against the direct or indirect importance of BITs in attracting investment.<sup>152</sup>

Specifically on the issue of investor awareness he found that ‘the few surveys that do ask about BITs appear to support the conclusion that they are not a particularly important factor in the establishment phase for the vast majority of foreign investors’ and further that ‘many investors are not aware that a BIT is in place at the time of considering an investment, and indeed investors remain oblivious until some issue arises when its provisions may be relevant’<sup>153</sup>

Sachs and Sauvant also make the point that the extent to which investors are aware of IIAs and are influenced in their investment decisions by the existence of a IIAs is informative. According to the authors a June 2007 EIU survey of 602 MNE executives worldwide showed that international investment agreements had very low levels of influence on investment decisions. A 2005 World Bank report also demonstrated that many investors were not even aware of the existence of investment agreement when making their investment decisions.<sup>154</sup>

### **Political risk insurance agency practice**

While investors seem to take these agreements into account only in the context of a particular dispute, and therefore after they have made their investment decision, it is interesting to consider the position taken by political risk insurance agencies. The main purpose of these agencies is to provide insurance against political risk for multinational enterprises (MNEs) undertaking FDI in high risk countries and as such one would expect them to take into consideration the existence of IIAs which serve a similar purpose. As Poulsen’s research shows, except for in rare circumstances, this is not actually the case.<sup>155</sup>

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<sup>152</sup>Skovgaard Poulsen, Lauge. The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence. *Yearbook on International Investment Law and Policy 2009/2010* by K. Sauvant (ed.). Oxford: Oxford University Press, 2010) quoting from World Bank *World Development Report 2005: A better investment climate for everyone* (2005)

<sup>153</sup> *Ibid.* p.177.

<sup>154</sup>Sachs, Lisa and Karl P. Sauvant. 2009. ‘ BITs, DTTs, and FDI Flows: An Overview’ in: Sachs, Lisa and Karl P. Sauvant. 2009. *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. Oxford University Press

<sup>155</sup>Skovgaard Poulsen, Lauge. The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence. *Yearbook on International Investment Law and Policy 2009/2010* by K. Sauvant (ed.). Oxford: Oxford University Press, 2010

He argues that many of the risks that are covered through political risk insurance are also covered by BITs. These include ‘uncompensated expropriation, breaches of contract, restrictions on repatriation of profits and damages due to political violence.’ Given this point Poulsen argues that it ‘would only be natural if they took BITs into account when assessing the risk of investment projects’. His findings however do not support this hypothesis. While PRI is often provided by governments, very few countries take the approach of Germany which ‘makes investment insurance contingent on the adoption of BITs’.<sup>156</sup>

The World Bank’s Multilateral Investment Guarantee Agency (MIGA), represents according to Poulsen ‘the most important public investment insurance program’. He found that while BITs were relevant to MIGA’s underwriting process, they were just one of 57 factors which were considered in determining underwriting premium rates. Interviews with MIGA officials suggested that ‘BITs were of marginal importance within MIGA, and of no practical importance when covering political risks’.<sup>157</sup>

‘The conclusion arising from this review is therefore remarkable: BITs are basically aimed at reducing the risk of investing abroad, but the vast majority of public and private agencies that price the risk of foreign investments rarely take them into account to any serious extent’<sup>158</sup>

**c. Do investment agreements contribute to the *liberalization* of international investment?**

Finally there is the question of whether IIAs achieve the goal of liberalizing investment. The main goal here has been to ‘facilitate the entry and operation of these investments by inducing host countries to remove various impediments in their regulatory systems.’<sup>159</sup> As discussed earlier, this is driven by the nature of investment provisions, both in terms of breadth and depth, as well as the extent to which protections are imposed before or after the establishment of the investment. This is where the North American liberalization model differs from the old European protection model outlined. As Salacuse and Sullivan explain, because most BITs protect investments at post-establishment phase and admit investments only in conformity with their laws, they have not been effective in achieving this goal.<sup>160</sup> This

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<sup>156</sup> Skovgaard Poulsen, Lauge. The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence. *Yearbook on International Investment Law and Policy 2009/2010* by K. Sauvant (ed.). Oxford: Oxford University Press, 2010

<sup>157</sup> Ibid

<sup>158</sup> Ibid.

<sup>159</sup> Salacuse, Jeswald W. and Nicholas P. Sullivan. 2005. ‘Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain.’ *Harvard International Law Journal*, 46: 67-129.

<sup>160</sup> Ibid.

difference has narrowed in recent years with the convergence of approaches towards the broader breadth and scope of the North American model as seen in the recent EU-Columbia, EU-Chile and EU-Canada investment negotiations.<sup>161</sup>

#### **d. The continued relevance of IIAs?**

This section has attempted to look at the relevance and effectiveness of IIAs. While we have outlined the original intent and rationale for these agreements, namely protection, promotion and liberalization, the actual empirical evidence seems to suggest that they are perhaps not as important as would be expected.

There is some evidence that IIAs effectively *protect* investments if one considers the content of provisions and growing use of the dispute settlement enforcement mechanism. BITs seem to have a weak or ambiguous impact on the *promotion* of investment into developing countries, or rather are not a primary determinant of FDI. There appears to be a potentially more significant impact on FDI when investment provisions are included as part of a PTIA. It is worth noting however that there is only a very limited amount of research which has looked at this issue compared to the analysis done on BITs. On the issue of whether IIAs help *liberalize* investment, the post-establishment nature of the commitments contained in the vast majority of IIAs would suggest that they have not been very successful at achieving this goal.

International investors do not appear to take them into account when making their investment decisions, although they do recognize their value once a dispute arises. Finally, while political risk insurance agencies do not appear to consider them when setting their risk premium rates, such a practice would seem to make intuitive sense. The evidence above begs the question: Are IIAs really all that relevant?

The fact remains that there has been a proliferation of bilateral and regional agreements on investment and with worldwide levels of investment expected to reach \$1.8 Trillion by 2015<sup>162</sup>, these agreements are arguably relevant to the overall trade and investment system. Furthermore, their impact on the political and regulatory autonomy of countries that sign

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<sup>161</sup>European Commission website, [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151918.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf). <http://trade.ec.europa.eu/doclib/press/index.cfm?id=973>. Additionally Canada concluded updated BITs with the Czech and Slovak Republics and Latvia in 2012 and 2011 respectively. The EU is currently in negotiations towards Free Trade Agreements with both the US and Canada which have substantial North American style investment provisions. Finally, the EU is involved in the negotiations on investment under the Trans Pacific Partnership (TPP) of which the US, Canada and Mexico are sure to have an influence.

<sup>162</sup> UNCTAD World Investment Prospects Survey 2013-2015

them seems to be growing, driven by the increasing use of their unique enforcement mechanism. It is to the issue of enforcement and the ISDS that we will now turn.

#### 4. INVESTOR-STATE DISPUTE SETTLEMENT AND INTERNATIONAL ARBITRATION

As Salacuse and Sullivan aptly point out, ‘according a private party the right to bring an action in an international tribunal against a sovereign country with respect to an investment dispute is a revolutionary innovation that now seems to be taken for granted.’ It is unique in the field of international trade law.<sup>163</sup> This section will look briefly at the history of investor-state dispute settlement provisions, how they work in practice and recent trends which are causing concern amongst policy makers, academics and NGOs.

##### a. History of investor-state arbitration

As previously mentioned, historically international investment disputes were settled through diplomacy or in rare cases through the intervention of states. Claims were brought on behalf of investors by their home states with investors maintaining very little control. More importantly, host states themselves could refuse to consent to international adjudication.<sup>164</sup> The use of diplomatic protection<sup>165</sup> in resolving investment disputes evolved outside the colonial relationships of the eighteenth, nineteenth and twentieth century’s, which themselves benefited from political and military control as well as extraterritorial jurisdiction.<sup>166</sup> According to Newcombe and Paradell, ‘the existence of extraterritorial regimes in Asia and the Far East, but not in Latin America, explains why Latin American states are the source of almost all early jurisprudence and cases on diplomatic protection.’<sup>167</sup>

Numerous attempts by capital exporting states to reach an international consensus on the issue of whether ‘foreign nationals and their property were entitled, under customary international law, to a minimum standard of treatment’ and belief that the ‘expropriation of property required compensation’ met consistently with opposition from capital importing countries.<sup>168</sup> This opposition crystallized in the adoption of the Calvo Doctrine by many developing countries, which asserted that foreign nationals should receive no better

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<sup>163</sup> Salacuse, Jeswald W. and Nicholas P. Sullivan. 2005. ‘Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain.’ *Harvard International Law Journal*, 46: 67-129.

<sup>164</sup> Van Harten, Gus. 2007 *Investment Treaty Arbitration and Public Law*. Oxford University Press. p.18

<sup>165</sup> According to Newcombe and Paradell (2009), ‘the theory underlying the principle of diplomatic protection is that an injury to a state’s national is an injury to the state itself, for which it may claim reparation from any responsible state.’ Newcombe, Andrew and Lluís Paradell. 2009. *Law and Practice of Investment Treaties*. Kluwer Law International. P. 5

<sup>166</sup> Newcombe, Andrew and Lluís Paradell. 2009. *Law and Practice of Investment Treaties*. Kluwer Law International. pp. 5-11

<sup>167</sup> *Ibid* p. 11

<sup>168</sup> *Ibid* p. 13

treatment than host country nationals. This polarization of views has been behind the numerous failed attempts by capital exporting states to establish multilateral rules on investment backed by an effective enforcement mechanism. The 1929 Draft Convention on the Treatment of Foreigners, a joint effort between the League of Nations and the International Chamber of Commerce (ICC) was the first to fail due to concerns over a broad commitment in the area of national treatment.<sup>169</sup> The Havana Charter of 1948, a multilateral investment code proposed for the International Trade Organization after the Second World War was also unsuccessful.<sup>170</sup>

In 1959 the Abs-Shawcross Draft Convention on Investments Abroad introduced the concept of a modern day investor-state dispute settlement provision. Once again it failed and was subsumed into the 1967 Organization of Economic Co-operation and Development (OECD) proposed Draft Convention on the Protection of Foreign Property. While this later agreement failed it formed the basis of many early European BITs.<sup>171</sup>

### **Institutions and procedures for international investment arbitration**

Prior and following WWII the use of international arbitration became commonplace in the settling of international investment disputes. These arbitrations generally arose as a result of the 'cancellation or nationalization of oil concessions' and were created with the consent of host and home countries following the emergence of a dispute.<sup>172</sup> This growing use of international arbitration and difficulties with the enforcement of awards, led to the ratification of The New York Convention in 1958 with the goal of restricting the 'grounds upon which local courts may refuse to recognize and enforce awards.'<sup>173</sup> As Newcombe and Paradell point out, one important aspect of the Convention is that it 'makes respect of arbitration agreements a treaty obligation.'<sup>174</sup>

Another key step in the 'international legal framework for foreign investment protection' was the establishment within the World Bank of the International Centre for Settlement of Investment Disputes (ICSID) in 1965.<sup>175</sup> Its goal was the 'impartial settlement of international investment disputes' within a neutral environment.<sup>176</sup> ICSID, while not a

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<sup>169</sup> Van Harten, Gus. 2007 *Investment Treaty Arbitration and Public Law*. Oxford University Press. p.18

<sup>170</sup> *Ibid.* p 18-20

<sup>171</sup> Van Harten, Gus. 2007 *Investment Treaty Arbitration and Public Law*. Oxford University Press. p 20

<sup>172</sup> Newcombe, Andrew and Lluís Paradell. 2009. *Law and Practice of Investment Treaties*. Kluwer Law International. P. 25

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.* p 27

<sup>176</sup> *Ibid.*

permanent tribunal, provides the 'legal and organizational framework' for the disputes arising between investors and host states. It is the primary choice of arbitral body for the settlement of disputes alongside other bodies offering ad hoc arbitral proceedings such as the United Nations Commission on International Trade Law (UNCITRAL), the Stockholm Chamber of Commerce (SCC) and the International Chamber of Commerce (ICC).

The New York Convention and ICSID Convention work together to 'supply an institutional structure and procedural paradigm for investor-state arbitration and to authorize the recognition and enforcement of awards by domestic courts.'<sup>177</sup>

### **Trends in arbitration**

As noted previously, investor-state claims have grown exponentially in the last ten years. At the same time a number of trends characterize the more recent investor-state arbitration. These include the growing number and size of arbitral awards and the financial burden this is creating for developing countries, the phenomena of conflicting awards by arbitral tribunals and a growing scepticism amongst developing countries leading to their withdrawal from the international investment system. Underlying all of this is the ongoing concern about the impact of IIAs on state autonomy resulting from the nature of arbitration claims which challenge government regulatory measures as well as the interpretive freedom given to arbitral tribunals.

Sachs and Sauvant note that in 2006 and 2007 a number of awards to investors exceeded US\$10 million which suggests that the size of awards may be increasing.<sup>178</sup> Concerns in general about the cost of arbitration are driven by both the size of the awards as well as the costs of defending the state.<sup>179</sup> Most recently in 2012 'the highest known award of damages in the history of investment treaty arbitration featured in *Occidental v. Ecuador II* where the investor was awarded US\$1.77 billion plus pre and post award interest'<sup>180</sup> This is not a new trend and has been an issue of some concern for a number of years. Gottwald (2005) identifies what he sees as the top three barriers for developing nations participation in the international investment arbitration process: 'a lack of affordable access to legal expertise, a lack of transparency in the arbitration process, and uncertainty over the meaning of key

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<sup>177</sup> Van Harten, Gus. 2007 *Investment Treaty Arbitration and Public Law*. Oxford University Press. p. 34

<sup>178</sup>Sachs, Lisa and Karl P. Sauvant. 2009. 'BITS, DTTs, and FDI Flows: An Overview' in: Sachs, Lisa and Karl P. Sauvant. 2009. *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. Oxford University Press

<sup>179</sup> UNCTAD. May 2013. Recent Developments in Investor-State Dispute Settlement (ISDS) p. 19

<sup>180</sup> *ibid*. Other cases of note were *EDF v. Argentina* with an award of \$13.73 million, *Deutsche Bank v. Sri Lanka* with an award of \$60.36 million and *SGS v. Paraguay* with an award of \$39.02 million.

treaty rights.<sup>181</sup> On average the cost of an arbitration case is upwards of US\$8 million per party with legal fees making up 82% of this cost.<sup>182</sup>

Of additional concern is the trend 'towards divergent interpretations of treaty obligations' which has led to conflicting awards.<sup>183</sup> This issue was raised by Van Harten (2007) as one of two worrying aspects of the existing system, namely 'its invitation to forum-shopping by investors and, by implication, its vulnerability to the troubling outcome of conflicting awards'.<sup>184</sup> Van Harten highlights the case of *CME Czech Republic v Czech Republic* by way of example, in which an arbitral tribunal ruled in favour of the investor under the Netherlands-Czech Republic BIT and ordered the Czech government to pay \$353USD million ten days after a parallel hearing saw a tribunal dismiss the same claim brought under the Czech-United States BIT.<sup>185</sup> Of equal significance was that the award of \$353USD million in this case 'was roughly equal to the country's entire health-care budget.'<sup>186</sup>

There is a growing concern that developing countries, particularly in Latin America, may be feeling that the burdens of investment agreements (in terms of financial costs and loss of autonomy) outweigh the benefits and this may lead to scepticism and provide an incentive for them to withdraw both from the ICSID convention, as well as to renege on their agreements.<sup>187</sup> A 2009 UNCTAD report highlights the fact that '2008 saw the denunciation of 11 BITs.' Ecuador alone denounced nine BITs, mainly with neighbouring Latin American countries. The report speculates that perceived effects of BITS on developing countries' economic development as well as issues of compatibility with domestic laws may play a role.<sup>188</sup> To date Bolivia (in 2007), Ecuador (in 2010) and Venezuela (in 2012) have all withdrawn from the ICSID Convention and Argentina has announced its intention to do so as well.<sup>189</sup> Perhaps of most concern has been the perceived impact of IIAs on the regulatory autonomy of states as a result of the threat of investor-state dispute settlement challenges to government measures in the area of health, safety and the environment.

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<sup>181</sup> Gottwald, Eric. 2007. 'Levelling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?'. *American University International Law Review*. 22:237, p 252

<sup>182</sup> Gaukrodger, David and Kathryn Gordon. 2012. 'Investor-state dispute settlement: A scoping paper for the investment policy community.' *OECD Working Papers on International Investment*, No 2012/3 OECD Investment Division. [www.oecd.org/daf/investment/workingpapers](http://www.oecd.org/daf/investment/workingpapers) p.19

<sup>183</sup> UNCTAD. May 2013. *Recent Developments in Investor-State Dispute Settlement (ISDS)*

<sup>184</sup> Van Harten, Gus. 2007 *Investment Treaty Arbitration and Public Law*. Oxford University Press. p.8

<sup>185</sup> *Ibid.* p7-8

<sup>186</sup> Van Harten, Gus. 2007 *Investment Treaty Arbitration and Public Law*. Oxford University Press. p. 7

<sup>187</sup> *Ibid*

<sup>188</sup> UNCTAD – *Recent Developments in International Investment Agreements (2008-June 2009)* p 9

<sup>189</sup> International Institute for Sustainable Development (IISD) *Investment Treaty News*. April 2012. <http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>

## 5. CONCERNS ABOUT REGULATORY CHILL

As discussed previously the 1994 negotiation of the North American Free Trade Agreement's (NAFTA) Chapter 11 on investment represented the first time that such a sophisticated investment protection agreement had been negotiated between developed countries. NAFTA's Chapter 11 also served to highlight the concerns of civil society and non-governmental organizations (NGOs) regarding the rights granted under the agreement, which were seen as giving foreign investors rights that unduly constrained national policy autonomy, especially in the areas of health, safety and environmental regulation. More specifically, the private access to international arbitration provided for in Chapter 11 resulted in unprecedented challenges to Mexican, Canadian and US regulatory measures in these sensitive areas by private investors, addressing what they perceived as regulatory takings.<sup>190</sup> This in turn raised concerns that these challenges could lead to *regulatory chill*<sup>191</sup>, as governments curtailed or amended their regulatory initiatives in an effort to avoid multi-million dollar lawsuits. This view was further reinforced by the increasing number of investor-state dispute challenges arising within emerging market countries under bilateral investment treaties (BITs).<sup>192</sup> At the same time, discussions were underway to negotiate a multilateral agreement on investment (MAI) under the auspices of the OECD, further escalating concerns. Among the NGO community at the time and in the public press, the MAI became known as 'NAFTA on Steroids'.<sup>193</sup>

### a. Early NAFTA Chapter 11 challenges on HSE regulation

The academic community at the time of the ratification of NAFTA Chapter 11 was aware of the potential that the regulatory environment might come under the influence of private investors. Neumayer describes how private investors might use ISDS provisions 'to knock

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<sup>190</sup> The OECD 2004 Working Paper on International Investment entitled 'Indirect Expropriation and the Right to Regulate in International Investment Law' outlines that the concept of regulatory taking applies to the 'misuse of otherwise lawful regulation to deprive an owner of the substance of his rights' and is meant to cover such things as 'creeping nationalism'. (p.8)

<sup>191</sup> Regulatory Chill is defined by Eric Neumayer in *Greening Trade and Investment*, as a situation where developed countries might either lower environmental standards or fail to raise them for fear that internationally mobile capital will move to countries with lower standards (p.68). Kevin Grey & Duncan Brack in the OECD Report of the Working Party on Global and Structural Policies on Environmental Issue in Policy-Based Competition for Investment, outline a situation 'where countries refrain from enacting stricter environmental standards in response to fears of losing a competitive edge' (p.8). Kyla Tienhaara argues in *The Expropriation of Environmental Governance* that this notion of regulatory chill has been further extended to address concerns regarding international investment arbitration such that regulators with knowledge of investor state challenges to regulatory measures or the threat of such challenges will curtail regulations or be reticent to pursue more stringent regulations in these areas. This extension of the meaning of regulatory chill has also been advanced by scholars such as Gray 2002 and Peterson 2004 (p.25)

<sup>192</sup> According to the May 2012 UNCTAD report *Recent Developments in Investor-State Dispute Settlement*, 66% of new cases have been launched against developing or transition economies. To date 61 developing countries and 16 countries with economies in transition 'have responded to one or more investment treaty arbitration.' p. 4. 'Argentina continues to be the most frequent respondent (53 cases) followed by Venezuela (34), Ecuador (23) and Mexico (21)

<sup>193</sup> Graham, Edward Montgomery. 2000. *Fighting the Wrong Enemy: Antiglobal Activists and Multinational Enterprises*. Institute for International Economics.

down existing environmental regulations or to deter countries from enacting future environmental regulations which they regard as an undue encroachment into their rights as a foreign investor.’<sup>194</sup> It was the early NAFTA Chapter 11 cases beginning in 1997 which have frequently been touted as examples of challenges to government regulatory measures which raised the spectre of regulatory chill in the areas of health, safety and the environment. As noted by the International Institute for Sustainable Development (IISD) in 1999, it is ‘the unexpectedly broad and aggressive use of this process to challenge public policy and public welfare measures, including environmental measures in about half the known cases today, that has caught governments and observers off guard. As a consequence, the provisions designed to ensure security and predictability for the investors have now created uncertainty and unpredictability for environmental (and other) regulators’.<sup>195</sup>

These early cases included *Ethyl Corporation v. Government of Canada* and *Methanex Corporation v. Government of the United States* which involved challenges to regulations dealing with the ban of gasoline additives MMT and MTBE respectively, *Metalclad Corp v. Government of Mexico* involving a ban on the export of PCB waste and *S. D. Meyers v. Government of Canada* involving the granting of a permit for the operation of a waste management facility. Together they reflected combined claims for compensation of approximately US\$1.4 billion and resulted in awards or settlements to private investors in three of the four cases worth approximately US\$35 million. Also of relevance however in these early cases have been the issue of the legitimacy of government regulatory measures and the extent to which this question of legitimacy has impacted both the outcome of the cases and the issue of government regulatory autonomy.

#### ***Ethyl Corporation v. Government of Canada***

In April 1997 the Government of Canada passed Bill C-29 banning the import and inter-provincial trade, though not the use of unleaded gasoline additive and fuel efficiency enhancing octane booster methylcyclopentadienyl manganese tricarbonyl (MMT). The ban was justified by the Canadian Government for health reasons given concerns over manganese oxides in tailpipe emissions and possible interference with on-board diagnostic systems, though not on the basis of clear scientific evidence.<sup>196</sup> Ethyl Corporation, a US company and the sole producer of MMT filed a NAFTA Chapter 11 claim for USD\$347 million in

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<sup>194</sup> Neumayer, Eric. 2001. *Greening Trade and Investment: Environmental Protection Without Protectionism*. Earthscan Publications Limited. p.x of the introduction

<sup>195</sup> Mann, Howard and Konrad von Moltke. 1999. NAFTA’s Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment. *International Institute for Sustainable Development*. p. 5

<sup>196</sup> Neumayer, Eric. 2001. *Greening Trade and Investment: Environmental Protection Without Protectionism*. Earthscan Publications Limited. p.79-81

compensation for what it argued were measures tantamount to expropriation<sup>197</sup>. At the same time that this was unfolding, a number of Canadian provinces successfully challenged the act as a violation of the Federal-Provincial agreement on internal trade. The Government of Canada settled the NAFTA claim in July 1998, lifting the ban and paying close to US\$13 million in compensation.<sup>198</sup> While this case appears to be the poster child for regulatory chill, a number of factors are worth taking into consideration. First at the time of award, the Government of Canada issued a statement claiming there was no scientific evidence that MMT provided a health risk. Furthermore the ban seemed to originate from pressures by both the automobile industry concerned about the impact on diagnostic systems and the Canadian agricultural industry anxious to promote the use of ethanol as a fuel additive substitute and domestic alternative to MMT.<sup>199</sup>

### ***Metalclad Corp v. Government of Mexico***

In July 1997, Metalclad a US company filed a NAFTA Chapter 11 claim against the Government of Mexico seeking US\$96 million in compensation for the seizure of its hazardous waste site in Guadalcazar, action it deemed ‘tantamount to expropriation’ of its assets as well as a violation of ‘fair and equitable treatment’ as guaranteed under Articles 1101 and 1105 of NAFTA. Metalclad claimed it had federal government approval for the creation of a hazardous waste confinement unit after it purchased an existing industrial waste site owned by the Mexican company Coterin. The local government had however refused to grant the necessary permits and argued that the clean-up of the existing site had not been done to the desired level.<sup>200</sup> In addition, prior to the seizure, the Governor signed an executive order decreeing a protected natural reserve which encompassed Metalclad’s facility site, with the purpose of protecting a large variety of cactus species.<sup>201</sup> In 2000, the tribunal ruled in favour of the claimant, requiring the Government of Mexico to pay \$US17 million in compensation for expenses. There has been much debate regarding the true intentions of the local Government and the possibility that its actions were driven more by a desire to respond to local resident resistance ‘acting in classic NIMBY (not in my back yard) fashion’, than efforts to project biodiversity. This belief has been supported by the lack of subsequent action by the local government toward the fulfilment of its ecological decree and the findings of two

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<sup>197</sup> Ethyl Corp. v. Government of Canada, Notice of Intent, April 1997 <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ethyl-01.pdf>

<sup>198</sup> Neumayer, Eric. 2001. *Greening Trade and Investment: Environmental Protection Without Protectionism*. Earthscan Publications Limited. p.79-81

<sup>199</sup> Neumayer, Eric. 2001. *Greening Trade and Investment: Environmental Protection Without Protectionism*. Earthscan Publications Limited. p.79-81

<sup>200</sup> Ibid. p.84

<sup>201</sup> Gaines, Sanford. 2007. ‘Environmental policy implications of investor-state arbitration under NAFTA Chapter 11’, *International Environmental Agreements*. 7:171-201, p. 178

international tribunals which 'have concluded that secretive and deceptive political decisions to mollify NIMBY feelings violated international norms.'<sup>202</sup>

***S. D. Meyers v. Government of Canada***

In July 1998, S.D. Myers Inc, a US company issued a Notice of Intent for a Chapter 11 arbitration against the Government of Canada seeking US\$10 million in compensation for the temporary ban on the export of PCB waste to the US. S. D. Myers claimed that the Canadian Government's ban was driven by a desire 'to protect Canada's domestic PCB destruction company Chem-Securities of Swan Hill, Alberta' and not by reasons of environmental protection.<sup>203</sup> The Canadian Environment Minister had previously been quite vocal about this issue including her July 1995 response to a parliamentary question in which she declared 'that 'the handling of Canada's PCBs should be done in Canada by Canadians.'<sup>204</sup> The Government of Canada argued that S.D. Myers did not have a valid investment in Canada and therefore that the case should be thrown out for lack of jurisdiction. In November 2000 the NAFTA tribunal ruled in favour of S. D. Myers and awarded compensation of CAN \$6.05 million. The tribunal found that the Government of Canada had breached Article 1102 of NAFTA on National Treatment by not affording S. D. Myers the same treatment it afforded its own nationals in like circumstances. With respect to the intent of the Canadian Government in imposing the PCB bans, the tribunal argued that these 'were intended primarily to protect the Canadian PCB disposal industry from U.S. competition. CANADA produced no convincing witness testimony to rebut the thrust of the documentary evidence. The tribunal finds that there was no legitimate environmental reason for introducing the ban.'<sup>205</sup>

***Methanex Corporation v. Government of the United States***

In March 1999 the Governor of California instructed the California environmental agencies through executive order to develop a timetable aimed at eliminating methyl tertiary butyl ether (MTBE) from gasoline no later than December 2002. This was a result of concerns over the appearance of trace amounts of the substance in California groundwater and a commissioned report by the University of California which highlighted the risk of contamination to ground water and the potential cancer causing properties of the

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<sup>202</sup> Gaines, Sanford. 2007. 'Environmental policy implications of investor-state arbitration under NAFTA Chapter 11', *International Environmental Agreements*. 7:171-201, p. 178

<sup>203</sup> Neumayer, Eric. 2001. *Greening Trade and Investment: Environmental Protection without Protectionism*. Earthscan Publications Limited. p.85

<sup>204</sup> Gaines, Sanford. 2007. 'Environmental policy implications of investor-state arbitration under NAFTA Chapter 11', *International Environmental Agreements*. 7:171-201, p. 187

<sup>205</sup> S.D. Myers, Inc. and Government of Canada. 2000. Partial award. Toronto: Arbitral Tribunal, 13 November 2000, paras 194-195

substance.<sup>206</sup> Methanex, a Canadian company issued a Notice of Intent for a Chapter 11 suit in June 1999 seeking US\$970 million for the ban, which it argued amounted to an expropriation of its business. Methanex disputed claims that MTBE was a human carcinogen arguing that if used properly it posed no hazards. Similar to the *Ethyl Corporation* case, Methanex felt that the justification for the ban on health reasons was not supported by sufficient scientific evidence and that protectionist issues with respect to the domestic Ethanol industry played a role in the government's decision.<sup>207</sup> In the end the NAFTA tribunal found in favour of the government, rejecting each of Methanex's claims on the merits and dismissed the claim due to lack of jurisdiction, denying compensation for the claimant. The tribunal saw the ban on MTBE as a good faith policy 'grounded in reasonable scientific concern about the difficulty of cleaning up MTBE contamination of groundwater', and with no intent to either 'harm the methanol industry or benefit the ethanol industry.'<sup>208</sup> Following these developments in California, numerous other US states followed suit by banning MTBE, reflecting similar environmental contamination concerns.<sup>209</sup>

### **The role of legitimacy**

While the early years of NAFTA Chapter 11 resulted in an unprecedented number of investor-state challenges to government regulatory measures in the area of health, safety and the environment and raised concerns among public policy makers and HSE advocates about the prospects of regulatory chill, the details and outcomes of the cases suggest that this concern might have been premature. This is particularly the case if one considers the issue of legitimacy and the extent to which governments might use HSE regulations, 'as a cover for protectionism' as well as the consideration given issues of legitimacy by arbitral tribunals. The issue of legitimacy relates to the issue of regulatory independence versus political accountability as well as the appropriateness of independent regulation with respect to social decisions versus strictly economic based decisions.<sup>211</sup> If one considers the two cases launched against the Government of Canada (*Ethyl Corp* and *S. D. Myers*), it has been argued that in each case 'the challenged environmental measure had no demonstrable environmental

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<sup>206</sup> Gaines, Sanford. 2007. 'Environmental policy implications of investor-state arbitration under NAFTA Chapter 11', *International Environmental Agreements*. 7:171-201, p. 191-192

<sup>207</sup> Neumayer, Eric. 2001. *Greening Trade and Investment: Environmental Protection without Protectionism*. Earthscan Publications Limited. p81-83

<sup>208</sup> Gaines, Sanford. 2007. 'Environmental policy implications of investor-state arbitration under NAFTA Chapter 11', *International Environmental Agreements*. 7:171-201, p.194

<sup>209</sup> Ibid. p. 196

<sup>210</sup> Tienhaara, Kyla. 2009. *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge University Press. p.208-211

<sup>211</sup> Posser, Tony . 2010. *The Regulatory Enterprise: Government, Regulation and Legitimacy*. Oxford University Press

merit under Canadian law or policy, and was quickly rescinded.<sup>212</sup> In a similar fashion, the actions of the Mexican Government with respect to waste facility sites including that owned by *Metalclad*, point to the use of environmental protection measures as a means of addressing community concerns regarding controversial yet not necessarily harmful projects.<sup>213</sup>

Finally, the *Methanex* case confirms that NAFTA tribunals will find in favour of governments which impose legitimate environmental measures aimed at protecting citizens when underscored by scientific evidence.<sup>214</sup> The *Methanex* case is also interesting with respect to the issue of regulatory chill. The Government of California's decision to ban MTBE came before the settlement in the *Ethyl* case which also dealt with the ban of a gasoline additive. Furthermore, despite the Chapter 11 suit filed by *Methanex*, a number of other U.S. states instigated their own bans on MTBE, demonstrating a lack of deterrence.<sup>215</sup> The issue of legitimacy is however complicated by the 'multiple factors influencing a government' including the many private interest groups as well as the role played by science and the weight given to decisions based on the precautionary principle.<sup>216</sup>

#### **b. Recent NAFTA Chapter 11 challenges and beyond**

The enormous increase in the number of IIAs in recent times and a second wave of NAFTA Chapter 11 cases dealing with health, safety and environmental issues together with other high profile BIT challenges have given rise to new concerns about regulatory chill. Sachs and Sauvant are among those that have highlighted the fact that the exploding landscape of IIAs can serve to 'limit the regulatory flexibility of host countries to pursue not only economic development policies but other public policies as well.'<sup>217</sup> These recent cases, aimed predominantly at Canada touch on issues such as a ban on the sale and use of pesticides with *Chemtura Corp. v. Government of Canada* (award in 2010) and *Dow AgroScience LLC v. Government of Canada* (award in 2011), natural resource regulation with *Abitibi Bowater Inc. v. Government of Canada* (award 2010), a moratorium on hydraulic fracking with *Lone Pine Resources Inc. v. Government of Canada* (notice of intent 2012) and food and drug intellectual property regulations with *Eli Lilly & Company v. Government of Canada* (notice of intent

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<sup>212</sup> Gaines, Sanford. 2007. 'Environmental policy implications of investor-state arbitration under NAFTA Chapter 11', *International Environmental Agreements*. 7:171-201, p.. p. 197

<sup>213</sup> Ibid

<sup>214</sup> As Rahim Moloo and Justin Jacinto argue in *Environmental and Health Regulation: Assessing Liability Under Investment Treaties* in the *Berkeley Journal of International Law* (2011:29:1), host states will need to present scientific evidence of the legitimacy of a health or environmental regulation when seeking to avoid compensation for a taking.

<sup>215</sup> Gaines, Sanford. 2007. 'Environmental policy implications of investor-state arbitration under NAFTA Chapter 11', *International Environmental Agreements*. 7:171-201, p.198

<sup>216</sup> These issues are raised by Tienhaara in her book *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge University Press.

<sup>217</sup> Sachs, Lisa and Karl P. Sauvant. 2009. 'BITs, DTTs, and FDI Flows: An Overview' in: Sachs, Lisa and Karl P. Sauvant. 2009. *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. Oxford University Press P xxxvii

2012). While a number of these cases remain on-going, mixed results in awards to date have led to public debate and concerns about regulatory autonomy. A further inspection of the facts of the cases however, suggest that they should not be cause for concern.

The CAN\$130 million dollar settlement paid by the Government of Canada in 2011 to *Abitibi Bowater* is held in contrast to its victory in both the *Dow AgroScience* and *Chemtura* cases. Abitibi Bowater's claim arose out of the Province of Newfoundland's measures to return water use and timber rights to the crown and to expropriate lands associated with hydro rights. The company claimed that these 'arbitrary' and 'discriminatory' measures resulted in the expropriation of Abitibi Bowater's investment in the province 'including their property and facilities' denying appropriate compensation and the 'usual appropriate judicial avenues of redress'.<sup>218</sup> While civil society groups such as The Council of Canadians were quick to suggest this 'effectively privatized Canada's water by allowing foreign investors to assert a proprietary claim to water permits and even water in its natural state',<sup>219</sup> a more measured perspective has been that this case reflects the proper functioning of the investment provisions and that the measures taken by the Newfoundland Government were truly discriminatory and egregious. In the case of *Dow AgroScience* it was the Government of Quebec ban of the commercial lawn pesticide additive 2,4-D which led to a NAFTA Chapter 11 challenge by the US company seeking CAN\$2 million in compensation. The case was settled, the measure upheld and no compensation provided to the investor. The award in the *Dow AgroScience* case, it is argued 'stands as a strong confirmation that legitimate regulatory conduct does not significantly conflict with a state's investment treaty obligations.'<sup>220</sup> Furthermore the period following the launch of the *Dow AgroScience* case also saw five Canadian provinces also institute their own bans of the pesticide additive 2,4-D<sup>221</sup>.

At the same time high profile challenges by Philip Morris International to tobacco control regulations in Australia through the Hong Kong-Australia BIT and to tobacco health warnings in Uruguay through the Switzerland-Uruguay BIT have moved concerns about the impact on government regulatory autonomy beyond North America.<sup>222</sup>

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<sup>218</sup> Abitibi Bowater Inc. v. Government of Canada – Notice of Intent, April 2009. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/AbitibiBowater.aspx?lang=eng>

<sup>219</sup> Council of Canadians website, March 2011 - AbitibiBowater NAFTA settlement has privatized Canadian water, trade committee hears: <http://www.canadians.org/media/trade/2011/08-Mar-11.html>

<sup>220</sup> Moloo, Rahim and Justin Jacinto argue in Environmental and Health Regulation: Assessing Liability Under Investment Treaties in the Berkeley Journal of International Law (2011:29:1), p.63

<sup>221</sup> In addition to Quebec's cosmetic pesticide ban which led to the 2008 NAFTA Chapter 11 dispute by Dow AgroScience, the provinces of Ontario, New Brunswick, Nova Scotia and Prince Edward Island have all banned the use of 2,4-D and the province of Alberta also prohibits the chemical in pesticide and herbicide mixtures according to the David Suzuki Foundation and Equiterre 2001 report 'Pesticide Free? Oui! Found at:

[http://www.davidsuzuki.org/publications/downloads/2011/Bilan\\_reglementations\\_pesticides\\_2011\\_EN\\_VF.pdf](http://www.davidsuzuki.org/publications/downloads/2011/Bilan_reglementations_pesticides_2011_EN_VF.pdf)

<sup>222</sup> These cases are discussed in detail in Chapter 6

## The impact of a 'threat' of an IIA ISDS dispute

It is frequently claimed that the simple 'threat of IIA litigation' can have a chilling impact on government regulation. Kyla Tienhaara looks at a number of cases involving developing countries where she claims the threat of a BIT challenge led to the chilling of regulation. She considers four mining related cases where a threat of arbitration had an impact on local environmental regulation and resulted in a possible chilling in Ghana, Indonesia and Costa Rica.

The first case involved the Government of Indonesia establishing a forestry law banning open pit mining in protected areas because of alleged concerns regarding its environmental impacts. A number of companies which held existing contracts for the development of such mines threatened the government with international arbitration under investment treaties held by their parent companies, due to concerns that the prohibition would result in a form of expropriation. In the end a number of companies received exemptions from the ban.<sup>223</sup> In the case of Ghana, the government established a moratorium on mining activities in Ghana's protected forests in 1996 despite the fact that a number of mining companies had already undertaken substantial exploration activity and were interested in proceeding further. In the wake of potential threats of arbitration, the government 'allowed five companies to carry out mine operations within the forests, subject to specific environmental guidelines.'<sup>224</sup> Finally, she highlights two cases in Costa Rica, one involving open pit mining and the other offshore oil exploration. The first involved threats of arbitration by a Canadian company facing difficulty with environmental approvals following a moratorium on open pit mining, but was eventually allowed to develop its mine. The second involved a US company which had a number of its land concessions annulled and also encountered difficulties receiving environmental approvals. Its ISDS claim was eventually withdrawn.<sup>225</sup>

While the cases outlined by Tienhaara highlight examples of the threat of arbitration potentially leading to changes or exemptions from environmental regulations, they also raise a number of important questions. Were these environmental measures legitimate? To what extent was the threat of ISDS simply cases of BITs serving their purpose and investors taking advantage of the provisions to address the negative impact of random policies or an ever changing regulatory environment in countries with weak institutions? More broadly, is most

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<sup>223</sup> Tienhaara, Kyla. 2009. *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge University Press. p. 217-266

<sup>224</sup> Ibid

<sup>225</sup> Ibid

of the evidence of regulatory chill strictly anecdotal and too difficult to measure? Finally, rather than a case by case anecdotal approach, is there a more systematic way to determine the impact of IIAs on government regulatory autonomy?

Neumayer makes the case that evidence of regulatory chill or proof that environmental standards have not been raised, is virtually impossible to gather because it involves the collection of evidence of something that has not taken place. He therefore claims that anecdotal evidence is most useful in determining the validity of a hypothesis of regulatory chill and goes on to give examples of chill in the traditional sense of the meaning.<sup>226</sup> Those scholars who have extended the meaning of regulatory chill to the case of IIAs and the impact of ISDS provisions approach the issue in a similar way, identifying anecdotal evidence of such a phenomena. The most commonly used example of a threatened investor-state claim under NAFTA leading to the chilling of regulation is the case of R.J. Reynolds Tobacco Company's lobbying of the Canadian Government in an effort to prevent the introduction of plain packaging legislation in 1994. The company's arguments to the House of Commons Standing Committee on Health which was considering the issue, revolved around claims that such a policy 'would constitute an illegal expropriation of its trademark' and lead to a threat of NAFTA dispute for hundreds of millions in compensation.<sup>227</sup> In the end, while the Committee recommended the adoption of plain packaging despite the threat of litigation, the policy was not pursued and was eventually dropped. David Schneiderman, who has written extensively on this issue, argues that the threat of a NAFTA Challenge was an influencing factor<sup>228</sup> despite the fact that other factors played a role in the Government's decisions, not least of which were the domestic legal challenges to existing tobacco control legislation which were deemed unconstitutional by the Supreme Court of Canada.

### **Revival of concerns through recent trade and investment negotiations**

As outlined above, it is difficult to draw conclusions of regulatory chill from the outcome of cases to date however many argue that the mere existence of challenges to government measures or even the threat of such challenges is enough to raise concern. Academic scholarship on the issue of regulatory chill has to date focussed on an analysis of IIA ISDS

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<sup>226</sup> Neumayer, Eric. 2001. *Greening Trade and Investment: Environmental Protection Without Protectionism*. Earthscan Publications Limited. P. 69. The traditional meaning of regulatory chill according to Neumayer is a situation where developed countries might either lower environmental standards or fail to raise them for fear that internationally mobile capital will move to countries with lower standards.

<sup>227</sup> Faunce, Thomas A. 2012. 'Plain packaging in a broader regulatory framework: preventing false claims and investor-state lobbying,' in *Public Health and Plain Packaging of Cigarettes: Legal Issues*, ed. Tania Voon, Andrew D. Mitchell and Jonathan Liberman with Glyn Ayres. Edward Elgar. p. 200-213

<sup>228</sup> Schneiderman, David. 2008. *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*. Cambridge University Press. p.120-129

cases and their outcomes. Despite lack of clear evidence or the existence of strictly anecdotal examples, popular opinion, health and environmental advocates remain concerned. In recent years the concern over the impact of IIAs and particularly the potential chilling impact of ISDS provisions have been brought to the fore by trade and investment negotiations towards the Trans Pacific Partnership (TPP), the US-EU (TTIP) Transatlantic Trade and Investment Partnership, the Canada-EU (CETA) Comprehensive Economic and Trade Agreement as well as the recent completion of the Canada-China (FIPA) Foreign Investment Protection Agreement. The US Government 2012 revision of its model (BIT) Bilateral Investment Treaty<sup>229</sup> as well as current efforts by the US government to secure (TPA) Trade Promotion Authority or 'Fast Track' negotiating authority as it is commonly known, have also been a catalyst for the rehashing of concerns regarding the impact of IIAs.

The key arguments tend to revolve around the belief that these agreements (IIAs) are unfair and biased against governments and the public and that negotiators are being led by corporate interests, that the ISDS tribunals which sit outside the jurisdiction of member states with no due process or openness and the fear that a successful claim or even the threat of a claim against a government regulatory measure could lead to the chilling of that measure.

### **Trans Pacific Partnership (TPP)**

The negotiations towards a Trans Pacific Partnership comprising Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam has been attracting criticism from numerous popular press, civil society and legal quarters on the agreement's investment provisions and inclusion of an ISDS mechanism.

Perspectives from the popular press are personified by Mark Weisbrot's Op-Ed in The Guardian on November 19 2013 in which he argued in the context of the Trans Pacific Partnership that 'laws to protect the environment, food safety, consumers (from monopoly pricing) and other public interest concerns can now be traded away in 'trade' negotiations'.<sup>230</sup> Lori Wallach, director of US based Public Citizen's Global Trade Watch and a familiar figure on

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<sup>229</sup>After campaigning on a platform critical of international trade and investment agreements including NAFTA, the Obama administration launched a review of the US Model BIT in June 2009. Views were polarized between labour and environmental groups pressing for substantial changes particularly to the investor-state arbitration provisions and business groups looking for increased protection when investing abroad. In the end there were no changes made to the investor-state provisions despite calls for increases in transparency, public participation and requirements for the exhaustion of local remedies among other things. Mark Kantor, 'The new US model BIT: not so very different from the old version', *Global Arbitration Review*, April 20, 2012. <http://globalarbitrationreview.com/news/article/30488/the-new-us-model-bit-not-so-different-old-version>

<sup>230</sup>Mark Weisbrot, 'The Trans-Pacific Partnership treaty is the complete opposite of 'free trade'', November 19, 2013 accessed November 22, 2013: <http://www.theguardian.com/commentisfree/2013/nov/19/trans-pacific-partnership-corporate-usurp-congress>

the anti- globalization front calls the TPP ‘NAFTA on steroids’, the term formally coined for the failed OECD MAI negotiations of 1999. In a January 2014 interview Wallach claimed that in the 20 years of NAFTA Chapter 11, over \$400 million has been paid out under investor-state law suits and that this is leading to a ‘chilling effect, because on average it costs \$8–10 million dollars to fight a Chapter 11 suit, and even if the country wins, it has to pay those costs.’<sup>231</sup> A petition sent to governments involved in the negotiation of the TPP and signed by a large number of respected jurists from Australia, New Zealand, the USA, Canada, Peru and Chile in May 2012 called for the rejection of the ISDS mechanism claiming that awards granted through investment chapters have demonstrated ‘overly expansive interpretations’ and that ‘some of these interpretations have prioritized the protection of the property and economic interests of transnational corporations over the right of states to regulate and the sovereign right of nations to govern their own affairs.’<sup>232</sup>

#### **(TTIP) Transatlantic Trade and Investment Partnership (US-EU) and (CETA) Comprehensive Economic and Trade Agreement (Canada-EU)**

There has been opposition by civil society groups, parliamentarians and within the public press to the EU government’s negotiation of trade and investment agreements with both Canada (CETA) and the USA (TTIP) launched 2012 and 2013 respectively.

A group of more than 100 civil society groups including social (Council of Canadians) aid (Oxfam), environment (Greenpeace) and labour (United Steelworkers) groups from Europe, Canada and the US signed a statement on November 25, 2013 calling for the investment chapter to be removed from the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. Among their claims were that the CETA would ‘strictly limit government regulation of services, investment, natural resources, environmental protection and public safety’ and that ‘the very presence of ISDS puts a ‘chill’ on environmental policy.’ They argue that this is due to the absence of a screen for precautionary measures dealing with the environment, public health or resource conservation. The statement goes on to ask ‘is it because Canada and the EU want to put a chill on effective climate policy?’<sup>233</sup> A similar letter, signed by over 200 organisations across the US and EU was written to the US Trade Representative Ambassador Michael Froman and European Trade Commissioner Karel de Gucht in December 2013 expressing opposition to the inclusion of an ISDS mechanism in the

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<sup>231</sup> Joshua Holland, ‘Trade Expert: Why TPP — “NAFTA on Steroids” — Must Be Stopped’. Moyers and Company website: <http://billmoyers.com/2014/01/09/fool-me-once-20-years-of-nafta-show-why-the-trans-pacific-partnership-must-be-stopped/>

<sup>232</sup> ‘An Open Letter From Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement’ May 8, 2012 <http://tpplegal.wordpress.com/open-letter/>

<sup>233</sup> Statement by civil society groups opposing the inclusion of an investment chapter in the CETA: ‘Stop the Corporate Giveaway! A transatlantic plea for sanity in the EU-Canada CETA negotiations.’ November 25, 2013

TTIP.<sup>234</sup> A February 17 2014 editorial in the Financial Times describes how antitrade campaigners have seized on the ISDS provisions of the TTIP as a risk to country sovereignty. The editorial highlights that despite the existence of ISDS clauses for the last 50 years ‘this has been portrayed as a vehicle for increasingly aggressive multinationals to water down regulations and laws through arbitration.’<sup>235</sup>

### **Canada-China Foreign Investment Protection Agreement**

The recent completion of the Canada-China Foreign Investment Protection Agreement (FIPA) similarly attracted an uproar following its September 2012 signing. Views were voiced by legal scholars, civil society groups and the popular press. Opponents of the agreement argued that China’s investors can ‘contest and bypass or be compensated regarding compliance with Canadian standards’<sup>236</sup> or that the legal costs of investor state rulings are steep and that governments therefore faced incentives to avoid these liabilities such that they ‘might prefer to pull back from proposed decisions in closed-door discussions with the investor and his lawyers, rather than assume the cost and risks of litigating investor claims.’<sup>237</sup>

Civil society groups and parliamentarians were equally vocal. The Canadian Environmental Law Association in their comments in response to the Federal Government’s Final Strategic Environmental Assessment of the Canada-China FIPA argued that ‘environmental and sustainable development concerns from investment protection agreements include a regulatory chill on environmental protection measures as a result of the additional legal rights it grants to Chinese investors in Canada, including the right to sue for indirect expropriation.’ Furthermore the group claimed that ‘the threat of being sued for measures that limit the profits of foreign investors could reasonably deter governments from undertaking a wide array of legitimate environmental protection measures.’ As such the group called on the government to follow the lead of Australia and refuse to negotiate investment agreements with ISDS provisions.<sup>238</sup>

Evoking the Australian Government’s position with respect to ISDS was a common theme with Parliamentarians and civil society groups concerned about regulatory chill. Elizabeth May, the Green Party of Canada Member of Parliament in her submission on the Canada-China

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<sup>234</sup> Letter by 200 environmental, consumer and labour groups expressing opposition to the inclusion of ISDS in the TTIP. December 2013. [http://corporateeurope.org/sites/default/files/attachments/ttip\\_investment\\_letter\\_final.pdf](http://corporateeurope.org/sites/default/files/attachments/ttip_investment_letter_final.pdf)

<sup>235</sup> Financial Times Editorial, ‘Time to advance on transatlantic trade’, Financial Times, February 17, 2014.

<sup>236</sup> Diane Francis, ‘Canada-China trade deal is too one-sided’, Financial Post, November 2, 2012

<sup>237</sup> David Schneiderman and Gus Van Harten, ‘Self-interested lawyers and the Canada-China FIPA’, The Toronto Star, November 25, 2012.

<sup>238</sup> Letter to the Hon. Ed. Fast, Minister of International Trade Canada from the Canadian Environmental Law Association dated November 2012 concerning the Canada-China FIPA

FIPA Environmental Assessment hearing argued that ‘the chilling effect of the *Ethyl Corporation* and *S.D. Myers* (cases) were profound’ and that they ‘have resulted in failures of the Canadian government to regulate and/or ban toxic substances that they would have in the pre-Chapter 11 era.’<sup>239</sup> The Council of Canadians, a long time vocal opponent of IIAs and ISDS provisions claims on their website that the Canada-China FIPA ‘will give Chinese firms in Canada and Canadian firms in China 31 years of ‘protection’ from environmental, human rights or resource conservation measures they don’t like.’<sup>240</sup>

### **Australia Government policy regarding ISDS**

Many opponents of IIAs and the rights bestowed on private investors point to the Australian government’s announcement that it would no longer include ISDS provisions in its investment treaty negotiations as a model approach for concerned governments. In the April 2011 *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity*, the Australian Government was clear that it would discontinue the inclusion of ISDS procedures in trade agreements because it could no longer ‘support provisions that would constrain the ability of the Australian Government to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses.’ The statement went on to confirm that the ‘Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme.’<sup>241</sup> Interestingly, however the Australian Government seems to have moved away from this position and reverted to a case by case assessment of the inclusion of ISDS. At the conclusion of the Korea-Australia FTA (KAFTA) negotiations in December 2013, the government released a Key Outcomes fact sheet which confirmed that the FTA was to include an ISDS mechanism but that ‘the Government has ensured the inclusion of appropriate carve-outs and safeguards in important areas such as public welfare, health and the environment.’<sup>242</sup> Furthermore as a negotiating party in the TPP, Australia will certainly feel pressure from countries such as Canada, US, Mexico and Peru to negotiate a comprehensive investment chapter including an ISDS mechanism.

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<sup>239</sup> Submission by Elizabeth May to the Trade Agreements and NAFTA Secretariat, Foreign Affairs and International Trade Canada on the Environmental Assessment for the Canada-China Foreign Investment Protection and Promotion Agreement. November 10, 2012

<sup>240</sup> ‘ACTION ALERT: Harper must tear up the Canada-China investment treaty’, Council of Canadians Website, October 2012. <http://www.canadians.org/tear-up-FIPA>

<sup>241</sup> Australian Government, Department of Foreign Affairs and Trade, ‘Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity’, April 2011. <http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx>

<sup>242</sup> Australian Government, Australia-Korea Free Trade Agreement (KAFTA) – Key Outcomes. 2013. <http://www.dfat.gov.au/fta/akfta/fact-sheet-key-outcomes.html>

### c. The consensus on regulatory chill?

While legal scholars, civil society groups and the public press continue to raise concerns about the potential chilling impact of IIAs and ISDS provisions, particularly under NAFTA Chapter 11, the majority of scholars have looked at the merits of IIA investment disputes and found little evidence of potential for regulatory chill beyond a handful of anecdotal examples in both developed and developing countries. As Neumayer argues there has been little concrete evidence to support the claim for regulatory chill either with respect to internationally mobile capital or ISDS challenges under IIAs, however he allows that when anecdotal evidence is considered, the potential for chill exists and moreover the threat of an ISDS challenge, as Tienhaara has arguably demonstrated<sup>243</sup>, might have a greater impact than the actual cases reviewed. Furthermore he argues that any actual impact from cases to date might take time to manifest, suggesting that trends in HSE regulations are likely to reflect any possible chilling impact only months or even years after they reach public consciousness<sup>244</sup>

Beyond a case by case consideration of this question, a more fundamental approach for consideration of this issue seems necessary and represents a gap in research to date. Coe and Rubins address this issue while questioning the rationale of what they term the regulatory chill thesis. 'The regulatory chill thesis is, of course, difficult to prove or disprove. First, it assumes that regulators are aware of international law, but are they? On the one hand, it is likely that legislators often attempt to acquaint themselves with the international ramifications of contemplated measures likely to affect foreign enterprises. Indeed, with the unprecedented public awareness of investor –state arbitration and the recent burgeoning of the associated docket, regulators may be more conscious of the prospect of liability than ever before. Nevertheless, there is still no shortage of State action clearly uninformed by the dictates of international law.'<sup>245</sup>

### d. Addressing the gap on regulatory chill

As outlined in Chapter 1, this research aims to probe and address concerns regarding the potential chilling impact of IIAs. It aims to do so by addressing the gaps in empirical work done to date. To date the empirical work has focussed on ISDS challenges and the outcomes

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<sup>243</sup> Tienhaara, Kyla. 2009. *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge University Press. outlines case studies of the threat of investment challenges by mining companies in Ghana, Indonesia and Costa Rica which she purports led to the chilling of domestic environmental regulation.

<sup>244</sup> Neumayer, Eric. 2001. *Greening Trade and Investment: Environmental Protection Without Protectionism*. Earthscan Publications Limited, p. 78-90

<sup>245</sup> Coe, Jack and Noah Rubins. 2005. Regulatory Expropriation and the Tecmed Case: Context and Contributions. In *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, edited by Todd Weiler, 597-667. London: Cameron May.

of individual cases as well as looking at anecdotal evidence of potential chill on the back of ‘threats’ of investment arbitration.<sup>246</sup> This research will focus on the issue of regulatory chill by looking at trends in HSE regulations and the role of ISDS disputes on the regulatory development process. The assumption of this thesis is that if the regulatory chill hypothesis was to hold or to be considered a viable possible outcome of IIA legal challenges, we would expect to find a number of observable outcomes in regulator behaviour and regulatory trends. First, one would expect trends in HSE regulation to reflect this chilling impact (through a stagnant or weakening regulatory environment or through the degree of uptake in regulatory policy), particularly in policy areas where regulatory measures were challenged under IIAs. Second we would expect to find a level of awareness and understanding among HSE regulators about the existence and content of IIAs. Any causal link between IIAs and regulatory chill would also need to demonstrate that beyond awareness, that IIAs have an influential role on regulators in the HSE regulatory development process.

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**Expectation 1 – We would expect HSE regulatory trends to reflect regulatory chill through a stagnant or weakening regulatory environment in the wake of IIA challenges**

**Expectation 2 – We would expect senior HSE regulators to be aware of IIAs and their implications, and to take them into consideration in the regulatory development process**

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The rationale for these expectations rests in the fact that regulatory chill presupposes behaviour on the part of regulators, namely that they will curtail regulations or be more reticent to pursue more stringent regulations due to the threat of litigation. It is only by analysing the extent to which this has happened consistently (through trends in regulation) as well as the degree to which regulator actions are deliberate and reflect full knowledge of IIAs and their impact, can we build a comprehensive picture of the regulatory chill phenomenon.

These two expectations of the hypothesis will guide the analysis of case studies of the Canadian regulatory environment under NAFTA Chapter 11 and of tobacco control regulations globally.

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<sup>246</sup> Some examples of those authors that have looked at this issue include Tienhaara (2009), Schneiderman (2008), Neumeyer (2001)

## 6. CONCLUSION

As outlined in this Chapter, the emergence of the modern day investment agreement and its unique enforcement mechanism has raised a whole host of issues for signatory governments. While there are conflicting views regarding the effectiveness of these agreements in achieving their stated goals, there are equally concerns about their impact. Proponents of chill point to countless examples of the influence of private actors on the regulatory autonomy of governments whether it is through past or on-going NAFTA Chapter 11 challenges or the use of ISDS mechanisms in the tobacco industry challenges to tobacco control regulation. They raise the spectre of the influence in the context of on-going regional and bilateral trade negotiations calling for the exclusion of the ISDS mechanism and point to Australia's lead in this regard.

This issue will be explored in more detail in the remainder of this thesis as we seek to determine the extent and nature of the impact of IIAs on governments, whether there is support for the hypothesis of regulatory chill and whether this differs among developing or developed countries. Chapter three will outline in detail the methodological approach to be taken.

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## Chapter 3: Concepts and methods: The research design

### 1. INTRODUCTION

There is a theory in political economy that argues that globalization has a negative impact on the policy autonomy of governments. Chapter 1, outlined how this issue has been looked at with respect to the influence of the ‘threat of exit of MNEs’ or of financial markets on social welfare policies, on the regulatory race to the bottom or on regulatory convergence. One strand of this theory as outlined in Chapter 2, hypothesises that international investment agreements (IIAs) have a constraining and dampening effect on domestic health, safety and environmental (HSE) regulations because of the legal trade challenges that have arisen against such regulations (for example under NAFTA’s Chapter 11 on investment or through bilateral investment treaties (BITs) against governments which have pursued aggressive tobacco control regulations). This research will address this issue by seeking to answer the following question:

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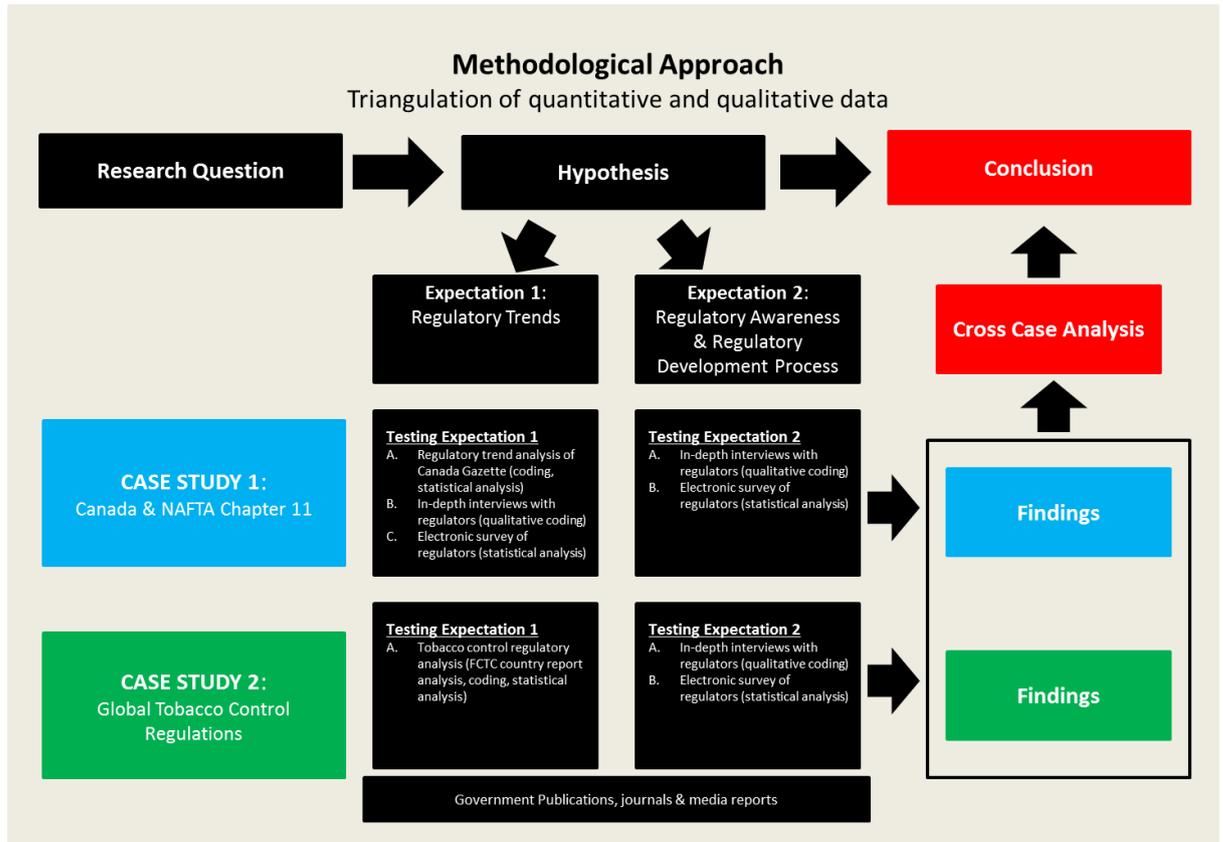
**What has been the impact of international investment agreements on national regulatory autonomy in the areas of health, safety and environment? Is there evidence of a “chilling” impact on the regulatory development process?**

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### 2. THE BASIC METHODOLOGICAL APPROACH

In order to test the expectations of the hypothesis on regulatory chill, this thesis uses quantitative and qualitative tools within a comparative case study analysis. These will include statistical analysis and the qualitative coding and analysis of in-depth interviews and an electronic survey of HSE regulators, as well as the statistical and qualitative analysis of government information such as regulatory databases, policy pronouncements and government reports and studies. Figure 1 below provides an overview of the methodological approach and the triangulation of qualitative and quantitative data.

Diagram 1 – Methodological approach



### 3. THE CASE STUDY SELECTION

Two case studies were selected for this research. The main case study looks at Canada’s HSE regulatory environment prior to and during a period of intensive legal challenge under NAFTA Chapter 11 on investment. The second, supporting case study looks at global tobacco control regulation at a time when tobacco industry litigation under IIAs has become more prevalent.

According to Gerring, a case study is defined ‘as an intensive study of a single unit with an aim to generalize across a larger set of units.’<sup>247</sup> The cases for this research were selected on the basis of their ability to provide results which might be more broadly generalized. Additionally, they represent both a broad look at HSE regulations (Canada) and a more focussed look at a single issue (tobacco). They were also chosen for their ability to provide perspectives from both developed and developing countries regarding the impact of IIAs on HSE regulation.

<sup>247</sup> Gerring, John. 2004. “What is a Case Study and What is it Good for?” *The American Political Science Review*. Vol. 98, No. 2, May 2004, p34

### a. Case Study 1 – The Canadian regulatory environment

This is the primary case study. The rationale for selecting the Canadian regulatory environment is twofold. First Canada is a developed country with a comprehensive approach to both international trade policy and HSE regulation. In the area of trade and investment, Canada is a member of the WTO and the NAFTA and is signatory to numerous high level bilateral trade treaties and bilateral investment treaties. At the same time Canada is at the forefront of HSE regulation both in terms of its domestic agenda as well as international leadership.

Second Canada has had unique experience at the interface between the international trade and investment and HSE regulatory world through the many NAFTA Chapter 11 challenges it has faced to regulation since the agreement entered into force in 1995. Canada has faced 28 of the 66 cases brought under NAFTA Chapter 11 over the course of the last 20 years, with the largest number of HSE challenges of any other country<sup>248</sup>. The nature of these challenges and the timeframe during which they have taken place provides a compelling environment for testing the hypothesis for regulatory chill.

This case study will look at trends in HSE regulation over the last fifteen years as well as seek to understand the role of international trade and investment on the regulatory development process in an attempt to test the expectations which underlie the hypothesis on regulatory chill.

As outlined in Figure 1, the Canada Case Study will test the expectations in the following way

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**Expectation 1 – We would expect HSE regulatory trends to reflect regulatory chill (through a stagnant or weakening regulatory environment) in the wake of IIA challenges**

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If there has been a chilling of HSE regulations as a result of IIAs, we would expect to see a trend of falling standards or of little increase in the comprehensiveness or stringency of HSE regulations over the last two decades and particularly in the last ten years (period during which NAFTA Chapter 11 challenges to HSE regulations in Canada have occurred)

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<sup>248</sup> European Commission. 'Fact Sheet – Investment Protection and Investor-to-State Dispute Settlements in EU Agreements'. November 2013

The HSE regulatory trend will be analysed using the Canada Gazette database of regulations with the findings supported by the views of Canadian regulators through in-depth interviews and an electronic survey.

**Expectation 2 – We would expect senior HSE regulators to be aware of IIAs and their implications, and to take them into consideration in the regulatory development process**

With respect to expectation two we would expect to see a clear awareness among regulators of Canada’s international trade commitments and specifically IIAs such as NAFTA Chapter 11 (versus other broader trade commitments like WTO SPS or TBT) including the potential for ISDS challenges and the cost (financial and social) of such challenges. A significant emphasis (ranked in the top half of influencing factors) placed on the role of international trade commitments as a factor influencing the regulatory development process (including changes to, or new regulations, or the issuing of licences or permits under regulatory authority). Additionally the expectation is that this would be heightened where a particular regulator has faced a NAFTA Chapter 11 challenge to a measure within their remit.

The role of international trade and investment in the HSE regulatory development process will be analysed through the in-depth interviews with Canadian regulators and a broader based electronic survey.

**b. Cast Study 2 – Global tobacco control regulation**

This is a secondary and supportive case study which will be used as a point of comparison with the Canada Case Study and as a means of looking at the issue of regulatory chill from both a global perspective and with respect to the differences between developed and developing countries.

The rationale for selecting global tobacco control regulation is twofold. First tobacco control is an area of HSE regulation which is unique with respect to the level of international activity and coordination. Since the ratification of the WHO Framework Convention on Tobacco Control (FCTC) it has been an area of regulation that has seen widespread uptake by countries worldwide. As such it will allow us to look at the issue of regulatory chill from a global perspective as well as providing a developing country perspective.

Second the tobacco industry is among the most litigious and has in recent years resorted to the use of trade and investment rules as a means through which it might challenge regulation

in this area. In particular the investor-state challenges which have arisen under IIAs against countries such as Australia and Uruguay provide a compelling environment for testing any possible cross border chilling impact.

This case study will look at trends in tobacco control regulation over the last decade as well as seek to understand the role of international trade and investment on the regulatory development process in an attempt to test the expectations which underlie the hypothesis on regulatory chill.

The case study will test the expectations in the following way

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**Expectation 1 – We would expect tobacco control regulatory trends to reflect regulatory chill (through the level of uptake in key tobacco control measures) in the wake of IIA challenges**

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If there has been a chilling of tobacco control regulations as a result of IIAs, we would expect to see little uptake globally and regionally of the kinds of tobacco control regulations that have been subject to IIA challenges in countries such as Australia and Uruguay (increasing restrictions on advertising and promotion, plain packaging and health warnings including pictograms)

The trend in tobacco control regulation will be analysed using the WHO Framework Convention on Tobacco Control's (FCTC) country reporting system<sup>249</sup> and analysis undertaken by third parties. The findings will be supported by the views of tobacco control regulators through in-depth interviews and an electronic survey.

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**Expectation 2 – We would expect senior tobacco control regulators to be aware of IIAs and their implications, and to take them into consideration in the regulatory development process**

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If there has been a chilling of tobacco control regulations as a result of IIAs, we would expect to see a clear awareness of IIAs and their potential impact (e.g.: costly litigation vehicle for governments to defend regulations) as well as a strong emphasis on the role of international trade, but particularly IIAs as an influencing factor in tobacco control regulatory development and decision making. We would also expect to hear vocalized concern regarding developments in Australia and Uruguay and a stated 'wait and see' attitude on these specific policies.

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<sup>249</sup> The WHO FCTC is described in greater detail in Chapter 6.

The role of international trade and investment in the tobacco control regulatory development process will be analysed through the in-depth interviews with global regulators and a broader based electronic survey.

#### **4. GOVERNMENT DATA ANALYSIS**

##### **a. Regulatory trends through Canada Gazette analysis**

In an effort to understand trends in HSE regulations we undertook an analysis of the Canada Gazette. The Canada Gazette has been the official publication of the Government of Canada since 1841 with on-line availability of all bi-weekly versions between 1998 and 2013.<sup>250</sup> Part 1 of the Canada Gazette outlines all proposed regulations prior to a period of public consultation while Part 2 outlines those official regulations which will become law.

This analysis was aimed at understanding trends in Canadian HSE regulations between 1998 and 2013 both in terms of proposed regulation and adopted regulation as well as any correlation between changes in regulation and NAFTA Chapter 11 disputes. A comprehensive database was created in Excel of all HSE regulatory proposals from Gazette 1 and all adopted HSE regulations from Gazette 2 over this period. This included the date of the proposal or official regulation, the sponsoring government department, the Act under which the regulation would fall and the regulation itself. In developing the database on Gazette 1, a further column was added outlining whether the proposal was a new regulation, a change to an existing regulation or the repeal of an existing regulation. The process involved a detailed review of thousands of published regulatory proposals in the Canada Gazette 1, as well as adopted regulations in the Canada Gazette 2, between 1998 and 2013 with a view to identifying those with a particular focus on health, safety or the environment. These numbered 757 in the case of regulatory proposals and 1579 in the case of actual adopted regulations or regulatory changes. Appendix 1 shows the databases compiled using raw data from Gazette 1 and 2. This analysis was aimed at understanding the quantity of proposed and adopted regulations by subject area (health, safety or environment) and across federal departments but more importantly whether these new regulations or regulatory changes

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<sup>250</sup> The Canada Gazette - <http://canadagazette.gc.ca/archives/archives-eng.html>

resulted in an increase or decrease in regulatory stringency and comprehensiveness.<sup>251</sup> This data was then coded for statistical analysis using SPSS software.<sup>252</sup>

Descriptive statistics allowed us to understand the trends in regulations across the individual areas of health, safety and the environment, by department as well as by the nature of the regulation in the case of Gazette 1. It also allowed us to understand the general direction of adopted regulations from Gazette 2 with respect to increasing, decreasing or neutral changes.<sup>253</sup> Finally these trends were plotted against NAFTA Chapter 11 disputes (both with respect to the date of the filing of a Notice of Intent as well as Final Award). Using logistic regression, an analysis was undertaken to understand any correlation between these regulatory trends and NAFTA Chapter 11 disputes on HSE measures.<sup>254</sup>

#### **b. Tobacco control regulatory initiatives through FCTC country reports**

In an effort to understand the level of uptake of controversial tobacco control regulations across countries and regions we undertook an analysis of the WHO FCTC country reports. The WHO FCTC requires each Party to submit to the Conference of the Parties (COP), through the Convention Secretariat, periodic reports on its implementation of the Convention measures. This analysis was aimed at understanding the extent to which Parties had implemented regulatory measures dealing with packaging and labelling of tobacco products (Article 11) and tobacco advertising, promotion and sponsorship (Article 13).<sup>255</sup>

A database was created in Excel from the reports filed by 131 parties to the Convention in 2011 and 2013 outlining the country name, region and whether or not they had implanted

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<sup>251</sup> Aimed at addressing the first expectation of the hypothesis on regulatory chill: Expectation 1: We would expect HSE regulatory trends to reflect regulatory chill (through a stagnant or weakening regulatory environment) in the wake of IIA challenges.

<sup>252</sup> Appendix x outlines the coding table for this analysis

<sup>253</sup> For the purposes of this analysis a *regulatory decrease* refers to a decrease in the comprehensiveness or stringency of regulations or involves the elimination of regulations. More concretely this would include regulations that exempt a substance after a review or scientific advance, moves control of an activity or substance from criminal law to regulation, changes a substance from prescription to non-prescription status, increases the allowable level of a restricted or controlled substance or generally reduces the burden of regulatory requirements on industry. Examples of this might include a move away from the criminalization of marihuana to allow for its medicinal use in certain circumstances, exempting power assisted bicycles from federal safety standards, the elimination of a requirement for environmental assessments on all projects which are deemed 'unlikely to cause more than minor adverse environmental effects or pose more than minor environmental risks. A *regulatory increase* refers to an increase in the comprehensiveness or stringency of regulations by adding regulatory coverage to a new substance or a new area of activity. This might involve measures which increase the protection of the environment and human health or general increases in the burden of compliance for industry. Examples of this would include new regulations dealing with hand held radiation devices, those aimed at reducing greenhouse gas emissions through greater emission control standards, the setting of Maximum Residue Limits (MRL) for controlled substances or the prohibition of a toxic substance for use and sale in Canada. A *neutral regulatory change* refers to regulations where it is assumed the stringency and comprehensiveness of the regulation does not change, and might include non-substantive regulatory amendments, changes in fees or tariffs, clarifications to regulations or allowing for new uses of an existing registered substance. Examples of this would include changes to fishing or hunting season dates and catch allowances in fishery conservation, changes to pilotage tariffs, the consolidation of Asbestos measures across many disparate Acts or general regulatory changes aimed at achieving greater efficiency, modernization, involving the shifting of cost burden or a move to cost sharing arrangements.

<sup>254</sup> Chapter 4 outlines the findings of this analysis

<sup>255</sup> A detailed outline of the role and evolution of the FCTC and the content of Articles 11 and 13 is provided in Chapter 6

some of the specific aspects of Article 11 and Article 13. This data was then coded for statistical analysis using SPSS software. Appendix 2 shows the database created out of raw FCTC data. Descriptive statistics and cross tabulations allowed us to understand the trends by region with respect to the uptake of regulations in the areas of health warnings and packaging and labelling.

#### **Other supporting information and third party analysis**

Both the Canada Case study and the Tobacco Control case study were supported by the analysis of government information. In particular departmental policy statements and reports provided background on domestic Canadian regulatory initiatives, while independent analysis by the OECD, Conference Board of Canada and the Canadian Cancer Society helped us understand trends in regulations both in Canada and worldwide.

## **5. QUALITATIVE INTERVIEWS WITH REGULATORS**

A key component of the analysis involved in-depth interviews with senior Canadian federal HSE regulators and senior tobacco control regulators globally. This section outlines the approach and structure of the interviews as well as the qualitative coding and statistical analysis that was used to analyse the resulting data.

### **a. Approach and structure of in-depth interviews**

#### **Canadian interviews**

During June, September and October 2012, a series of in-depth semi-structured interviews were held with fifty officials at the Section Head, Director and Director General levels, across the Canadian federal government departments and agencies listed in Table 1.<sup>256</sup>

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<sup>256</sup> Appendix 3 provides a list of all federal Canadian regulators interviewed. Interviews were not held with regulators from NEB, NRCA or DFINA however the first two were represented in the on-line survey.

**Table 1: Federal HSE regulatory department and agencies**

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Federal Departments and Agencies
<b>Health Canada (HC)</b>
<b>Environment Canada (EC)</b>
<b>Transport Canada (TC)</b>
<b>Fisheries and Oceans Canada (DFO)</b>
<b>Human Resources and Skills Development Canada (HRSCD)</b>
<b>Canadian Environmental Assessment Agency (CEAA)</b>
<b>Canadian Nuclear Safety Commission (CNSC)</b>
<b>Canadian Food Inspection Agency (CFSA)</b>
<b>Pest Management Regulatory Agency (PMRA)</b>

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The vast majority of people contacted agreed to be interviewed for this research, with a 95% positive response rate among those contacted.<sup>257</sup> Access was facilitated by the researcher's previous role as an international trade negotiator with the Canadian Government. Appendix 3 outlines the list of regulators interviews by department.

The main objective of the interviews was to understand how HSE regulations have changed over the last two decades and whether they have become more or less comprehensive and stringent and the evidence that would support either assertion, the key factors which influence or drive regulatory decision making, the extent to which Canada's trade commitments play a role in influencing regulatory decision making, which trade commitments have the most impact or create the most concern (WTO, IIAs, FTAs), the extent of regulator awareness of IIAs, particularly NAFTA Chapter 11 and its possible implications for regulation and whether this awareness is borne from experience with a NAFTA Chapter 11 case.

Appendix 4 provides a copy of the questions used to guide the interviews. Interviews were on average one hour in duration and were not recorded given widespread concerns about confidentiality amongst regulators and in order to encourage them to speak freely. Concise notes were taken and the interviews were written up shortly after their completion with key issues clarified through email exchanges by way of follow-up.

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<sup>257</sup> Regulators were identified via the Government Electronic Directory (GEDs) which provides a full electronic database of government of Canada employees as well as through web searches and personal contacts.

The interview notes were then subject to qualitative coding as a means to determine systematically what respondents were saying regarding the stringency and comprehensiveness of health safety and environmental regulations in Canada over the last decade as well as the factors which influence the regulatory development process, including the role of international trade and investment. The analysis used *Descriptive Coding* which is a coding practice that ‘summarizes in a word or short phrase’<sup>258</sup> the core content of an interview transcript, *Process Coding* also known as *Action Coding* which is useful for understanding actions ‘taken in response to situations or problems’<sup>259</sup> as well as examples and quotes to illustrate or support the views of interviewees. A table was developed in Excel outlining examples, Descriptive and Process Coding outcomes and also facilitating the calculation of descriptive statistics. Categories were developed from the long list of initial codes and these categories were further grouped into the primary themes of the data which is outlined in Chapters 4 and 5. These themes were reinforced by the examples from interviewees.<sup>260</sup> Appendix 5 provides the qualitative coding analysis of interview transcripts.

### **Tobacco interviews**

Interviews were conducted with senior global tobacco control regulators from eleven countries, representing five regions primarily during the fifth session of the Conference of the Parties (COP5) of the World Health Organization Framework Convention on Tobacco Control (FCTC)<sup>261</sup>. The FCTC conference took place in Seoul, Republic of Korea, from 12 to 17 November 2012. The session was attended by the delegations of more than 140 Parties, seven States that are not Party to the Convention and 18 intergovernmental and nongovernmental organizations accredited as observers. Representatives were interviewed from the following countries listed in Table 2.

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<sup>258</sup> Saldana, Johnny (2013). *The Coding Manual for Qualitative Researchers*. Second Edition, Sage, p.88

<sup>259</sup> Ibid, p. 96

<sup>260</sup> See Appendix 5 for the full analysis table with codes and categories. Chapter 4 and 5 outline the findings of the in-depth interviews.

<sup>261</sup> In the case of Canada and the UK, the in-depth interviews were held in Ottawa in April and June 2012 and London in January 2013 respectively.

**Table 2: List of countries interviewed at the WHO FCTC conference in Seoul, Korea**

Countries
<b>Canada</b>
<b>Finland</b>
<b>Malta</b>
<b>Norway</b>
<b>New Zealand</b>
<b>Panama</b>
<b>Singapore</b>
<b>Sweden</b>
<b>United Kingdom</b>
<b>Yemen</b>

This case study represents a second and supportive case study and as such the quantity of interviews are relatively smaller in number than those conducted for the primary case study on Canada. Appendix 6 lists regulators interviewed.

The main objective of the interviews was to understand the progress made in key areas of tobacco control regulation (such as bans on advertising and promotion, the use of health warnings on packaging and the possible adoption of plain packaging regulations), specifically, what respondent countries were doing to meet their commitments to Article 11 and 13 of the FCTC, whether they were considering plain packaging and the factors influencing their decision in this regard, the extent to which the litigation faced by Australia on the issue of plain packaging was affecting their decision making, more generally, the key factors which influence or drive regulatory decision making, the extent to which trade commitments play a role in influencing regulatory decision making, the extent of regulator awareness of IIAs and their possible implications for regulation and whether this awareness is borne from experience with a BIT challenge to their government or neighbouring governments.

Appendix 7 provides a copy of the questions used to guide the interviews. Interviews were not recorded given widespread concerns about confidentiality amongst regulators and in order to encourage them to speak freely. Concise notes were taken and the interviews were written up shortly after their completion with key issues clarified through email exchanges by way of follow-up.

The interview notes were then subject to qualitative coding as outlined earlier, as a means to determine systematically what respondents were saying regarding the impact of BITs on tobacco control regulations. Appendix 8 outlines the codes identified.

## **6. ELECTRONIC SURVEY OF REGULATORS**

Complementing the in-depth interviews was an electronic survey of a broader range of HSE regulators and tobacco control regulators with greater representation among developing countries. These surveys were conducted using Qualtrics software and subsequently analysed qualitatively through qualitative coding and statistically through the use of SPSS software. This section outlines the approach and content of the surveys as well as details of the qualitative coding and statistical analysis that was used to analyse the resulting data.

### **a. Approach and content of electronic survey**

#### **Canadian survey**

In addition to understanding how HSE regulations have changed since the signing of NAFTA (through interviews, an analysis of the regulatory Gazette process and independent assessments produced by international bodies such as the OECD), it was important to understand to what extent regulators themselves are aware of Canada's international trade and investment commitments and the extent to which they consider them in making their regulatory decisions.

This survey was focussed on achieving this understanding in an effort to measure the degree of regulatory involvement and decision making of each respondent, the regulator's awareness of trade commitments, the regulator's differentiation between trade and investment commitments, the degree of influence of trade commitments and the extent to which this differs by role or seniority, the factors influencing regulatory policy and their relative weights, the role trade plays in the regulatory development process, personal experience of regulators with NAFTA disputes and the extent to which this affects awareness and impact.

## *Sample*

The survey population consisted of HSE regulators and policy makers from Manager through to Director General level within the federal government. As it is possible in this case to define the entire population of interest, this survey was directed at all members of this population and not done on the basis of sampling, although a number of assumptions were made in defining the population. A HSE regulatory body was defined as a body whose regulatory responsibilities govern the development, licensing, monitoring and evaluation stages in the sphere of HSE. HSE regulators and policy makers were defined as those government officials with a clear policy or regulatory responsibility as well as those with decision making power. Regulatory responsibility was determined by the specific focus of work. Regulator for the purpose of this study refers to those individuals whose activity (policy development, licensing, evaluating, monitoring enforcing) influences at any point of the life cycle of a product (sale, manufacturing, labelling, packing). Decision making responsibility is relevant but this study will also be seeking to differentiate views and knowledge of those developing regulations and those making decisions on regulatory policy. In total 395 regulators were contacted for this survey. 140 or 35% of regulators responded and 114 or 29% of regulators provided complete responses.<sup>262</sup>

The survey was geared to Director General, Director, Head of Section and Manager within the relevant Departments and Agencies. In many cases the identification of survey recipients has been guided by the advice of the Director Generals and Directors of the relevant organizations. Table 3 provides a breakdown of survey respondents showing the broad coverage of responses across regulators at the Section Head, Director and Director General levels.

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<sup>262</sup> This response rate is in line with expectations. A 2000 meta study by Cook et al suggests that the mean response rate for the 56 surveys represented in 39 studies with no missing data on 16 variables was 34.6%. This study also suggests that one can 'expect between a 25% and 30% response rate from an email survey when no follow-up takes place' and that this can be increased with the use of follow-up. (Cook, Colleen and Fred Heath and Russell L. Thompson, 'A Meta-Analysis of Response Rates in Web or Internet Based Surveys', *Educational and Psychological Measurement* Vol. 60, No. 6 December 2000, 821-836, Sage Publications)

**Table 3: Canadian federal regulator survey respondents by title**

<b>1. Which title most approximates your position within your Department or Agency?</b>				
#	Answer		Response	%
1	Director General		20	14%
2	Director		56	39%
3	Head of Section		29	20%
4	Manager		22	15%
5	Other		15	11%
	Total		142	100%

Source: Qualtrics Survey of Canadian Federal Regulators – Report May 22 2013

Those regulators that completed the survey had broad regulatory responsibility across the areas of regulatory policy development and planning, regulatory authorization (such as licencing), monitoring and evaluation. Table 4 below shows the breakdown of responsibilities.

**Table 4: Area of responsibility of Canadian regulatory survey respondents**

<b>2. Where in the regulatory process do you spend your time? You can identify more than one.</b>				
#	Answer		Response	%
1	Regulatory policy development and planning		84	59%
2	Developing regulatory changes or new regulations		73	51%
3	Regulatory authorization (e.g.: licensing)		41	29%
4	Monitoring regulatory compliance		42	30%
5	Evaluating regulatory effectiveness		38	27%
6	Other		26	18%

Source: Qualtrics Survey of Canadian Federal Regulators – Report May 22 2013

Those regulatory bodies included in the survey were identical to those for the in-depth interviews with the addition of Natural Resources Canada (NRCan) and the National Energy Board (NEB). A very comprehensive database of survey respondents was compiled in order to track responses by title and government department.

### *Content and conduct of the survey*

The survey aimed to describe the respondents and their attitudes and experiences with respect to the interface between Canada's international trade commitments and the development of regulation. The survey focused on the current views and experiences of regulators though it captured historical behaviour commensurate with the length of service in a particular role.

The electronic survey was developed using Qualtrics software. It comprised 15 open and closed questions and took respondents on average 15 minutes to complete. The survey was self-administered and was sent electronically to the identified list of recipients by email on a rolling basis. The survey software allowed for the tracking of responses from commencement to completion. Given the challenges involved in achieving high response rates, every effort was made to follow-up with respondents to encourage participation through email reminders. Efforts were also made to gain support and sponsorship throughout the organizations to bring internal pressure to bear on participation rates. The in-depth interviews conducted prior to this were also aimed at gaining support for completion within each federal department. Appendix 9 shows the survey questionnaire.

Qualitative coding was used to analyse the qualitative responses received. Statistical analysis was used to analyse the remainder of the survey data. With the help of SPSS software a number of logistic regressions and cross tabulations were undertaken to assess the relationship between variables with a view to drawing some generalizable outcomes.<sup>263</sup> Appendix 10 shows the qualitative coding analysis.

#### **Tobacco Control survey**

As with the Canadian Regulator survey this survey was aimed at complementing the in-depth interviews that were held with regulators on the margins of the FCTC conference in Korea. The main goal of the survey was to understand the key factors which influence or drive regulatory decision making, whether trade agreements and IIAs were influencing factors, whether regulators were considering plain packaging and the factors influencing their decision in this regard, the extent to which the litigation faced by Australia on the issue of plain packaging affected their decision making and whether they faced legal action from the tobacco industry.

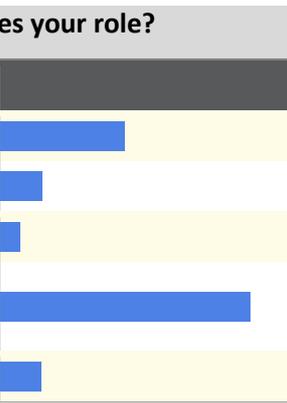
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<sup>263</sup> The statistical methods used in the quantitative analysis are covered in detail in Section 7.

### Sample

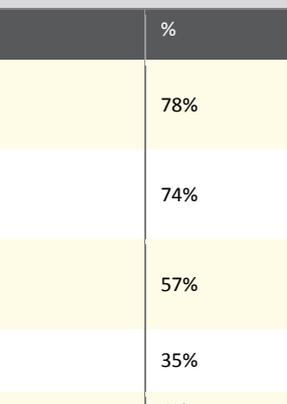
The survey population consisted of tobacco control regulators worldwide. The respondents were identified from the list of 2012 WHO FCTC participants where contact details were available or internet searchable. All those that could be identified were included in the survey. 120 regulators were contacted and 28 or 23% responded fully. The survey was conducted in two stages, an initial test phase of 5 respondents and a more fulsome second stage which yielded 23 respondents. There were 28 countries represented in the survey across North America, Latin America & Caribbean, Australasia, Europe, Africa and the Middle East. Tables 5 and 6 outline the titles and areas of regulatory responsibility of survey respondents.

**Table 5: Distribution of titles by tobacco control survey respondents**

<b>1. What title most approximates your role?</b>			
#	Answer		%
1	Director		26%
2	Head of Section		9%
3	Special Adviser		4%
4	Tobacco Control Focal Point		52%
5	Other		9%
	Total		100%

Source: Qualtrics Survey of Global Tobacco Regulators– Report May 22 2013

**Table 6: Distribution of responsibilities by tobacco control survey respondents**

<b>2. In the area of tobacco control, where in the regulatory process do you spend your time? You can identify more than one.</b>			
#	Answer		%
1	Regulatory policy development and planning		78%
2	Developing regulatory changes or new regulations		74%
3	Monitoring regulatory compliance		57%
4	Evaluating regulatory effectiveness		35%
5	Other		4%

Source: Qualtrics Survey of Global Tobacco Regulators – Report May 22 2013

### *Content and conduct of the survey*

The survey was comprised of 10 open and closed questions, and took respondents on average 10 minutes to complete. The survey was self-administered and was sent electronically to the identified list of recipients on a rolling basis. The electronic survey was developed using Qualtrics software which allowed for individual tracking numbers. Given the challenges involved in achieving high response rates, every effort was made to follow-up with respondents to encourage participation through email reminders. Appendix 11 shows the survey questions.

In line with the Canadian Regulator survey, qualitative coding was used to analyse the qualitative responses received. Statistical analysis was used to analyse the remainder of the survey data. With the help of SPSS software a number of logistic regressions and cross tabulations were undertaken to assess the relationship between variables with a view to drawing some generalizable outcomes.

## **7. QUANTITATIVE ANALYSIS OF DATABASE AND SURVEY DATA**

A number of quantitative techniques and statistical software packages were used to analyse the data collected through the analysis of the Canada Gazette, the FCTC Country Report information and the electronic survey data from both the Canadian Federal Regulator Survey and the Global Tobacco Control Survey.

### **a. Electronic Survey Data and Statistical Software**

The two electronic surveys conducted for this thesis were undertaken using the Qualtrics survey software. Qualtrics is a leading survey supplier and used extensively in academic research worldwide. The data was collected directly from recipients, with each respondent assigned an individual tracking number which facilitated follow-up.

The statistical analysis packaged used for this thesis was SPSS. The data collected through the survey was downloaded directly into SPSS and coded for the analysis. Data from the Canada Gazette database and FCTC database that were created in Excel were also downloaded into SPSS for analysis. The data from all three sources were analysed through the use of descriptive statistics, cross tabulations and logistic regressions.

## Statistical analysis

Descriptive statistics were used to run frequencies and look for missing data. They were also used to show trends in the data on HSE regulations as well as responses to the survey questions. Cross tabulations were run in order to understand the relationship between variables in the data as well as the relationship between different responses in the survey.

Due to the categorical nature of the data, logistic regression was undertaken with a view to understanding correlations between variables in the Canada Federal Regulator Survey. It was also used to understand the correlation between regulatory trends emanating from the Gazette analysis against NAFTA chapter 11 disputes. In the case of survey data, *Binary logistic regression* was used for the analysis of survey data while *Multinomial logistic regression* was used for the analysis of the Gazette and NAFTA Chapter 11 data.<sup>264</sup>

## 8. METHODOLOGICAL CHALLENGES

While every attempt was made to achieve a triangulation of data both primary and secondary in the design of this research, a number of challenges remained.

### *Definitions*

There are a number of challenges with respect to definitions which must be considered in undertaking this research. Because much of the methodology is qualitative in nature it relies quite heavily on subjective interpretations of meaning. There are a number of terms which have been defined which are open to interpretation.

First and foremost is the definition of *regulatory chill*. Regulatory Chill is defined by Eric Neumayer in *Greening Trade and Investment*, as a situation where developed countries might either lower environmental standards or fail to raise them for fear that internationally mobile capital will move to countries with lower standards.<sup>265</sup> Kevin Grey & Duncan Brack in the OECD Report of the Working Party on Global and Structural Policies on Environmental Issue in Policy-Based Competition for Investment, outline a situation 'where countries refrain from enacting stricter environmental standards in response to fears of losing a competitive

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<sup>264</sup> Logistic regression is a probabilistic statistical classification model which is used to determine the relationship between a categorical dependant variable and one or more independent variable.

<sup>265</sup> Neumayer, Eric. 2001. *Greening Trade and Investment – Environmental Protection Without Protectionism*. Earthscan Publications Ltd. p. 68

edge'.<sup>266</sup> Kyla Tienhaara argues in *The Expropriation of Environmental Governance* that this notion of regulatory chill has been further extended to address concerns regarding international investment arbitration such that regulators with knowledge of investor state challenges to regulatory measures or the threat of such challenges will curtail regulations or be reticent to pursue more stringent regulations in these areas. This extension of the meaning of regulatory chill has also been advanced by scholars such as Gray 2002 and Peterson 2004.<sup>267</sup>

Other terms which require a great degree of subjectivity in their definition yet which have a big impact on the quality of the analysis include *regulatory stringency, comprehensiveness, increases in regulation, decreases in regulation or a neutral change in regulation*. For the purposes of this analysis a *regulatory decrease* for the purposes of this study refers to a decrease in the comprehensiveness or stringency of regulations or involves the elimination of regulations. More concretely this would include regulatory changes that exempt a substance after a review or scientific advance, move control of an activity or substance from criminal law to regulation, change a substance from prescription to non-prescription status, increase the allowable level of a restricted or controlled substance or generally reduce the burden of regulatory requirements on industry. Examples of this might include a move away from the criminalization of marijuana to allow for its medicinal use in certain circumstances, exempting power assisted bicycles from federal safety standards, the elimination of a requirement for environmental assessments on all projects which are deemed 'unlikely to cause more than minor adverse environmental effects or pose more than minor environmental risks'<sup>268</sup>

A *regulatory increase* for the purposes of this study refers to an increase in the comprehensiveness or stringency of regulations achieved by expanding the scope of regulatory coverage to include new substances or areas of activity or by increasing the depth and complexity of compliance requirements. This might involve measures which increase the protection of the environment and human health or general increases in the burden of compliance for industry. Examples of this would include new regulations dealing with hand held radiation devices, those aimed at reducing greenhouse gas emissions through greater

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<sup>266</sup> Grey, Kevin and Duncan Brack. 2002. OECD Report of the Working Party on Global and Structural Policies - Environmental Issue in Policy-Based Competition for Investment. P.8

<sup>267</sup> Tienhaara, Kyla. 2009. *The Expropriation of Environmental Governance – Protecting Foreign Investors at the Expense of Public Policy*. Cambridge University Press. p.25

<sup>268</sup> Canadian Environmental Assessment Agency. 2007. Federal Screenings: An Analysis Based on Information from the Canadian Environmental Assessment Registry Internet Site. [http://www.ceaa-acee.gc.ca/Content/4/5/0/4507E796-2D92-47B9-9DC1-52F691619A8E/Federal\\_Screenings-eng.pdf](http://www.ceaa-acee.gc.ca/Content/4/5/0/4507E796-2D92-47B9-9DC1-52F691619A8E/Federal_Screenings-eng.pdf)

emission control standards, the setting of Maximum Residue Limits (MRL) for controlled substances or the prohibition of a toxic substance for use and sale in Canada.

*A neutral regulatory change* for the purposes of this study refers to regulations where it is assumed the stringency and comprehensiveness of the regulation does not change, and might include non-substantive regulatory amendments, changes in fees or tariffs, clarifications to regulations or allowing for new uses of an existing registered substance. Examples of this would include changes to fishing or hunting season dates and catch allowances in fishery conservation, changes to pilotage tariffs, the consolidation of Asbestos measures across many disparate Acts or general regulatory changes aimed at achieving greater efficiency, and modernization, often involving the shifting of cost burdens or a move to cost sharing arrangements.

### ***Federal government focus***

As mentioned previously, the focus of the research for the Canadian case study was at the federal level of government. Given the shared jurisdiction on HSE regulation between federal and provincial levels of government this provides only one perspective on this issue, albeit a key one. This issue is discussed further in Chapter 4.

### ***Access to information***

Finally the success of this research has been predicated on gaining access to the information necessary to undertake the analysis. While it proved quite easy to gain access to senior regulators in Canada this proved more challenging globally on tobacco control. The secondary importance of this case study reflects this data challenge.

Chapters 4 and 5 will outline the findings of the Canada Case Study while Chapter 6 will outline the findings of the Tobacco Control Case Study.

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## Chapter 4: Case Study 1: The Canadian regulatory environment – The trends in HSE regulations

*'The chilling effect of the Ethyl Corporation and S. D. Myers cases were profound and have resulted in failures of the Canadian Government to regulate and or ban toxic substances they would have in the pre-Chapter 11 era.'*

Elizabeth May – Member of Parliament, Green Party of Canada<sup>269</sup>

### 1. INTRODUCTION

A ban on pesticides for commercial lawn use, on the export of PCB waste, on the import and trade of a purportedly toxic gasoline additive, as well as a moratorium on hydraulic fracking have one important thing in common. These regulations have all resulted in legal challenges against the Government of Canada by private investors through the ISDS provisions of NAFTA Chapter 11 and are among the numerous challenges to HSE regulations which have led to growing concerns about the possible chilling impact of IIAs. The unprecedented volume of challenges to Canadian HSE measures since the inception of NAFTA in 1995, make Canada an ideal test case for the hypothesis on regulatory chill.

The next two chapters outline the findings in this Case Study on Canada, with this Chapter addressing the first 'expectation' regarding regulatory trends. Chapter 5 looks at the 'second' expectation regarding the influence of trade and investment on the regulatory development process in Canada, while Chapter 6 addresses this question under Case Study 2: Tobacco Control Regulation – A global look at investment and regulation.

### Methodological overview of Case Study 1<sup>270</sup>

In April, June and September 2012 in-depth face-to-face interviews were conducted with over fifty senior federal health, safety and environmental regulators in Canada. The purpose of the interviews was to gain an understanding of the influences on the regulatory development process and particularly the role played by Canada's international trade and investment commitments. At the same time, the objective was to understand how HSE regulations had

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<sup>269</sup> Submission by Elizabeth May to the Trade Agreements and NAFTA Secretariat, Foreign Affairs and International Trade Canada on the Environmental Assessment for the Canada-China Foreign Investment Protection and Promotion Agreement. November 10, 2012

<sup>270</sup> Chapter 3 provides a detailed outline of the methodology

changed over the last 10 years and whether federal regulators felt that HSE regulations were becoming more or less stringent and comprehensive during this period.<sup>271</sup>

From January to March 2013 an extensive online survey was conducted of a more diverse selection of Canadian federal regulators in the areas of health, safety and the environment with a view to probing similar themes to those addressed in the in-depth interviews. In this case a broader group of regulators were reached and 140 responded with 114 full responses received. The views of regulators that have emerged from these interviews together with those outlined in the survey findings, and the outcome of a quantitative analysis of actual HSE regulations in Canada between 1998 and 2013<sup>272</sup> provide a triangulation of data to test the expectations of the hypothesis on regulatory chill.

This chapter will first provide an understanding of the regulatory environment in Canada with respect to the federal provincial division of powers on HSE regulations, the process for regulatory development as well as current trends in regulatory reform. Second it will outline the international trade and investment environment and particularly the ways in which Canadian HSE regulators have faced challenges to their regulatory measures under NAFTA Chapter 11 on Investment. This will then provide the Canadian context for the testing of the first 'expectation' on trends in regulation as well as the role of international trade and investment dealt with in Chapter 5.

## **2. CURRENT CANADIAN CONTEXT**

### **a. The regulatory environment in Canada**

Canada is a Federal State in which the development of regulations is the shared jurisdiction of the federal and provincial governments. Furthermore the provincial legislatures delegate some of their powers to municipal governments on these matters.<sup>273</sup>

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<sup>271</sup> Stringency of regulations refers to the requirements for a greater depth of science to demonstrate acceptability of risk, while comprehensiveness of regulations refers to the expanding scope of regulations including the regulation of emerging areas.

<sup>272</sup> This analysis was conducted using the Canada Gazette 1 and 2 database of proposed and adopted regulations. <http://canadagazette.gc.ca/archives/archives-eng.html>. Data was coded and analysed using SPSS software

<sup>273</sup> Privy Council Office, Government of Canada. <http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=federal&sub=legis&doc=env-eng.htm>. Examples of areas of municipal responsibility include water and sewage services, garbage collection and city parks. [http://www.parl.gc.ca/about/parliament/senatoreugeneforse/touchpoints/touchpoints\\_content-e.html](http://www.parl.gc.ca/about/parliament/senatoreugeneforse/touchpoints/touchpoints_content-e.html)

## The Federal Provincial division of powers

The Constitution Acts of 1867 to 1982 confer on the federal government the authority ‘to make laws for the peace, order, and good government of Canada’ except for matters under exclusive provincial jurisdiction.<sup>274</sup> There are a number of areas of shared jurisdiction as outlined in Table 1 below. Most importantly for the purposes of this research are the areas of health, safety and environment. A well-structured system of intergovernmental cooperation is an important aspect of addressing the challenges of duplication and overlap in jurisdiction as well as the harmonization of regulatory reform initiatives. While such a system is well entrenched in Canada through regular intergovernmental initiatives such as Federal/Provincial/Territorial First Ministers meetings as well as meetings between ministers and other senior officials, difficulties persist, not least of which on matters of international trade and investment related to jurisdiction. These issues are dealt with later in this chapter.

**Table 1: Regulatory powers across levels of government**

<b>Economic and social sectors</b>	<b>Federal</b>	<b>Provincial</b>
Telecommunications	√	-
Electricity	√	√
Gas	-	√
Financial Services	√	√
Postal Services	√	-
Inter-city buses	-	√
Inter-provincial	√	-
Trucking	√	√
Rail transport	√	√
Air transport	√	-
Agriculture	√	√
Water use	√	√
Regulated professions and trades	√	√
Infrastructure investment	√	√
Pharmaceuticals	√	√
Health care	√	√
Road safety	√	√
Aviation safety	√	-
Water treatment	√	√

<sup>274</sup> The Constitution Acts, 1867 to 1982 ss. 91 and 92.

Environment	√	√
Consumer protection and privacy	√	√
Immigration selection systems	√	-
Gambling	√	√
Education	√	√
Training	√	√
Care of the Aged	√	√
Unemployment and Social Security	√	-
Product Safety and Labelling	√	√
Occupational Health and Safety	√	√

Source: Privy Council Office, Government of Canada as outlined in the OECD Reviews of Regulatory Reform: Canada<sup>275</sup>

### Health, safety and environmental regulations in Canada

Within the shared jurisdiction, at the federal level there are twelve primary departments and agencies with a remit for HSE. These are listed in Table 2 below.

In the area of the environment, the federal government regulates in the areas of environmental protection, pollution prevention, biodiversity and conservation and sustainable development. Some specific examples of this include the prohibition of activities which are harmful to the environment through the *Canadian Environment Protection Act*, the regulation of the environment of fish as well as the activities of ships through the *Fisheries Act* and the regulation of international and domestic transportation through the *Transportation of Dangerous Goods Act*.<sup>276</sup>

In the area of health and safety, the federal government, through its ‘peace, order and good government’ power regulates public health matters which would be of national concern or constitute a national emergency.<sup>277</sup> While the provinces have jurisdiction over the delivery of health care services, the federal government regulates ‘the safety of workers in federally-regulated industries, such as banking, transportation and communications’. Additionally they have jurisdiction over areas of criminal law or ‘conduct dangerous to health, such as the use of narcotics and tobacco, and the regulation of hazardous products.’<sup>278</sup>

<sup>275</sup> OECD Reviews of Regulatory Reform: Canada – ISBN 92-64-19908 X – OECD 2002

<sup>276</sup> Privy Council Office, Government of Canada. <http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=federal&sub=legis&doc=env-eng.htm>

<sup>277</sup> Ibid.

<sup>278</sup> Ibid.

**Table 2: Federal HSE regulatory department and agencies**

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Federal Departments and Agencies with HSE regulatory remit
<b>Health Canada (HC)</b>
<b>Environment Canada (EC)</b>
<b>Transport Canada (TC)</b>
<b>Fisheries and Oceans Canada (DFO)</b>
<b>Human Resources and Skills Development Canada (HRSCD)</b>
<b>Natural Resources Canada (NRCan)</b>
<b>Canadian Environmental Assessment Agency (CEAA)</b>
<b>Canadian Nuclear Safety Commission (CNSC)</b>
<b>Canadian Food Inspection Agency (CFSA)</b>
<b>National Energy Board (NEB)</b>
<b>Pest Management Regulatory Agency (PMRA)</b>
<b>Aboriginal Affairs and Northern Development Canada (AANDC)</b>

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### **The federal process for regulatory development**

The federal process for regulatory development involves a number of key stages from inception through to regulation. A key component of this process, as outlined in Diagram 1, is the mechanism for public consultation afforded by the publication of proposals and final regulations in the Canada Gazette parts 1 and 2.

After a regulatory proposal has been approved by the Cabinet Minister responsible, it is published in the Canada Gazette 1 and undergoes public scrutiny during a period of 30-75 days. The regulatory proposal is then updated as a result of the feedback received through public consultations, once again approved by the Minister in its final form, recommended by Treasury Board for Governor General (GIC) approval and if approved, it is registered and published in the Canada Gazette II.

The Canada Gazette thus maintains a detailed electronic record of all regulatory proposals, Regulatory Impact Analysis Statements (RIAs)<sup>279</sup> and approved regulations from 1998 to current day. These regulations, along with their RIAs are published on a quarterly basis and provide a rich source of data for understanding trends in Canadian HSE regulation.

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<sup>279</sup> Regulatory Impact Analysis Statements (RIAs) describes the regulation, it's anticipated outcome with respect to a cost-benefit analysis, the process and outcome of consultation and issues of implementation, compliance and enforcement

**Diagram 1 – The Canadian regulatory process** <sup>280</sup>



Source: Treasury Board Secretariat, Government of Canada

### Current domestic initiatives driving regulation

The Canadian Government has been very focussed on regulatory reform over the last ten years. This has been partially driven by global trends among OECD countries towards regulatory efficiency, but also a desire to both modernize the regulatory environment and increase links and ease of doing business with the United States, an important trading partner. A number of key initiatives have characterized this focus and were top of mind among health, safety and environmental regulators during the face-to-face in-depth interviews.

***Cabinet Directive on Streamlining Regulations:*** In 2003 the External Advisory Committee on Smart Regulation was created with the objective of modernizing Canada’s regulatory approach and led in 2007 to a series of recommendations for change under the Cabinet Directive on Streamlining Regulations (CDSR). The main focus of the CDSR was to create ‘a more effective, efficient and accountable regulatory system’.<sup>281</sup>

***Regulatory Cooperation Council:*** The Regulatory Cooperation Council (RCC) was created on February 4, 2011 with the goal of aligning regulatory approaches between Canada and the

<sup>280</sup> Treasury Board of Canada Secretariat. <http://www.tbs-sct.gc.ca/rtrap-parfa/gfrpg-gperf/gfrpg-gperf02-eng.asp#t8>

<sup>281</sup> Treasury Board of Canada Secretariat background note on the Cabinet Directive on Streamlining Regulations. <http://www.tbs-sct.gc.ca/report/orp/2011/cdsr-dcrr01-eng.asp#tphp>

United States in the areas of agriculture, food, transportation, health, personal care products, workplace chemicals, environment, nanomaterial and reducing the burden on small business.<sup>282</sup>

***Red Tape Reduction Action Plan:*** Through the Red Tape Reduction Action Plan, launched in 2012 in response to an extensive consultation with business, ‘the Government of Canada has made cutting red tape a key priority.’ The focus of the Action Plan is reducing burdens on business in the areas of tax, transport and trade while also making it easier to do business and improving service and predictability. These goals have been pursued while at the same time preserving the health and safety of Canadians.<sup>283</sup>

## **b. The international trade and investment environment**

Canada is an active participant in international trade and investment, and is signatory to many agreements at the multilateral (WTO), regional (NAFTA) and bilateral levels (FTA, FIPAs<sup>284</sup>).<sup>285</sup> These trade and investment agreements involve Canada making international commitments with a particular or potential focus on regulation across a wide set of areas including intellectual property (IP), finance, technical barriers to trade (TBT), sanitary and phytosanitary measures (SPS) and investment.<sup>286</sup> Adhering to internationally agreed rules which govern or guide the development of domestic regulation raises some challenges where the goals and practices of Canada and its trading partners might differ (for example on food or transport safety standards, on financial sector regulations, or on efforts to preserve domestic sectors of cultural significance). It is however the commitments on international investment, particularly at the regional level under NAFTA Chapter 11 which have been the subject of greatest concern with respect to regulation, and as outlined in Chapter 2 they have resulted in numerous investor-state challenges<sup>287</sup> to HSE measures and raised the prospect of regulatory chill.<sup>288</sup>

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<sup>282</sup> Canada’s Economic Action Plan. <http://actionplan.gc.ca/page/rcc-ccr/about-regulatory-cooperation-council?wb48617274=F196FB7F>

<sup>283</sup> Treasury Board of Canada Secretariat. <http://www.tbs-sct.gc.ca/rtrap-parfa/index-eng.asp>

<sup>284</sup> Foreign Investment Protection Agreements are Canada’s bilateral investment treaties

<sup>285</sup> Canada currently has 25 FIPAs in force, has concluded FIPA negotiations with another 15 countries between 2008 and 2013 and is currently negotiating with 10 countries which includes Burkino Faso, Ghana, India, Indonesia, Kazakhstan, Macedonia, Mongolia, Pakistan, Tunisia and Vietnam. They also have FTAs with investment chapters concluded or signed with 11 countries which includes NAFTA and on-going negotiations with another 10 on a bilateral basis and is an active participant in the TPP negotiations.

<sup>286</sup> Chapter 2 outlines the IIA landscape

<sup>287</sup> Chapter 2 defines investor state dispute settlement and its role in IIAs

<sup>288</sup> Chapter 2 outlines the arguments of the NGO and academic community around regulatory chill

## HSE challenges under NAFTA Chapter 11

To date Canada has faced 28 investor state dispute challenges out of 66 under NAFTA Chapter 11<sup>289</sup>, a large number of which have been on HSE measures (as outlined in tables 3 and 4). NAFTA remains one of the most used investor-state dispute settlement instruments and certainly the one that has given greatest cause for concern with respect to challenges to HSE regulatory measures. The NAFTA Chapter 11 investment disputes outlined in Table 3 show challenges to Canadian regulatory measures dealing with PCB waste, gasoline additives, the toxicity of pesticides and natural resource management across the federal departments of Health, Environment, Fisheries and Oceans, Natural Resources, The Canadian Environmental Assessment Agency as well as the Pest Management Review Agency. These disputes also highlight the complexity of the shared federal and provincial jurisdiction for HSE regulations and the role played by the many levels of government under Canada's federal system. It is important to note that 'the obligations under the NAFTA are assumed by the federal governments of Canada, the U.S. and Mexico. Therefore, these governments would be respondent in any dispute arising from alleged breaches of the Agreement'<sup>290</sup>, whether the alleged breaches originate at the federal, provincial, territorial or municipal levels of government. We see this shared jurisdiction reflected across the disputes highlighted in tables 3 and 4.

The disputes outlined below also give rise to the difficult question of whether a regulatory measure constitutes a legitimate HSE regulation or a veiled protectionist or discriminatory measure.<sup>291</sup> Finally they highlight potential costs of an investor state challenge for the Government. Two early cases against Canada, that of *Ethyl Corporation v. Government of Canada* and *S.D. Meyers v. Government of Canada* together resulted in over \$25CAN million dollars in settlement money being paid to US investors.

While the outcomes of these NAFTA disputes and the legitimacy of these regulatory measures as public policy instruments, as well as the right of investors to protection against discrimination or egregious treatment have been the subject of much study, very little work

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<sup>289</sup> European Commission. 'Fact Sheet – Investment Protection and Investor-to-State Dispute Settlements in EU Agreements'. November 2013

<sup>290</sup> Foreign Affairs, Trade and Development Canada, Government of Canada: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/Mun-FAQs.aspx?lang=eng>

<sup>291</sup> The issue of legitimacy is discussed in Chapter 2 and relates to the issue of regulatory independence versus political accountability as well as the appropriateness of independent regulation with respect to social decisions versus strictly economic based decisions. This is explored in greater detail in Tony Posser's Book *The Regulatory Enterprise: Government, Regulation and Legitimacy*. 2010. Oxford University Press

has been done to consider their impact on regulatory development in the areas of HSE, particularly in the context of allegations of chill.

**Table 3 – Completed HSE ISDS challenges under NAFTA Chapter 11**

Completed NAFTA Chapter 11 disputes against Government of Canada						
Dispute	Department/ type of dispute	Measure	Notice of Intent	Award	Nature of Award	Outcome CAN\$
Ethyl Corp. v. Government of Canada	Health Canada <b>HEALTH</b>	Regulation of gasoline additives: Ban on import and inter-provincial trade of unleaded gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT). MMT is a suspected neurotoxin	Sept 1997	June 1998	found for Investor	\$20 million Government repealed the ban
S. D. Myers v. Government of Canada	Environment Canada <b>ENVIRONMENT</b>	PCB waste export and import regulations: Temporary ban on export of toxic PCB waste	July 1998	Dec 2002	found for Investor	\$6.05 million
Chemtura Corp. v. Government of Canada	PMRA-Health Canada Province of Ontario <b>HEALTH</b>	Regulation of pesticides: Ban on sale and use of crop pesticide and fungicide Lindane	Nov 2001	Aug 2010	found for Government	Investor paid arbitration cost (\$688k) and 50% of Government costs (\$5.7million)
V.G. Gallo v. Government of Canada	Environment Canada <b>ENVIRONMENT</b>	Waste disposal regulations: Provincial government blocks proposed landfill on site of decommissioned open-pit mine	Oct 2006	Sept 2011	found for Government	\$450,000 cost
Dow AgroScience LLC v. Government of Canada	PMRA-Health Canada Province of Quebec <b>HEALTH</b>	Regulation of pesticides: Quebec provincial ban on sale and certain uses of lawn pesticides containing 2,4-D	Aug 2008	May 2011	Settled - Government	No compensation, withdrawal of Notice of Arbitration, measure upheld
Abitibi Bowater Inc. v. Government of Canada	Natural Resources Canada Province of Newfoundland <b>ENVIRONMENT</b>	Natural resource regulation: Quebec Provincial measures to return water use and timber rights to crown and expropriate lands associated with hydro rights	Apr 2009	Dec 2010	Settled - Investor	Settlement of \$130 million
St Mary's VCNA v. Government of Canada	Environment Canada Province of Ontario <b>ENVIRONMENT</b>	Provincial land use regulation: measure taken by Ontario Government affecting proposal to convert agricultural lands into aggregate quarry. (\$275 million in compensation sought)	May 2011	Mar 2013	Settled - Government	No compensation, withdrawal of Notice of Arbitration

Source: Foreign Affairs, Trade and Development Canada, Government of Canada database of NAFTA Chapter 11 disputes against Canada: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>

Table 4 below outlines those HSE NAFTA Chapter 11 investment disputes that remain on-going. There has been an increasing trend towards such investment challenges in the HSE sphere with investor-state challenges to predominantly provincial government measures dealing with food and drug patents, land use regulations, natural energy sources and environmental management. The on-going ISDS disputes listed in table 4 below account for

\$2.21 billion in compensation sought by private investors under challenges to HSE measures in Canada today.

**Table 4 – On-going HSE ISDS challenges under NAFTA Chapter 11**

<b>On-going NAFTA Chapter 11 disputes against Government of Canada</b>				
<b>Dispute</b>	<b>Department</b>	<b>Measure</b>	<b>Notice of Intent</b>	<b>Status</b>
Mobil Investments Canada Inc. v. Government of Canada	Natural Resources Canada/ Environment Canada Province of Newfoundland <b>ENVIRONMENT</b>	Oil and Gas Performance Requirements: Canada-Newfoundland offshore Petroleum Board placed requirements on Exxon Mobil to Pay millions in R&D with respect to Hibernia & Terra Nova Oil fields (\$40 million in damages sought)	Aug 2007	Awaiting final award. Decision on liability in 2012 found for the investor
Clayton/ Bilcon v. Government of Canada	CEAA DFO <b>ENVIRONMENT</b>	Environmental Assessment Regulations: Provincial and federal environmental reviews resulting in Basalt quarry and marine terminal rejected due to adverse environmental impacts. (\$188USD Million in compensation sought)	Feb 2008	On-going
Mesa Power Group LLC v. Government of Canada	Environment Canada Province of Ontario <b>ENVIRONMENT</b>	Contract award criteria and approval process of the Food-in Tariff Program (FIT) under the Ontario Green Energy Act for wind farms to provide renewable electric power. (\$775 million in compensation sought)	July 2011	On-going
Lone Pine Resources Inc. v. Government of Canada	Environment Canada Province of Quebec <b>ENVIRONMENT</b>	Environmental management regulations: Provincial measure revoking oil and gas exploration permits following partial moratorium on hydraulic fracking in Quebec. (\$250 million in compensation sought)	Nov 2012	On-going
Windstream Energy LLC v. Government of Canada	Environment Canada Province of Ontario <b>ENVIRONMENT</b>	Environmental management regulations: Off shore wind farm project put on hold following a Provincial moratorium on off shore wind farms. (\$475 million in compensation sought)	Oct 2012	On-going
Eli Lilly & Company v. Government of Canada	Health Canada <b>HEALTH</b>	Food & drug and intellectual property regulations: Invalidation of the Strattera and Zprexa pharma patents because drugs no longer met clinical trial thresholds. (\$500 million in compensation sought)	Nov 2012 (original) June 2013 (new)	On-going

Source: Foreign Affairs, Trade and Development Canada, Government of Canada database of NAFTA Chapter 11 disputes against Canada: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng><sup>292</sup>

The key question is whether the trade and investment challenges outlined above are impacting the development of HSE regulations in Canada regardless of whether they have been resolved or remain ongoing. Has the commencement of a NAFTA dispute in the areas of HSE or the eventual outcome of the dispute had an impact on either the trends in regulation in this area or on the regulators themselves? The first ‘expectation’ of the hypothesis on regulatory chill regarding trends in HSE regulations will be tested, including an exploration of any relationship these trends in regulation might have with NAFTA disputes, then in Chapter

<sup>292</sup> The case of Sunbelt v. Government of Canada has not been included in this table as no valid claim was ever filed

5 the second 'expectation' regarding the impact of trade and investment on the regulatory development process and the awareness of federal regulators will be examined, as well as the importance they place on such disputes.

### 3. TESTING EXPECTATION 1: TRENDS IN HSE REGULATION OVER LAST DECADE

**Expectation 1 – We would expect HSE regulatory trends to reflect regulatory chill (through a stagnant or weakening regulatory environment) in the wake of IIA challenges**

In an effort to understand the trends in HSE regulations over the last decade we have looked at the record of proposed and adopted HSE regulations as published in the Canada Gazette between 1998 and 2013<sup>293</sup>, the views of experienced senior federal regulators as expressed through the face-to-face interviews and electronic survey as well as the independent assessments of international organizations such as the OECD and an independent Canadian research organization.<sup>294</sup>

Interestingly there was a downward trend in the growth rate of HSE regulations proposed and adopted over the period in question, although this trend is slightly less marked among actual regulations adopted. This decrease demonstrates that the Canadian Government was introducing fewer new regulations or changes in regulations which is in line with a growing trend in regulatory reform and streamlining. At the same time however, there was some evidence that environment and health disputes under NAFTA were correlated with lower numbers of environmental regulations in a couple of the years analysed. Consistent with the data and input from all three sources, the analysis also shows that trends in HSE regulations reflected an increase in the stringency and comprehensiveness of those regulations, even in those areas which have been hardest hit by trade and investment challenges under NAFTA Chapter 11 on investment suggesting that the empirical evidence does not support the regulatory chill hypothesis. The analysis and findings are outlined in detail below.

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<sup>293</sup> This regulatory analysis did not include within the definition of HSE regulation, those regulations dealing with aboriginal land claims, federal-provincial equalization payments for health care, regulations dealing with issues of security such as firearms, terrorism, air security or sex offences. These were deemed outside the scope of the analysis

<sup>294</sup> While any comprehensive analysis of HSE regulation would entail coverage of both federal and provincial regulation, this case study is focussed solely at the federal level. This decision was made in an effort to ensure a manageable scope for this research given time and cost restrictions, the lead role played by the Federal Government on international trade as sole respondent in investor-state disputes, and by the superior level of access that would be possible at the federal level of government. This is addressed in more detail in Chapter 3.

### a. Trends in HSE regulations between 1998-2013

The analysis of the Canada Gazette process involved a detailed review of thousands of published regulatory proposals in the Canada Gazette 1, as well as adopted regulations in the Canada Gazette 2, between 1998 and 2013 with a view to identifying those with a particular focus on health, safety or the environment. These numbered 757 in the case of regulatory proposals and 1579 in the case of actual adopted regulations or regulatory changes. This analysis was aimed at understanding the quantity of proposed and adopted regulations by subject area (health, safety or environment) and across federal departments but more importantly whether these new regulations or regulatory changes resulted in an increase or decrease in regulatory stringency and comprehensiveness.<sup>295</sup>

A *regulatory decrease* for the purposes of this study refers to a decrease in the comprehensiveness or stringency of regulations or involves the elimination of regulations. More concretely this would include regulatory changes which exempt a substance after a review or scientific advance, move control of an activity or substance from criminal law to regulation, change a substance from prescription to non-prescription status, increase the allowable level of a restricted or controlled substance or generally reduce the burden of regulatory requirements on industry. Examples of this might include a move away from the criminalization of marihuana to allow for its medicinal use in certain circumstances, exempting power assisted bicycles from federal safety standards, the elimination of a requirement for environmental assessments on all projects which are deemed 'unlikely to cause more than minor adverse environmental effects or pose more than minor environmental risks'<sup>296</sup>

A *regulatory increase* for the purposes of this study refers to an increase in the comprehensiveness or stringency of regulations achieved by expanding the scope of regulatory coverage to include new substances or areas of activity or by increasing the depth and complexity of compliance requirements. This might involve measures which increase the protection of the environment and human health or general increases in the burden of compliance for industry. Examples of this would include new regulations dealing with hand held radiation devices, those aimed at reducing greenhouse gas emissions through greater

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<sup>295</sup> Aimed at addressing the first expectation of the hypothesis on regulatory chill: Expectation 1: We would expect HSE regulatory trends to reflect regulatory chill (through a stagnant or weakening regulatory environment) in the wake of IIA challenges.

<sup>296</sup> Canadian Environmental Assessment Agency. 2007 . Federal Screenings: An Analysis Based on Information from the Canadian Environmental Assessment Registry Internet Site. [http://www.ceaa-acee.gc.ca/Content/4/5/0/4507E796-2D92-47B9-9DC1-52F691619A8E/Federal\\_Screenings-eng.pdf](http://www.ceaa-acee.gc.ca/Content/4/5/0/4507E796-2D92-47B9-9DC1-52F691619A8E/Federal_Screenings-eng.pdf)

emission control standards, the setting of Maximum Residue Limits (MRL) for controlled substances or the prohibition of a toxic substance for use and sale in Canada.

*A neutral regulatory change* for the purposes of this study refers to regulations where it is assumed the stringency and comprehensiveness of the regulation does not change, and might include non-substantive regulatory amendments, changes in fees or tariffs, clarifications to regulations or allowing for new uses of an existing registered substance. Examples of this would include changes to fishing or hunting season dates and catch allowances in fishery conservation, changes to pilotage tariffs, the consolidation of Asbestos measures across many disparate Acts or general regulatory changes aimed at achieving greater efficiency, and modernization, often involving the shifting of cost burdens or a move to cost sharing arrangements.

This analysis does not suggest that an increase in regulation is preferable to a decrease or place more value on one trend over the other. It is ideologically possible to argue that decreasing or increasing regulation is beneficial for a variety of reasons. Certainly a reduction in regulatory burden on business will reduce its cost of operation and allow for a more competitive and attractive Canadian investment climate. Equally an increase in regulation aimed at protecting human health, such as in the case of tobacco control, would arguably have long term downward costs on the Canadian health care system by reducing smoking rates and the incidence of smoking related diseases. The main purpose of this analysis is not to attribute value but rather to understand the trend as one possible indicator of regulatory chill. Regulatory chill presupposes regulating less, reducing the stringency and comprehensiveness of regulations but also doing so out of fear for the consequences (whether it be the flight of FDI or the impact of litigation)

### **Canada Gazette 1 – Proposed regulations or regulatory changes**

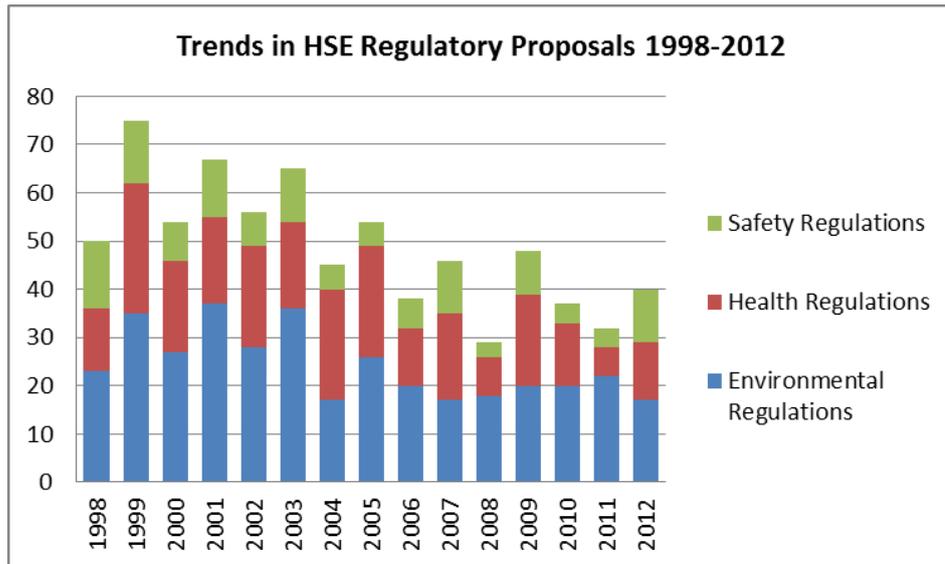
As previously mentioned, after a regulatory proposal has been approved by the Cabinet Minister responsible, it is published in the Canada Gazette 1 and undergoes public scrutiny during a period of 30-75 days. This data is therefore considered a predictor of regulations to be adopted and reflects transparency in the regulatory development process. All regulatory proposals in Gazette 1 were reviewed in this analysis and 757 were identified for inclusion in this HSE regulatory proposal database.<sup>297</sup>

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<sup>297</sup> Appendix 1 is the Gazette 1 HSE Regulatory Proposal database created through the analysis of all regulatory proposals between 1998-2012.

The analysis revealed a number of things regarding trends in HSE regulations. First, the analysis of the Canada Gazette 1 HSE regulatory proposals split out across environmental, health and safety proposals as outlined in Diagram 2 below. Proposed new or amended environmental regulations were the most numerous of all three types over the period studied, totalling 363 or 49%, followed by health at 250 or 34% and safety at 123 or 17%.

**Diagram 2 – Trends in HSE regulatory proposals across fields- Canada Gazette1**



Analysis of Canada Gazette 1<sup>298</sup>

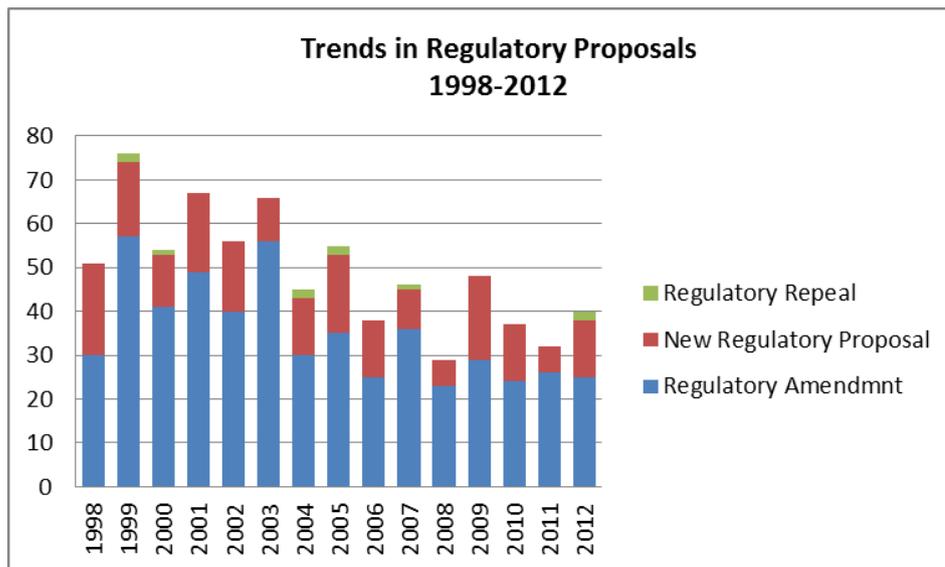
Additionally the majority of these proposals were concentrated across the key federal departments of Environment, Health, Transport, Fisheries and Oceans and the Food Inspection Agency.

Finally as outlined in Diagram 3 below, the regulatory proposals were most commonly amendments to existing regulations followed by new regulatory proposals and a small category of regulatory repeals.<sup>299</sup>

<sup>298</sup> Data is from Treasury Board archives of Gazette 1 <http://canadagazette.gc.ca/archives/archives-eng.html>

<sup>299</sup> Regulatory amendments involve a change to existing regulations and may involve either an increase or decrease in stringency and comprehensiveness, a new regulatory proposal involves regulating areas that have not previously been regulated while a regulatory repeal involves the removal of existing regulation. This analysis of regulatory proposals does not attribute trends of increasing, decreasing or neutral regulatory change. This is done under the Gazette 2 analysis.

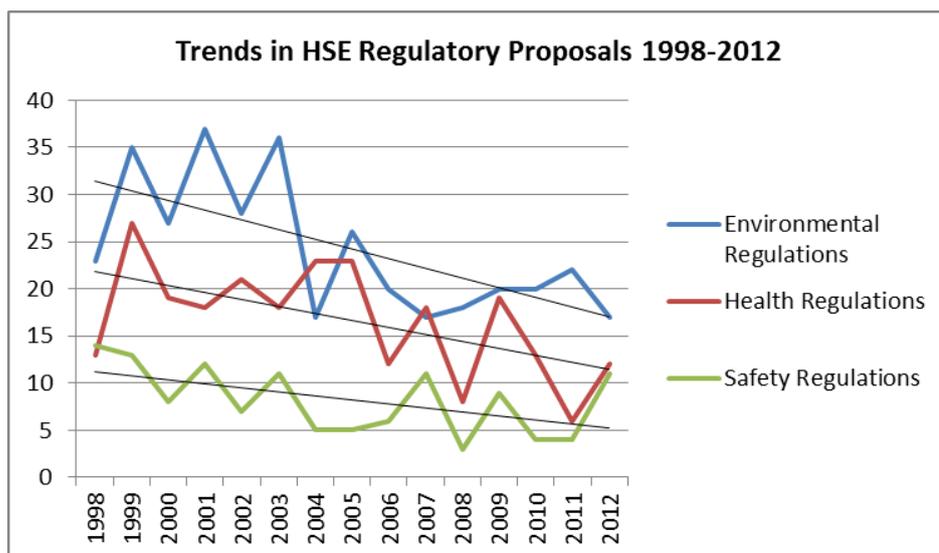
**Diagram 3 – Trends in HSE regulatory proposals by type- Canada Gazette1**



**Analysis of Canada Gazette 1<sup>300</sup>**

Interestingly, year on year changes in regulatory proposals showed a decreasing trend in the growth rate of new regulations or regulatory amendments across all three fields of HSE. (Diagram 4) The reduction in the growth rate or volume of proposed new regulations or regulatory changes may be partially explained by global and domestic trends towards less regulation and the shift by governments towards other instruments of public policy such as flexible less prescriptive regulation, co-regulation or self-regulation, market or incentive based approaches and education.<sup>301</sup>

**Diagram4– Trend line in HSE regulatory proposals by type- Canada Gazette1**



**Analysis of Canada Gazette 1<sup>302</sup>**

<sup>300</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

<sup>301</sup> OECD Report on Alternatives to Traditional Regulation

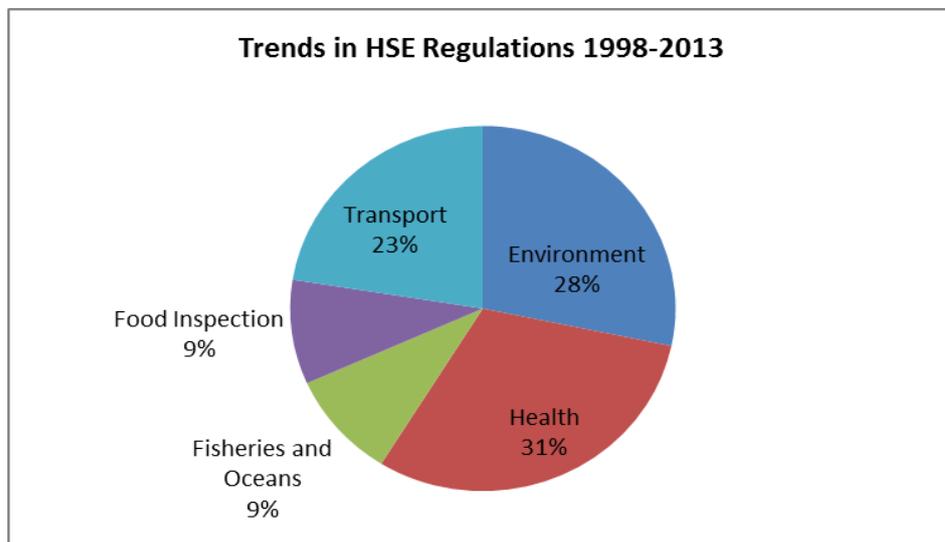
<sup>302</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

## Canada Gazette 2 and NAFTA Investor State Dispute cases

The analysis of Gazette two was aimed at understanding which HSE regulations were actually adopted during this same period, the extent to which there was a measurable relationship between the government's proposals and actual regulations and whether adopted regulations or changes to regulations resulted in an increase or decrease in regulatory stringency and comprehensiveness or simply had a more neutral impact on regulation policy in these areas. All new regulations or regulatory changes from Gazette 2 from 1998-2013 were reviewed in detail and 1579 regulations were identified for the creation of this HSE database.<sup>303</sup>

Not surprisingly the analysis of Gazette 2 showed a similar breakdown to Gazette 1 between regulation type (HSE) and department of origination with similar trends towards less year-on-year new or amended HSE regulation. Diagrams 5 through 7 show these trends with the federal departments of Health accounting for 31%, Environment 28%, Transport (safety) 23%, Food Inspection (health) and Fisheries and Oceans (environment) 9% respectively.

**Diagram 5 – Departmental breakdown of HSE Regulation – Canada Gazette 2**



**Analysis of Canada Gazette 2<sup>304</sup>**

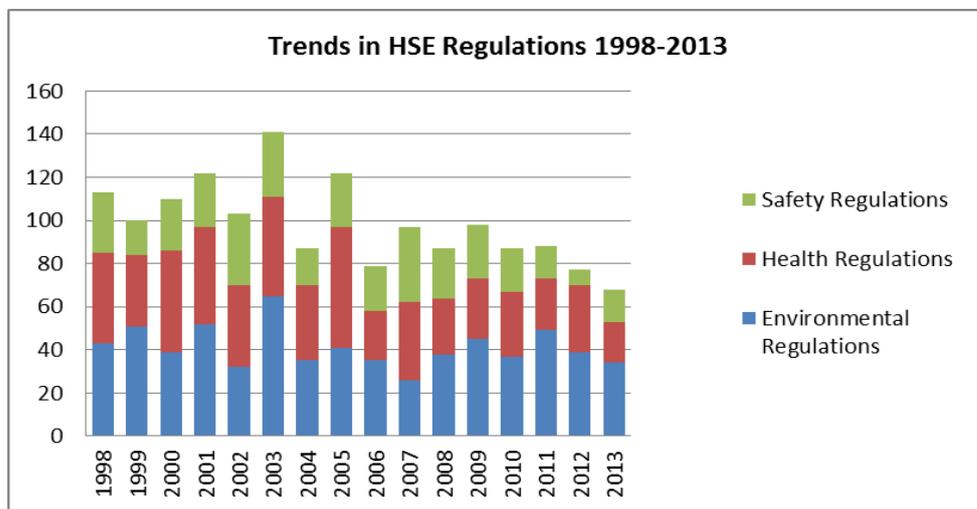
When all regulations were categorized by health, safety or environmental type it is clear that environmental regulations were most numerous at 661, followed by health at 554 and safety at 364. Again there was a downward trend in growth rate of new regulations or regulatory changes from a high of 113 regulations in 1998 to 63 in 2013, with the period between 1998

<sup>303</sup> Appendix 1 is the Gazette 2 HSE Regulatory Proposal database created through the analysis of all regulatory proposals between 1998-2012.

<sup>304</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

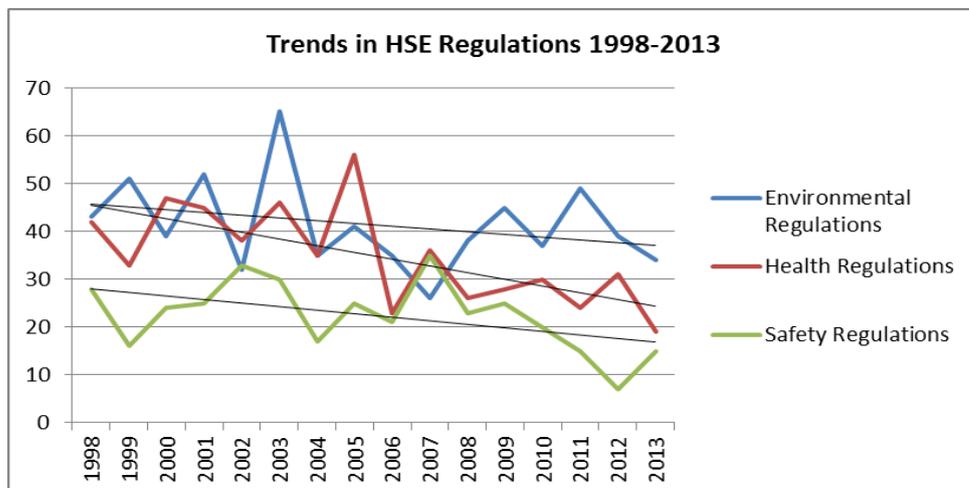
and 2005 averaging 112 regulations per year while the period between 2006-2-13 averaging only 85 regulations per year. As mentioned earlier, this downward trend seen in Diagram 7. It is not possible to determine definitively the causes of such a declining trend but we will be guided by the interviews held with senior government regulators who identified the trend in Canada during this period to regulate differently with an emphasis on modernization. This trend towards the streamlining of regulations and modernization efforts aimed at reducing red tape and the regulatory burden on industry is likely a key driver. Other factors may however have played a role such as a reduced imperative to introduce new regulations given the strong regulatory base Canada had already established through its regulatory development initiatives in the 1980s, 1990s and 2000s.

**Diagram 6 – Trends in HSE regulations by type – Canada Gazette 2**



Analysis of Canada Gazette 2<sup>305</sup>

**Diagram 7– Trend line in HSE regulations by federal department – Canada Gazette 2**



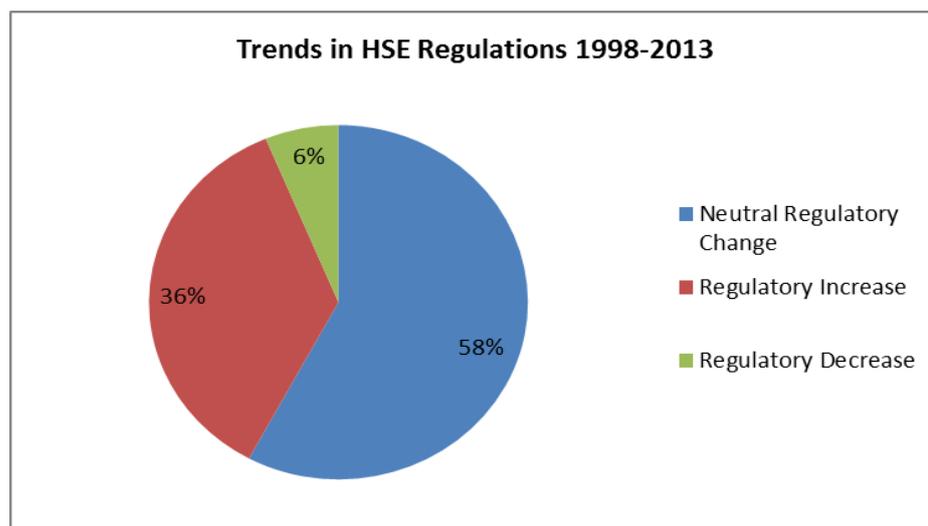
Analysis of Canada Gazette 2<sup>306</sup>

<sup>305</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

Direct logistic regression was performed to assess the correlation between proposed and adopted HSE regulations and whether the proposed regulations under Gazette 1 were predictors of the adopted regulations under Gazette 2. The model as a whole was statistically significant and contained three types of regulations across the period of 1998-2012 as independent variables (Environment G1, Health G1 and Safety G1). The model showed a positive correlation between proposed and adopted regulations in most years with odds ratios ranging from 0.996-4.551, suggesting that *adopted* HSE regulations were between 1 and 4.5 times likely to result from *proposed* HSE regulations. The independent variable Health G1 showed a statistically significant contribution to the model in 2005 and 2006. The difficulty of reflecting the time lag between proposal and adoption might also have had an impact on the results.<sup>307</sup> While this correlation was to be expected it demonstrates broadly that proposed regulations, following periods of public consultation were consistently adopted. Furthermore the greater number of adopted to proposed regulations during this period reinforces this trend.

Most interesting to the findings on the Gazette 2 analysis, was the fact that the analysis showed that the trends in adopted regulatory changes under Gazette 2 have been towards neutral regulatory change (58%) or regulatory increases (36%) with 566 regulations, representing increases in regulations and 912 showing a more neutral change.

**Diagram 8 – Composition of adopted HSE regulations – Canada Gazette 2**



Analysis of Canada Gazette 2<sup>308</sup>

<sup>306</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

<sup>307</sup> SPSS multinomial logistic regression was undertaken. The full model containing all predictors was statistically significant,  $X^2(48, N=1580) = 97.26, p < .001$  indicating that the model was able to determine either a positive or negative correlation between the adopted and proposed regulations. The model as a whole explained between 6% (Cox and Snell R square) and 7% (Nagelkerke R square) of the variability based on type of regulation.

<sup>308</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

This shows that while the trends in the growth rate of HSE regulations were declining, the stringency and comprehensiveness of regulations were remaining constant or increasing. Diagram 8 above illustrates.

When the regulatory trends are broken down across the three areas of health, safety and the environment we observe a number of factors. First, the ratio between high levels of neutral regulatory change and regulatory increases in general remained constant across all three areas of HSE throughout the period. Furthermore, while the growth rate of HSE regulations fell from 1998 levels by 2013 (by half for health & safety regulations, though slightly less than half for environmental regulations), many of the intervening years continued to show consistent and relatively high levels of growth in regulation. Diagrams 9-16 below illustrate this point across all three regulation types.

### ***Trends in environmental regulations***

Trends in environmental regulations as illustrated by diagrams 9 & 10 showed a high level of regulatory activity in 1999, 2001 and most significantly 2003 driven by amendments to the domestic substances list under the Canadian Environmental Protection Act (CEPA) including the identification and regulation of toxic substances, regulations aimed at reducing vehicle emissions and wildlife, migratory birds and fisheries preservation regulations.

During this same period 1998-2013 there were a substantial number of NAFTA Chapter 11 Investor State Dispute challenges to HSE regulations in Canada. As outlined previously in table 3 & 4, measures dealing with PCB waste, gasoline additives, the toxicity of pesticides and issues of natural resource management and environmental assessment were among those challenged during this period.

On the environment NAFTA Chapter 11 disputes were launched from 1998 with *S.D. Meyers v. Government of Canada* tabling the first Notice of Intent over the Government of Canada's temporary ban on the export of toxic TCB waste.<sup>309</sup> Diagram 9 plots the tabling of Notice of Intents for eight environmental investment challenges<sup>310</sup> as well as five environmental investment Awards three of which found in favour of the investor (in 1998 with *S. D. Myers*,

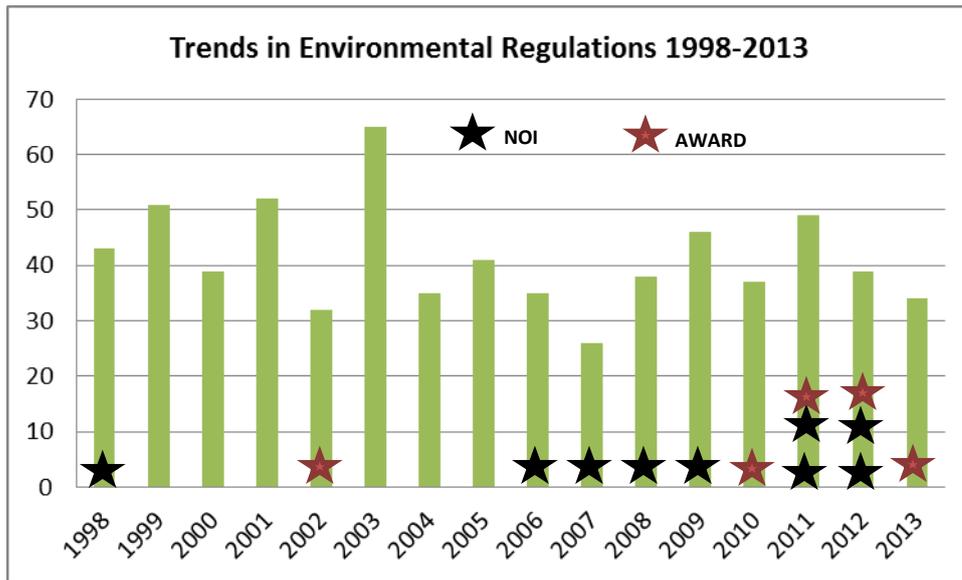
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<sup>309</sup> *S.D. Meyers Inc v. Government of Canada* Notice of Intent 1998. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/myers-01.pdf>

<sup>310</sup> These included *S.D. Myers Inc. v. Government of Canada* (1998), *V.G. Gallo v. Government of Canada* (2006), *Abitibi Bowater Inc. v. Government of Canada* (2009), *St. Mary's VCNA v. Government of Canada* (2011), *Mobil Investments Canada Inc. v. Government of Canada* (2007), *Clayton/Bilcon v. Government of Canada* (2008), *Mesa Power Group LLC v. Government of Canada* (2011), *Lone Pine Resources Inc. v. Government of Canada* (2012), *Windstream Energy LLC v. Government of Canada* (2012). <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>

2010 with *Abitibi Bowater*, and 2012 with *Mobil Investments* decision on liability).<sup>311</sup> These are outlined against the trend in environmental regulations with respect to growth rates in regulation (in Diagram 9) and their continued comprehensiveness and stringency (in Diagram 10). We would expect the impact of the disputes to have a time lag of between one year and eighteen months which would give time for regulators to both absorb the information regarding the dispute and to take it into consideration when developing new regulations or making regulatory changes in the future.

**Diagram 9 – Trends in Environmental regulations & NAFTA disputes - Canada Gazette 2**



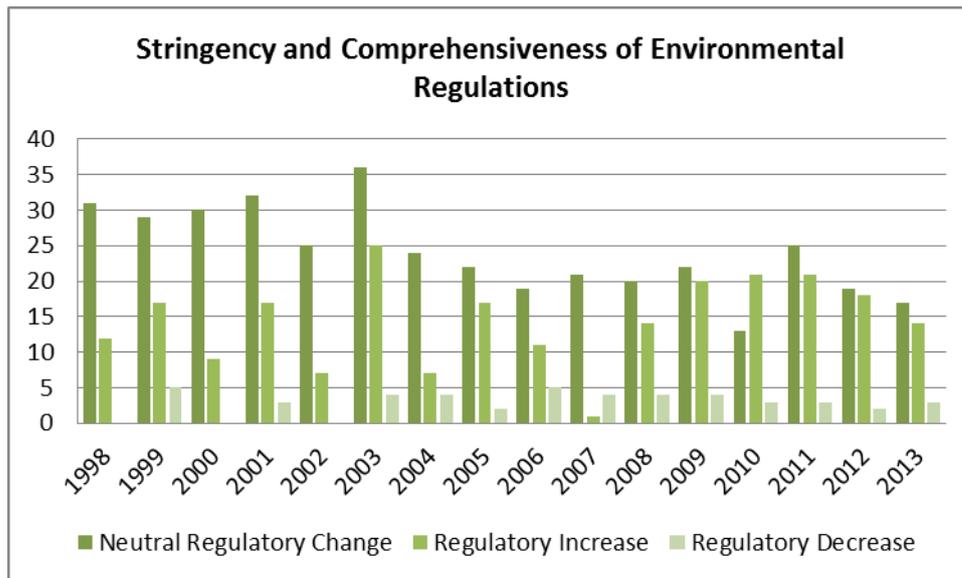
Analysis of Canada Gazette 2<sup>312</sup>

The period between 1998 and 2002 reflects the filing of the Notice of Intent in the *S.D. Myers* case and subsequent award in favour of the investor. There does not appear to be any marked change in regulation volume or comprehensiveness or stringency during that time. While there is actually a peak in activity in 2003, the volume of environmental regulations and their level of stringency and comprehensiveness remain constant through to 2013 with the exception of a dip in the trend for increased stringency of regulations in 2002, 2004 and most notably 2007.

<sup>311</sup> These included *S. D. Myers v. Government of Canada* (2002) for the investor, *V.G. Gallo v. Government of Canada* (2011) for the *Government and Abitibi Bowater Inc. v. Government of Canada* (2010) settled for the investor and *Mobil Investments* where an award on liability was issued for the investor. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>

<sup>312</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

Diagram 10 – Stringency and comprehensiveness of environmental regulations – Canada Gazette 2



Analysis of Canada Gazette 2<sup>313</sup>

Direct logistic regression was performed to assess whether there was more likely to be an increase or decrease in the growth rate of environmental regulations on the back of a NAFTA Chapter 11 ISDS challenge to environmental measures (as denoted in this analysis by the filing of a NOI or arbitral award). The model as a whole was statistically significant as a predictor and contained two independent variables, one reflecting the presence or absence of an environmental dispute and the other the year between 1998-2013. The model suggested an inverse relationship between ISDS disputes and the adoption of regulations on the environment in most years and in health in some years during this period. At the same time a statistically significant impact is shown by NAFTA Chapter 11 ISDS challenges to environmental measures in two of the fifteen years suggesting that the presence of an environmental ISDS challenge would decrease the probability of environmental regulations being adopted in 2002 and 2007. The odds ratios in these cases were low however at or below 0.5.<sup>314</sup> Furthermore the analysis suggests that a NAFTA Chapter 11 ISDS challenge on environmental measures was also 3 times more likely to increase the probability of health regulations being adopted in 2013. Table 5 illustrates shows the statistically significant findings.

<sup>313</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

<sup>314</sup> SPSS multinomial logistic regression was undertaken. The full model containing all predictors was statistically significant,  $X^2(32, N=1580) = 58.93, p < .003$  indicating the model was able to distinguish whether the existence of an ISDS dispute on the environment was relevant to the adoption of environmental or health regulation during the period 1998-2013. The model as a whole explained between 3.7% (Cox and Snell R square) and 4.2% (Nagelkerke R square) of the variability based on the existence or not of an ISDS dispute.

**Table 5 – Multinomial logistic regression predicting impact of NAFTA Chapter 11 environmental disputes on adopted environmental and health regulations between 1998-2013**

Environment Regulations	B	S.E.	Wald	df	Sig.	Exp (B)	95% C.I. for EXP (B)	
							Lower	Upper
2002	-.849	.397	4.573	1	.032	.428	.196	.932
2007	-1.115	.404	7.614	1	.006	.328	.149	.724

Health Regulations	B	S.E.	Wald	df	Sig.	Exp (B)	95% C.I. for EXP (B)	
							Lower	Upper
2013	1.236	.544	5.165	1	.023	3.442	1.185	9.997

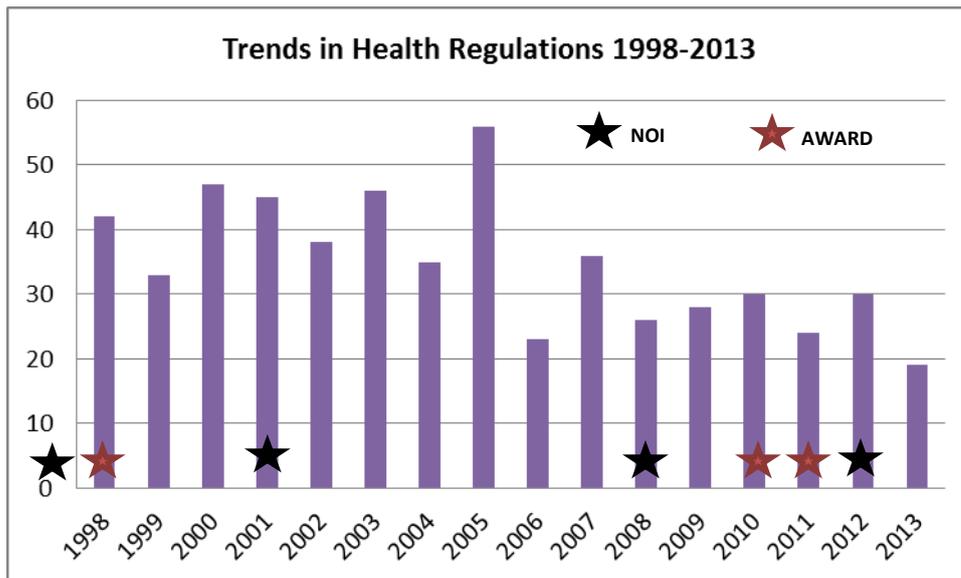
This result would suggest that there may be a correlation between a NAFTA Chapter 11 environmental dispute and the growth rate of environmental regulations adopted. Interestingly, 2002 and 2007 are years which show a particularly low growth rate of regulations as well as lower levels of stringency and comprehensiveness in regulations being adopted. Additionally, 2007 appears to be the year where the number of environmental regulations with decreasing stringency and comprehensiveness were highest. The first period in 2002 is the year of the award in the *S.D. Myers* case, following the initial notice of intent in 1998. The second period in 2007 following the filing of the notice of intent in the *V.G. Gallo* case but was prior to the launch of quite a large series of cases. While it is difficult to determine the magnitude of the impact, there is nevertheless a statistically significant correlation worth considering. It certainly raises the potential that these disputes were having a dampening effect on regulatory development at certain points over the period in question. This does not negate the fact that overall trends in environmental regulation have consistently been towards a more stringent and comprehensive set of measures. The impact on health regulations will be addressed below.

***Trends in health regulations***

Trends in health regulations as illustrated by Diagrams 11 & 12 showed consistently high levels of growth in regulation between 2000-2005 dropping off thereafter. This increased regulatory growth reflected the establishment of maximum residue levels (MRLs) for multiple substances under the Food and Drug Act by the Pest Management Control Agency, establishing new uses for already approved substances, changes in the prescription status of controlled drugs as well as regulations dealing with hazardous products and changes to food inspection regulations dealing with meat, poultry and plants.

During this early period Canada faced numerous NAFTA Chapter 11 Investor State Dispute challenges to health measures beginning with the case of *Ethyl Copr. V. Government of Canada* in 1997 dealing with the ban on import and interprovincial trade of unleaded gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT),<sup>315</sup> and was followed in 2001 by *Chemtura Corp. v. Government of Canada* banning the pesticide Lindane from commercial lawn use.<sup>316</sup>

**Diagram 11 – Trends in health regulations & NAFTA disputes - Canada Gazette 2**



Analysis of Canada Gazette 2<sup>317</sup>

Note: The first NOI was in 1997 for *Ethyl Corporation v. Government of Canada*

Diagram 11 above plots the tabling of Notice of Intents for five health ISDS challenges including one that was launched in 1997<sup>318</sup> as well as four awards, one of which found in favour of the investor (1998 with *Ethyl Corporation*).<sup>319</sup> These are outlined against the trend in health regulations with respect to levels of regulation and their continued comprehensiveness and stringency.

<sup>315</sup> *Ethyl Corp. v. Government of Canada*. Notice of Intent 1997. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ethyl-01.pdf>

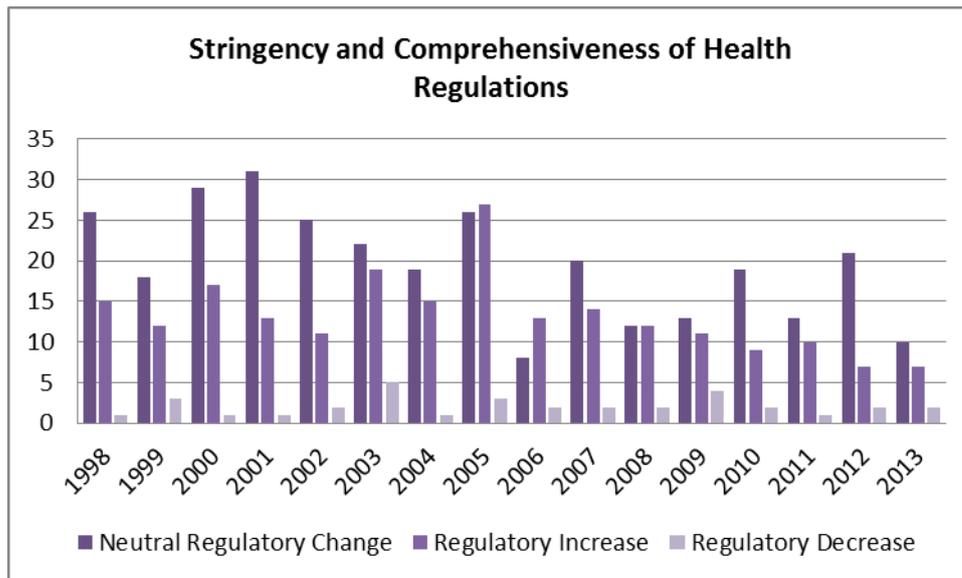
<sup>316</sup> *Chemtura Corp. v. Government of Canada*. Notice of Intent. 2001. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng>

<sup>317</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

<sup>318</sup> These included *Ethyl Corp. v. Government of Canada* (1996), *Chemtura Corp. v. Government of Canada* (2001), *Dow AgroScience LLC v. Government of Canada* (2008), *Eli Lilly & Company v. Government of Canada* (2012) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>

<sup>319</sup> These included *Ethyl Corp. v. Government of Canada* (1998) for the investor, *Chemtura Corp. v. Government of Canada* (2010) for the government, *Dow AgroScience LLC v. Government of Canada* (2011) settled for the government. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>

**Diagram 12 – Stringency and comprehensiveness of health regulations – Canada Gazette 2**

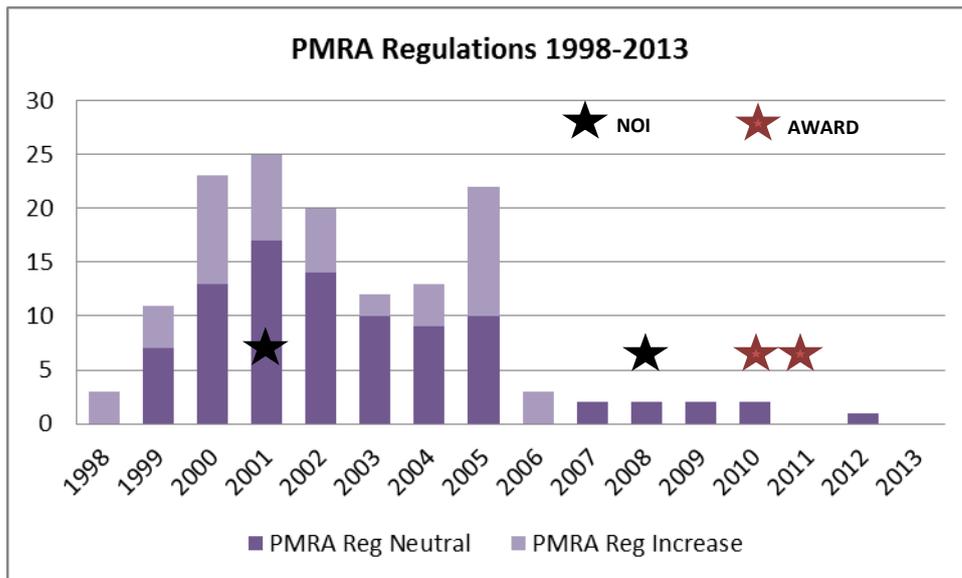


Analysis of Canada Gazette 2<sup>320</sup>

Again, it is assumed that any influencing impact one might observe between the tabling of a Notice of Intent or Award from a NAFTA Chapter 11 challenge and a chilling in regulations would take a period of time (probably at least a year). Our expectation is that regulators will develop awareness of this issue as it unfolds and begin to take it into consideration in their development of future regulation. We can observe a slight dip in the volume of health regulations in 1999 and an overall lower trend in volume from 2006-2013. The level of regulatory increase remains relatively constant however as illustrated in Diagram 12. When regulatory trends are further split out in health by the federal departments and agencies dealing with health issues - Health Canada and the Pest Management Review Agency we see a more stark trend in dropping regulatory growth rates and levels of stringency and comprehensiveness within the PRMA (which faced two ISDS NAFTA Chapter 11 challenges) from 2006-2013 and in 2001-2002 within HC. Diagrams 13 and 14 below illustrate. Again, the declining trend in regulatory growth is partly due to the Government’s push towards modernization and efficiency mentioned earlier. The drop in the case of the PMRA may also reflect the cyclical nature of the regulatory development process. There does appear to be some relationship between the timing and number of disputes and changes in regulatory growth levels. This will be examined through further statistical analysis.

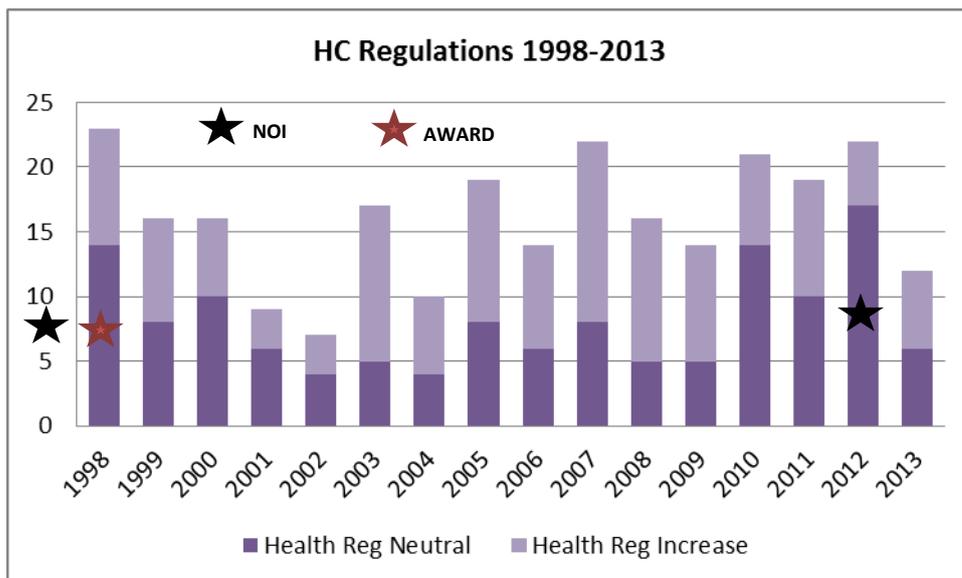
<sup>320</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

Diagram 13 – Trends in PMRA regulations & NAFTA disputes – Canada Gazette 2



Analysis of Canada Gazette 2<sup>321</sup>

Diagram 14 – Trends in HC regulations & NAFTA disputes – Canada Gazette 2



Analysis of Canada Gazette 2<sup>322</sup>

As with environmental disputes, direct logistic regression was performed to assess whether there was more likely to be a decrease in health regulations on the back of a NAFTA Chapter 11 challenge to health measures (as denoted in this analysis by the filing of a NOI or arbitral award). Once again the model as a whole was statistically significant as a predictor and showed an inverse relationship between ISDS disputes on health and the adoption of environmental regulations in most years, and the adoption of health regulations in only five of

<sup>321</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

<sup>322</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

the thirteen years. The model contained two independent variables, one reflecting the presence or absence of a health dispute and the other the year between 1998-2013. Similar to the results shown for environmental disputes, there was a statistically significant impact shown by NAFTA Chapter 11 challenges to health measures on adopted health regulations in 2013, suggesting that for every incidence of a NAFTA Chapter 11 challenge on a health measure, there was a 3.5 times probability of the adoption of health regulations in that year. In other words there was a positive correlation between NAFTA ISDS disputes and the adoption of health regulations. This finding serves to further weaken the hypothesis on regulatory chill.

At the same time however, there was also statistically significant impact shown by NAFTA Chapter 11 challenges to health measures on adopted environmental regulations, suggesting that the presence of trade dispute on health was likely to decrease the probability of environmental regulations for the same two years 2002 and 2007. The odds ratios in these two cases were low, at or below 0.5.<sup>323</sup> Table 6 illustrates.

**Table 6 – Multinomial logistic regression predicting impact of NAFTA Chapter 11 health disputes on adopted environmental and health regulations between 1998-2013**

Environment Regulations	B	S.E.	Wald	df	Sig.	Exp (B)	95% C.I. for EXP (B)	
							Lower	Upper
2002	-.849	.397	4.574	1	.032	.428	.196	.932
2007	-1.116	.404	7.630	1	.006	.328	.149	.723

Health Regulations	B	S.E.	Wald	df	Sig.	Exp (B)	95% C.I. for EXP (B)	
							Lower	Upper
2013	1.252	.543	5.322	1	.021	3.496	1.207	10.127

As with the earlier analysis, this result appears to reinforce the correlation between a NAFTA Chapter 11 dispute and the volume of environmental regulations adopted. This does raise some questions however regarding how NAFTA disputes against measures from one department (health) could increase the probability of a decrease in regulations in another (environment). This is made all the more perplexing given that those same health measures appear to be having the opposite impact within the health department, spurring an increase in the development of health regulations. Nevertheless, the findings with respect to environmental regulations is worth noting and can be considered in the context of

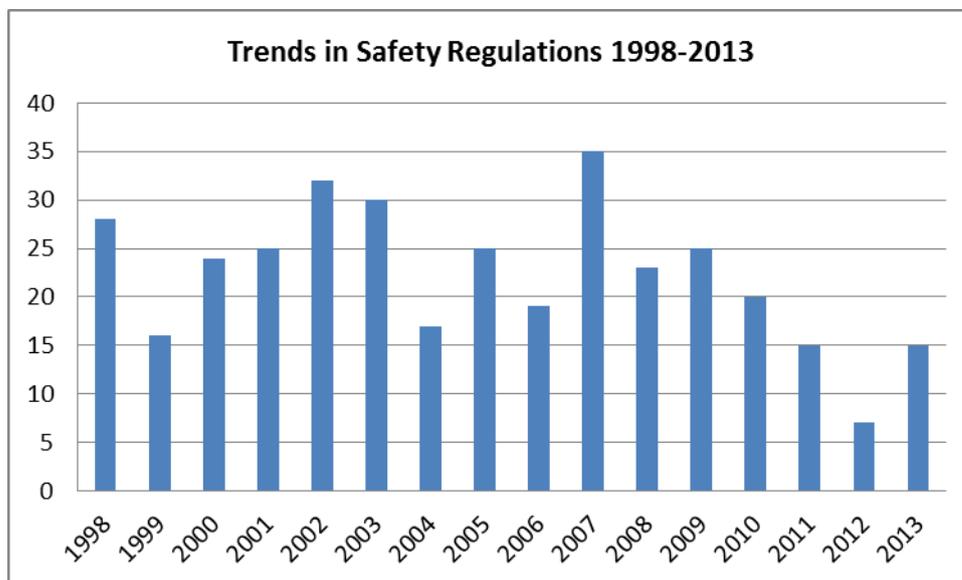
<sup>323</sup> SPSS multinomial logistic regression was undertaken. The full model containing all predictors was statistically significant,  $X^2(32, N=1580) = 58.35, p < .002$  indicating the model was able to distinguish whether the existence of an ISDS dispute on health was relevant to the adoption of environmental or health regulation during the period 1998-2013. The model as a whole explained between 3.7% (Cox and Snell R square) and 4.2% (Nagelkerke R square) of the variability based on the existence or not of an ISDS dispute.

information received through the in-depth interviews and survey responses by senior federal Canadian regulators in the remainder of this chapter and in Chapter 5.

### *Trends in safety regulations*

Finally, trends in safety regulations showed increased levels of regulation in 2002, 2003 and 2007 driven predominantly by improvements to motor vehicle safety regulations aimed at addressing new safety concerns and harmonizing with US standards as well as shipping safety, the transport of dangerous goods and arctic water pollution prevention.

**Diagram 15 – Trends in safety regulations- Canada Gazette 2**

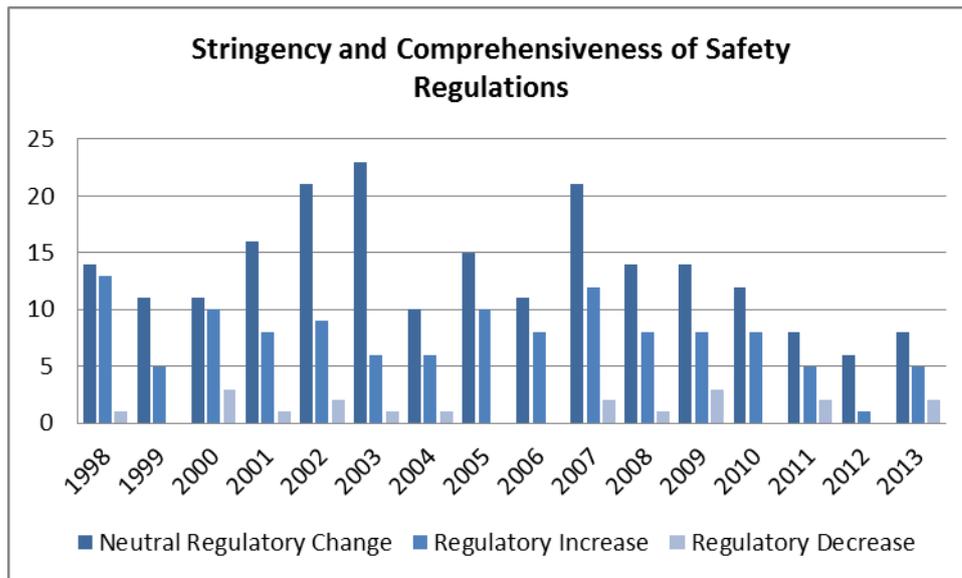


Analysis of Canada Gazette 2<sup>324</sup>

The trends in safety regulations follow a similar pattern to those on environment and health both in terms of regulation growth rates and trends in regulatory increases versus neutral regulatory changes and provide a helpful counterfactual given the absence of NAFTA Chapter 11 challenges to safety measures during this period.

<sup>324</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

**Diagram 16 – Stringency and comprehensiveness of safety regulations – Canada Gazette 2**



Analysis of Canada Gazette 2<sup>325</sup>

The key findings of this analysis are that the trends in HSE regulations have been towards fewer new regulations year on year but with neutral or increasing stringency and comprehensiveness of regulations across all main departments, with the majority of proposed regulations making it into law. At the same time there appeared to be some correlation between the adoption of environment and health regulations and the filing of NOI or Awards under NAFTA Chapter 11 disputes during this period suggesting a possible influencing factor, particularly in the area of environmental regulations. The views of regulators are probed in section two and will help provide the necessary qualitative information to understand the trends we are seeing in Canada between 1998 and 2013.

**b. Perspectives from Federal Regulators**

In addition to the analysis of proposed and adopted HSE regulations under the Canada Gazette, a large and representative group of senior Canadian federal regulators were asked through both survey and in-depth interviews, their views regarding trends in regulations over the last decade. Together they confirmed the trend in increased stringency of regulations and provided a concrete explanation of the influencing factors.

In the face-to-face interviews, regulators were asked how they felt regulations had changed in their area of expertise over the last ten years and whether they felt these regulations had become more or less stringent or comprehensive, where stringent referred to the

<sup>325</sup> Data is from Treasury Board archives of Gazette 1: <http://canadagazette.gc.ca/archives/archives-eng.html>

requirements for a greater depth of science to demonstrate acceptability of risk and comprehensive referred to the number of emerging areas being regulated. Interviewees were also asked to give examples to illustrate their answers.

The largest group of regulators in these interviews felt that regulations had become **more stringent**. A few regulators felt that regulations had remained **static** while a substantial group argued that regulations were neither more nor less stringent and comprehensive but rather that the Canadian government was **regulating differently**. The focus, particularly in more recent years has been on ensuring the continuity of health, safety and environmental regulation yet with an effort to ensure smarter regulations and fewer burdens on industry. Finally in some cases it was felt there had been substantial regulatory change involving the establishment of a new act (Canadian Environmental Assessment Act 2012), a complete regulatory overhaul (Chemical Management Plan) or even the establishment of aggressive future regulatory targets (on Green House Gas emissions).

The results of the online survey showed similar trends when regulators were asked whether regulations had become more or less stringent and more or less comprehensive.

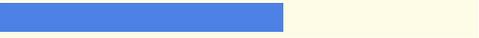
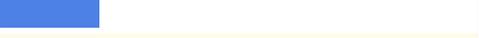
**Table 7 – Regulators’ views on trends in the comprehensiveness of HSE Regulations over last decade**

<b>3. To the best of your knowledge, would you say that regulation within your area of expertise has become more or less comprehensive in its coverage over the last decade (where comprehensive refers to the number of emerging areas being regulated)?</b>				
#	Answer		Response	%
1	More comprehensive		91	67%
2	Less comprehensive		22	16%
3	Other		22	16%
	Total		135	100%

Source: Qualtrics survey of Canadian Federal Regulators – Report 22 May 2013

As Table 7 indicates, 67%, the majority of the 135 survey respondents believe that regulations have become more *comprehensive* in terms of the number of areas being regulated over the last decade while 16% felt they had remained constant.

**Table 9 – Regulators’ views on trends in the stringency of HSE Regulations over last decade**

<b>4. To the best of your knowledge, would you say that regulation in your area of expertise has become more or less stringent over the last decade (where stringent refers to the requirements for a greater depth of science to demonstrate acceptability of risk)?</b>				
#	Answer		Response	%
1	More stringent		80	59%
2	Less stringent		28	21%
3	Other		27	20%
	Total		135	100%

Source: Qualtrics survey of Canadian Federal Regulators – Report 22 May 2013

Similarly 59% of respondents felt that regulations had become more *stringent* in terms of greater depth of science to demonstrate acceptability of risk, with 20% suggesting they had remained constant. In both cases less than a fifth felt regulations felt they had become either less comprehensive or less stringent. Roughly one fifth of regulators also argued that governments were regulating differently.

**The drivers for increases in regulatory stringency and comprehensiveness**

Regulators identified a number of drivers responsible for increases in regulatory stringency and comprehensives. The primary reasons which emerged from the face-to-face interviews were consistent with those identified in the Federal Regulator Survey analysis. The main drivers for changes or increases in regulatory stringency and comprehensiveness were the fact that new areas were now being regulated, that there were deeper science requirements, a strong international influence, increasing public scrutiny and demands, and a push for harmonization of regulations with the US. These factors sat alongside the trend for regulatory efficiency and modernization, which was seen as a factor impacting the changing nature of how government regulates in Canada.<sup>326</sup>

***New areas being regulated***

Over the last decade regulators told us new areas have emerged which require a regulatory response (the use of new hand held radiation devices, the emergence of e-waste and new vehicle safety requirements are a case in point). Interviewees cited the broader nature of regulations and the increased comprehensiveness of coverage. In the online survey, a third of recipients argued that this was the case.

<sup>326</sup> Appendix 6 includes details of the qualitative coding of the Canadian Federal Regulator Interviews

By way of illustration, regulators argued that this was the '*first time the government (is) regulating air emissions*' and that '*regulations cover new areas*' and that '*increased species and chemicals (were) being managed through regulation*'.<sup>327</sup>

### ***Deeper Science Requirements***

Regulators argued that deeper science requirements were a factor leading to greater stringency and comprehensiveness of requirements. They cited the increased depth of analysis and science required as well as the role played by technological advances in many areas of health, safety and the environment and the subsequent increases in complexity. In the online survey, over 15% of respondents argued that deeper science requirements were a factor leading to greater stringency and comprehensiveness of requirements. They cited greater evidence and knowledge requirements, a science driven focus and the quality of data as key factors.

Regulators argued that '*scientific understanding of hazard and risk (has) become deeper*', that '*regulations reflect current capacity of science*', that there were '*more science-based decisions*' or the '*increasing need for more evidence*'.<sup>328</sup>

### ***International influence***

The role of international standard setting bodies such as the Intergovernmental Panel on Climate Control (IPCC), Framework Convention on Tobacco Control (FCTC) and CODEX (the World Health Organization (WHO) organization on international food standards) have been a factor impacting increases in comprehensiveness and stringency in regulations. Canada is an active participant in these global bodies on issues such as climate control, tobacco control and food safety standards to name a few. Additionally, international influence was responsible for the tightening of regulations in the area of nuclear safety as a result of world events such as the conflict in Iraq, 9/11 and the Fukushima nuclear incident.<sup>329</sup> In line with survey respondents, 10% of respondents highlighted this as a key influence on the scope and scale of regulation.

Regulators argued that there were '*more links to external standards*' or that '*regulations are dictated by international treaty*'.<sup>330</sup>

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<sup>327</sup> Interview transcripts with Canadian Federal Regulators 2012 – non attributable comments for reasons of confidentiality

<sup>328</sup> Ibid

<sup>329</sup> Ibid

<sup>330</sup> Ibid

### ***Public scrutiny and demands***

A small category to emerge was the issue of public scrutiny and the subsequent demands on regulators to address safety and environmental concerns. There was a feeling of greater public scrutiny and stakeholder involvement in the identification of new regulations or regulatory changes.

Arguments raised by regulators in this area were that there is '*increased attention by the general public*' or that the '*public also demands very safe products*.'<sup>331</sup>

### ***Harmonization***

While survey respondents did highlight the importance of cooperation with the US through harmonization, the regulators interviewed face-to-face placed a greater emphasis on this factor. Initiatives such as the Regulatory Cooperation Council (RCC) were seen as very significant influences on regulatory development. The need to align regulations with the US Environmental Protection Agency (EPA) and the specific example of Green House Gase (GHG) regulations were highlighted as key factors. Concern over the potential loss of sovereignty resulting from the increased difficulty of pursuing 'made in Canada' responses was also raised.

### ***Regulatory Efficiency and Modernization***

Government wide initiatives on regulatory efficiency and modernization have resulted in more focussed regulation as a counterbalance to other pressures already mentioned and was highlighted by the largest group of interviewees with over half of those interviewed identify this as a key factor (compared with over 15% of survey respondents). The government's shift from process to output based regulations, the cost/benefit focus, the use of alternative control mechanisms as well as the movement to smarter focussed regulations were all key factors. Together these changes in regulatory approaches demonstrate how the government is regulating differently or reflects what some regulators in the online survey saw as a downward trend. This also explains how regulations could reduce in number yet increase in stringency and comprehensiveness as seen in the analysis of regulatory trends under the Canada Gazette.

Regulators suggested that '*Environmental assessment is more focussed*' and that the government '*no longer require assessments for smaller scale projects*'. '*Clarity of*

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<sup>331</sup> Interview transcripts with Canadian Federal Regulators 2012 – non attributable comments for reasons of confidentiality

*requirements* and *'flexibility for the regulated community'* were both comments illustrative of this trend.

There were a number of key areas which were highlighted as examples of how regulations have changed over the last decade through aggressive initiatives by the federal government to address concerns in the areas of HSE as well as to modernize the existing regulatory framework.

<b>Canadian Federal Regulatory Initiatives</b>
<p><b>Chemical Management Plan:</b> The Chemical Management plan launched 2006, is a joint Health Canada and Environment Canada initiative was Canada's response to the United Nations Environment Program's (UNEP) strategic approach to chemicals management. The goal of the program is to assess and manage 23,000 chemicals in use in Canada and in particular under the Challenge Initiative to look at 200 high priority chemicals and undertake a re-evaluation. Another key feature of the initiative are the greater powers established to revoke or grant chemical registration.</p>
<p><b>New Environmental Assessment Act:</b> The establishment of The <i>Canadian Environmental Assessment Act, 2012</i> (CEAA 2012) involved a full modernization of the regulatory system aimed at responsible resource management. A key aspect of the new act has been a move to focus exclusively on large natural resource projects which are most likely to cause an environmental impact and to discontinue the evaluation of projects which were deemed 'unlikely to cause more than minor adverse environmental effects or pose more than minor environmental risks'<sup>332</sup>, currently 90% of all environmental assessments.</p>
<p><b>Tobacco Control Act and new regulations:</b> Canada has been a world leader in the area of tobacco control regulations. Steps have included the adoption of The Tobacco Product Control Act of 1988 to deal with advertising, reporting and labelling, the adoption of The Tobacco Sales to Young Persons Act in 1994, The New Tobacco Act in 1997 and the adoption of pictorial health warnings in 2000 and increases in health warnings to 75% of total packaging in 2004.</p>
<p><b>US EPA alignment on GHG emissions:</b> The Canadian government has been very active alongside the US in dealing with greenhouse gas (GHG) emissions. With respect to tailpipe emissions for vehicles, regulations set the level of contaminants that have to be met and require more aggressive action on the part of producers to develop technology to reduce these contaminants. On greenhouse gases the goal is a doubling of the level of reduction in the economy by 2025. Internationally Canada has been involved with the UN World Forum for harmonization of vehicle regulations which in its 1998 agreement added vehicle emissions.</p>

Unlike the online survey, none of the regulators interviewed argued that regulations had become less stringent or comprehensive. There was much focus on the fact that they were regulating differently both in terms of the output based focus of regulations and efforts to ensure they were applied in the most efficient manner.

<sup>332</sup> Canadian Environmental Assessment Agency. 2007 . Federal Screenings: An Analysis Based on Information from the Canadian Environmental Assessment Registry Internet Site. [http://www.ceaa-acee.gc.ca/Content/4/5/0/4507E796-2D92-47B9-9DC1-52F691619A8E/Federal\\_Screenings-eng.pdf](http://www.ceaa-acee.gc.ca/Content/4/5/0/4507E796-2D92-47B9-9DC1-52F691619A8E/Federal_Screenings-eng.pdf)

### c. Perspectives from international or independent agencies

This analysis of regulatory trends also looked to the assessment of the international community regarding Canada's regulatory performance in the area of HSE. While there was no perfect analysis of performance, a number of studies provide both an international and independent domestic perspective.

The OECD undertakes a Review of Regulatory Reform of member countries on a rolling basis, aimed at improving domestic regulatory quality. A review of the Canadian regulatory environment was undertaken in 2002. While somewhat dated, the review highlights Canada's world class transparency and public consultation process (through its Regulatory Impact Analyses - RIAs), its practice of balancing social and competitiveness goals, as well as the challenges of regulated areas of shared federal provincial jurisdiction. The OECD also highlights Canada's early focus on regulatory reform, suggesting that 'unlike most OECD countries, Canada shows a declining trend in the growth rate of new legislation and regulation'. While this report was undertaken at the beginning of the period of relevance for this analysis it is worth noting that it includes all areas of economic and social regulation and according to the OECD this trend must be mitigated by the fact that it incorporates the consolidation of regulatory instruments and the growing use of performance based standards.<sup>333</sup> However, this declining trend in the growth rate of new legislation and regulation is consistent with the continuing trend found in the Canada Gazette analysis outlined earlier, and serves as a counterfactual for the analysis of regulatory trends. The 10 year period covered by the OECD report 1992-2002 shows declining trends in the growth of new legislation during a period where NAFTA Chapter 11 disputes had not yet commenced.

In 2004 the OECD also undertook an Environmental Performance Review of Canada aimed at assessing progress made since its last review in 1995. While again quite dated the OECD does find that 'since the mid-1990s Canada has made significant improvements in its environmental policies',<sup>334</sup> highlighting improvements to the legislative framework through the 1999 Canadian Environmental Protection Act coupled with effective policies for compliance and enforcement as well as mechanisms for public communication. The report also praises Canada's record of co-operation on the environment both internationally and at the regional level but argues that it has not been effective at translating the international commitments into action as a result of the challenges of federal provincial shared

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<sup>333</sup> OECD Reviews of Regulatory Reform Canada. OECD 2002. P 32.

<sup>334</sup> OECD Environmental Performance Reviews: Canada. OECD 2004

responsibility and cuts to budgets. Overall these reports do not tell us enough about the trends in health, safety and environmental regulation both because of their dated nature as well as their focus on regulatory management or outcomes rather than regulatory trends.

Perhaps of more direct relevance, the Conference Board of Canada, an independent research organization in Canada produces report cards on Canada’s environmental and health performance against 16 peer countries through a multi-year research program. On the environment in 2012, while Canada received a ‘C’ grade overall, ranking 15<sup>th</sup> out of the 17 countries analysed, its performance improved between 1990 and 2009 across “ten indicators in the overall Environment report card, stayed the same for one indicator, and worsened for two indicators”<sup>335</sup> Table 9 below shows the trend across air quality, waste, water, biodiversity and conservation, natural resource management and climate change and energy efficiency. This suggests that while Canada’s relative position against other states was weak, it has made progress on the quality of its environmental program over the last two decades. How quality of its environmental program relates to levels of regulatory stringency and comprehensiveness is difficult to determine definitively but would suggest an increase rather than decrease. This analysis, covering the ten year period before as well as the ten years after the commencement of NAFTA Chapter 11 ISDS challenges to government environmental measures also serves to illustrate the counterfactual and does not seem to have changed the upward trend in environmental regulatory quality.

**Table 9 – Conference Board of Canada Environmental Report Card**

REPORT CARD													
Environment													
	Air quality				Waste Municipal waste generation	Water		Biodiversity and conservation Forest cover change	Natural resource management		Climate change and energy efficiency		
	Nitrogen oxides emissions	Sulphur oxides emissions	VOC emissions	PM10 concentration		Water Quality Index	Water withdrawals		Use of forest resources	Marine Trophic Index	GHG emissions	Low-emitting electricity production	Energy intensity
	1990 to 2009	1990 to 2009	1990 to 2009	1990 to 2009		1990 to 2009	2008 to 2010		1990 to 2009	1990 to 2010	1990s to 2000s	1990 to 2006	1990 to 2010
Australia	worse	worse	better	better	n.a.	worse	better	worse	worse	worse	better	better	better
Austria	better	better	better	better	worse	better	n.a.	better	worse	n.a.	better	worse	better
Belgium	better	better	better	better	worse	better	better	better	no change	better	better	better	better
Canada	better	better	better	better	worse	better	better	no change	better	worse	better	better	better
Denmark	better	better	better	better	worse	better	better	better	worse	worse	better	better	better
Finland	better	better	better	better	worse	worse	better	better	worse	worse	better	worse	better
France	better	better	better	better	worse	better	better	better	better	better	better	better	better
Germany	better	better	better	better	better	better	better	better	worse	better	better	worse	better
Ireland	better	better	better	better	worse	better	better	better	no change	better	better	better	better
Italy	better	better	better	better	worse	worse	worse	better	worse	worse	better	better	better
Japan	better	better	better	better	better	better	better	better	better	better	better	worse	better
Netherlands	better	better	better	better	worse	better	worse	better	worse	better	better	better	better
Norway	better	better	better	better	better	better	worse	better	better	worse	better	worse	better
Sweden	better	better	better	better	worse	better	better	better	worse	worse	better	worse	better
Switzerland	better	better	better	better	worse	worse	better	better	no change	n.a.	better	worse	better
U.K.	better	better	better	better	worse	worse	better	better	worse	better	better	better	better
U.S.	better	better	better	better	better	better	better	better	n.a.	worse	better	better	better

Source: The Conference Board of Canada.

<sup>335</sup> Conference Board of Canada Environment Report Card. <http://www.conferenceboard.ca/hcp/details/environment.aspx>

On health, Canada receives a 'B' grade ranking 10<sup>th</sup> among the 17 peer countries. While there are a number of areas of poor performance, the Conference Board of Canada claims that 'on balance, fewer Canadians are dying today from the diseases benchmarked here than they did in the 1960s and 1970s' (see table 10)<sup>336</sup>. Furthermore, Canada performs ahead of its peer group in a number of key areas related to life expectancy and mortality due to disease is perhaps also reflective of the trend in neutral regulatory change highlighted in the Canada Gazette analysis. Perhaps a highlight of regulatory efficiency is demonstrated by Canada's leading performance on the risk factors of tobacco and alcohol consumption. Reference is made to tobacco control regulation which has led to Canada registering among the lowest proportion of smokers among OECD countries.

**Table 10 – Conference Board of Canada Health Report Card**

REPORT CARD					
Health in Canada					
	1960s	1970s	1980s	1990s	2000s
Overall	B	B	B	B	B
Life expectancy	B	B	B	B	B
Self-reported health status	n.a.	n.a.	n.a.	A	A
Premature mortality	C	C	C	B	B
Mortality due to cancer	B	B	C	B	B
Mortality due to circulatory diseases	C	B	B	B	B
Mortality due to respiratory diseases	A	A	A	B	A
Mortality due to diabetes	C	C	B	C	D
Mortality due to musculoskeletal system diseases	n.a.	B	A	B	C
Mortality due to mental disorders	A	B	B	B	B
Infant mortality	B	B	B	C	C
Mortality due to medical misadventures	n.a.	n.a.	B	A	B

Source: The Conference Board of Canada.

#### 4. CONCLUSION

In testing the first 'expectation' regarding the regulatory chilling impact of IIAs on HSE regulations in Canada we looked at a number of primary and secondary sources in an effort to achieve a triangulation of data. Overall while the analysis found a downward trend in the

<sup>336</sup> Conference Board of Canada Health Report Card. <http://www.conferenceboard.ca/hcp/details/health.aspx>

growth rate of new HSE regulations but an increasing trend in the stringency and comprehensiveness of regulations in health safety and environment. We did however find some evidence of a trend of stagnant or weakening regulations in the wake of NAFTA Chapter 11 challenges in the case of environmental regulations which serves as a factor mitigating our overall results.

An analysis of the Canada Gazette 1 and Canada Gazette 2 shows a declining trend in the growth rate of new regulations or regulatory changes, but an increasing trend in the stringency and comprehensiveness of regulations in health safety and environment. The analysis showed that the trends in adopted regulatory changes under Gazette 2 have been towards neutral regulatory change (58%) or regulatory increases (36%) with 566 regulations representing increases in regulations and 912 showing a more neutral change.

There was at the same time some evidence of a statistical correlation between Chapter 11 disputes on environment and health measures and the adoption of environment and health regulations during a few of the years between 1998-2013. There was a statistically significant impact shown by NAFTA Chapter 11 challenges to environmental or health measures in two of the of the fifteen years suggesting that the presence of an investment dispute on the environment and health was likely to *decrease* the probability of the adoption of environmental regulations in 2002 and 2007. This raised the potential that these NAFTA disputes were having a dampening effect on regulators during the period in question. At the same time however, a NAFTA Chapter 11 challenge on environmental or health measures was also likely to *increase* the probability of the adoption of health regulations in 2013. This positive correlation suggests it was not a concern in the development of health regulations. This has interesting implications regarding the impact of NAFTA Chapter 11 and will be explored further in Chapter 5 through the in-depth interviews and survey of Federal Canadian regulators.

Senior Federal HSE regulators in Canada believe that regulations in HSE have generally been increasing in stringency and comprehensiveness driven by new areas now being regulated, deeper science requirements, a strong international influence, increasing public scrutiny and demands, and the push for harmonization of regulations with the US. Alongside this trend, a desire for regulatory efficiency and modernization has also resulted in a different way of regulating (a partial explanation for declining trends in the growth rate of regulations).

While not providing a clear perspective on trends in regulation the OECD confirms the Canadian focus on regulatory reform and a different way of regulating and highlights Canada's improvement in environmental policies as a reflection of increased stringency and comprehensiveness. Canada also receives praise for its steady performance on health and the environment from the Conference Board of Canada.

Chapter 5 will test the second 'expectation' of the hypothesis on regulatory chill through an analysis of the regulatory development process and the role that trade and investment plays within that process.

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## Chapter 5: Case Study 1: The Canadian regulatory environment – The role of international trade and investment

*‘The regulatory chill thesis is of course difficult to prove or disprove. First, it assumes that regulators are aware of international law, but are they?’*

Jack Coe and Noah Rubins<sup>337</sup>

### 1. INTRODUCTION

The previous chapter outlined how trends in HSE regulatory development in Canada over the last decade have been towards more stringent and comprehensive HSE regulations addressing the first expectation on regulatory chill. In an effort to understand the regulatory impact of these agreements, we are also concerned with regulator awareness of IIAs and the possibility of an investor-state challenge, and the extent to which HSE regulators take these into consideration in the regulatory development process. An analysis of the in-depth interviews and electronic survey of federal HSE regulators provide some valuable insights on these issues and allow us to address the second ‘expectation’ which underlies the hypothesis on regulatory chill.

### 2. THE KEY DRIVERS OF REGULATORY DEVELOPMENT

In trying to understand the role played by Canada’s international trade and investment commitments in influencing the regulatory development process, the in-depth interviews with regulators and the electronic survey began by probing the main influences.

#### a. The main influences on the regulatory development process

During the in-depth interviews, regulators were asked to outline and discuss the primary factors which influenced their regulatory development process. The main influencing factors

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<sup>337</sup> Coe, Jack and Noah Rubins. 2005. Regulatory Expropriation and the Tecmed Case: Context and Contributions. In *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, edited by Todd Weiler, 597-667. London: Cameron May.

for them were responding to health, safety and environmental needs, to advances in science and technology, to stakeholder expectations, to domestic streamlining and modernization initiatives, complying and harmonizing with international standards and commitments, and facilitating international trade.<sup>338</sup>

***Responding to health, safety and environmental needs***

A primary driver of regulatory development involved regulators responding to the health and safety needs of the population as set out in the mandates of each federal department. The focus varied across the various departments between an emphasis on safety (such as in the case of Transport Canada, Human Resources and Skills Development Canada, or the Canadian Nuclear Safety Commission), on health (across Health Canada, the Pest Management Review Agency and the Canadian Food Inspection Agency) or the environment (across Environment Canada, the Canadian Environmental Assessment Agency and Fisheries and Oceans Canada). Regulatory development was driven by existing gaps in protection, assessed levels of risk or responding to an existing need.

This driver was seen as the primary one by many of the regulators interviewed. *'First and foremost is the determination of the health issue'*<sup>339</sup> was how one regulator described the influences.

***Responding to advances in science and technology***

While the overall health, safety or environmental mandate was a key driver, so to was the need for regulators to be seen responding to advances in science, emerging scientific data, technology and innovation when developing regulations or amending existing regulations.

***Complying and harmonizing with international standards and commitments***

Regulators identified the need to comply with international standards and commitments as a driver of domestic regulatory development. This included everything from aligning regulations with standards set by the international community, responding to international trends and generally adhering to international commitments such as those established through technical barriers to trade (TBT) or sanitary and phytosanitary (SPS) agreements. Similarly, they identified the importance of harmonizing regulations with the US and

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<sup>338</sup> Quantitative coding of interview data was undertaken in order to identify the key categories and themes outlined here. Appendix 6 provides the coding and categories resulting from this analysis

<sup>339</sup> Canadian Federal Regulator Interview transcripts – un-attributable quote due to confidentiality

internationally. The recent Regulatory Cooperation Council (RCC) was seen as an influential force in this regard. As one regulator put it '*The bedrock is US regulation*'.<sup>340</sup>

Additionally, it was often difficult to justify a different regulatory approach given the size of the Canadian market. One senior health regulator explained how they are consistently challenged in this regard '*Why are we not adopting a US or European solution? We have some latitude to exercise our sovereignty but the question is always whether this is really needed. What are the key differences with other major trading partners that would necessitate such a unique approach*'.<sup>341</sup>

### ***Responding to stakeholder expectations***

Responding to stakeholder expectations was another factor impacting the regulatory development process. This included incorporating or aligning with the expectations of the provinces, responding to Non-Governmental Organizations as well as consumers or the general public. Formal mechanisms have been put in place to solicit feedback from stakeholders as part of the regulatory development process.

### ***Responding to domestic streamlining and modernization initiatives***

Responding to the various domestic streamlining and modernization initiatives that have been the cornerstone of the Federal Government's agenda was identified as another influencing factor in regulatory development. As outlined previously these originated with the Cabinet Directive on Smart Regulations as a response to the OECD's analysis of Canadian regulations in 2002 and more recently the Red Tape Reduction Task Force which has spawned policies such as the One-for-One initiative within a comprehensive government response.<sup>342</sup>

This was very much top of mind in the discussion with senior regulators and had resulted in the development of regulations which took into account the cost-benefit equation, improving efficiency, streamlining, more focus on outcome based versus prescriptive regulations and a

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<sup>340</sup> Canadian Federal Regulator Interview transcripts – un-attributable quote due to confidentiality

<sup>341</sup> Ibid

<sup>342</sup> The One-for-One Rule 'will require regulators to offset new administrative burden costs imposed on business with equal reductions in administrative burden from the stock of existing regulations. They will also have to remove a regulation when a new one increases administrative burden costs on business. Canada will be the first country to give such a rule the weight of legislation.' Treasury Board of Canada Secretariat. Red Tape Reduction Action Plan 2012.

general push to modernize where regulations were seen as outdated. As one regulator put it ‘*There is a desire not to impose onerous costs*’<sup>343</sup>.

### *Facilitating international trade*

Finally, facilitating international trade was identified as an influencing factor in the regulatory development process. The focus here was very much on maintaining competitiveness and continuing to ensure market access through regulations which did not impose undue burdens on industry or to the free flow of goods and services with Canada’s trading partners. At this early stage of interviews, regulators did not raise the issue of international trade and investment *commitments* or international trade and investment *disputes* through their own volition, as factors of relevance to the process.

In addition to face-to-face interviews, an electronic survey was used to capture views on this issue. Table 1 below outlines the findings.

**Table 1 – Factors influencing the regulatory development process**

<b>6. When developing new regulations, changes to existing regulations, providing regulatory authorization or making decisions on evaluation and monitoring, there are a number of key drivers in your decision making process. Please rank the influences below, where 1 indicates the most influential and 8 the least.</b>										
#	Answer	1	2	3	4	5	6	7	8	Total Responses
1	The public environmental, health or safety need	85	21	11	1	3	4	0	0	126
2	Science or technological advances in the field	10	36	15	17	20	6	19	2	126
3	Canada's international trade and investment commitments	6	11	12	24	15	20	31	6	126
4	The views of key industry stakeholders or proponents	3	25	22	25	25	16	7	2	126
5	The views of other stakeholders such as Non-Governmental Organizations (NGOs) or the public	1	9	22	12	27	28	20	6	126
6	Global trends such as the work of international bodies	4	13	30	16	13	22	21	6	126
7	Domestic initiatives such as efforts at regulatory streamlining or red tape reduction	19	18	17	27	12	17	13	2	126
8	Other	10	5	4	2	3	5	2	93	126
	Total	138	138	133	124	118	118	113	117	-

Source: Qualtrics Survey of Canadian Federal Regulators – Report May 22 2013

<sup>343</sup> Canadian Federal Regulator Interview transcripts – un-attributable quote due to confidentiality

When this broader group of regulators were asked a very similar question, the electronic survey yielded quite consistent results with public environmental, health or safety needs ranking as the key driver of regulatory development by 85 or 61% of regulators. This was followed by science or technological advances in the field and global trends such as the work of international bodies. As Table 1 below shows, Canada's international trade and investment commitments ranked last for 25% of regulators surveyed, with close to 50% placing it in the bottom half of decision making influences.

### **3. TESTING EXPECTATION 2: THE ROLE OF INTERNATIONAL TRADE AND INVESTMENT IN THE REGULATORY DEVELOPMENT PROCESS**

Of primary interest in this analysis is understanding the specific role that international trade and investment commitments play in the regulatory development process and gauging the level of awareness of regulators with respect to these commitments and particularly NAFTA Chapter 11.

#### **a. The role of international trade and investment in the regulatory development process**

Regulators were asked to outline and discuss how specifically they considered international trade in the regulatory development process. This was obviously key to the research question regarding the impact of trade and investment agreements on HSE regulation. By probing the ways in which regulators consider Canada's international trade and investment commitments in the regulatory development process, the goal was to understand the level of impact in general and how litigation under bilateral investment agreements or NAFTA was specifically of relevance. The goal was also to determine the level of awareness that existed among regulators about the potential impact of these international investment agreements such as NAFTA Chapter 11 and whether they made a distinction when discussing 'trade' between the goal of ensuring trade facilitation and ensuring market access, versus the avoidance of disputes or even between the different types of trade and investment commitments to which Canada is signatory.

**Table 2 – Regulators’ views on the relevance of trade and investment commitments**

<b>7. To what extent do you consider Canada's trade and investment commitments as relevant to the regulatory process?</b>				
#	Answer		Response	%
1	Very much		39	31%
2	Some		61	48%
3	not very much		22	17%
4	not at all		4	3%
	Total		126	100%

Source: Qualtrics Survey of Canadian Federal Regulators – Report May 22 2013

While Canada’s trade and investment commitments ranked low vis-à-vis all other factors influencing the regulatory development process (as outlined in Section B), when regulators were asked the extent to which they consider Canada’s trade and investment commitments as relevant to the regulatory process in more absolute terms, Table 2 above shows that 31% said ‘*very much*’, 48% said ‘*some*’ while 20% said either ‘*not very much*’ or ‘*not at all*’. This varied marginally by level of seniority with the most senior regulators at the Director General level evenly split between these three responses and the remaining regulators from Director, Section Head, Manager or the more technical non managerial grades, all most likely to give ‘*some*’ consideration to trade and investment commitments.<sup>344</sup> This is perhaps not surprising as one might expect these types of issues to be more top of mind the more senior the regulator. The next section outlines how specifically this was a consideration.

### **Specific ways in which regulators consider trade and investment**

Regulators where asked in the electronic survey to identify under what situations Canada’s trade and investments commitments were of most concern and were asked to identify all those which they felt were relevant.

<sup>344</sup> SPSS cross-tabulation indicates that 56.5% Directors, 48.1% Section Heads, 47.4% Managers and 46.7% Other responded ‘some’ to this question.

**Table 3 – Regulators’ views on the role played by trade and investment commitments**

<b>8. When are Canada's trade and investment commitments of most concern to you? Which of the following describe how trade plays a role in your decision making? You can identify as many as are</b>				
#	Answer		Response	%
1	When a trade agreement is being negotiated by Canada (to ensure any new commitments are compatible with existing regulations)		45	36%
2	In balancing the economic cost-benefits of a regulatory decision, in order to avoid a barrier to trade or to the free commercial flow of goods and investment		61	49%
3	To ensure that any new regulation would not lead to a trade dispute or litigation from international investors		45	36%
4	As part of the Regulatory Impact Analysis Statement (RIAS) which necessitates consideration of trade and investment implications of any new regulation		62	50%
5	In identifying regulatory alternatives for addressing a public need		50	40%
6	They are rarely of concern		25	20%
7	Other		10	8%

Source: Qualtrics Survey of Canadian Federal Regulators – Report May 22 2013

Table 3 shows that between 40%-50% felt that trade and investment commitments were of concern a) as part of the Regulatory Impact Analysis Statement (RIAs) which necessitates consideration of trade and investment implications of any new regulation, b) In balancing the economic cost-benefits of a regulatory decision, in order to avoid a barrier to trade or to the free commercial flow of goods and investment, and c) in identifying regulatory alternatives for addressing a public need. Only 36% felt that these agreements were of concern when a trade agreement is being negotiated or to ensure that any new regulation would not lead to a trade dispute or litigation from international investors while 20% thought they were rarely of concern.

This begins to give us some insight into the ways ‘trade and investment’ are perceived by regulators in their daily work. Outlining similar themes, during in-depth interviews regulators argued that trade and investment commitments were most relevant with respect to their efforts at harmonizing regulations with trade partners, ensuring international transparency and disclosure as well as compatibility with international trade commitments, avoiding the creation of barriers to trade and avoiding international trade and investment disputes. Many regulators also claimed they did not consider trade and investment in any way when developing regulations. <sup>345</sup>

<sup>345</sup> Quantitative coding of interview data was undertaken in order to identify the key categories and themes outlined here. Appendix 5 provides the coding and categories resulting from this analysis

### ***Harmonizing with trade partners***

There are strong pressures for regulators to ensure they are harmonizing regulations with Canada's key trading partners. This driver in the regulatory development process was most frequently mentioned by interviewees and was the main way in which they were likely to consider 'trade and investment' as relevant.

Two senior environmental regulators argued that '*FTAs matter most*' and that '*the willingness to regulate, both the forum and actual regulations is driven by what the US is doing*'. Additionally it was suggested from the food inspection domain that '*they need more than a good reason to do something different in regulation*'. One transport regulator suggested that there was a '*high degree of attention on making things compliant with the US*'.

### ***Ensuring international transparency and disclosure***

The process of notification under regional and multilateral SPS and TBT agreements was seen as a primary means by which international trade and investment was a regular consideration in the regulatory development process. Notification provisions require regulators to advise the trade bodies (such as NAFTA and the WTO) of any proposed changes to their regulations in those areas which could have an impact on trade. The purpose is to ensure transparency and predictability and forms part of the commitments to which member countries have signed up to. Second to harmonization this was the most commonly raised way that trade played a role for the majority of regulators.

As an environmental regulator indicated the '*biggest trade concern is notification*'. Additionally, one health regulator argued, the '*real desire to is to be as open as we can*'.<sup>346</sup>

### ***Ensuring compatibility with new and existing trade and investment commitments***

Another way in which international trade and investment played a role in the regulatory development process was with respect to ensuring compatibility with both new and existing trade and investment commitments. In the case of trade agreements, a number of regulators indicated that they would often become involved in the trade negotiation process in an effort to ensure that Canada did not commit to standards which were lower than existing domestic standards. With respect to Canada's existing commitments, regulators felt it was important to ensure any new regulations were consistent with SPS and TBT agreements to which Canada was signatory.

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<sup>346</sup> Canadian Federal Regulator Interview transcripts – un-attributable quote due to confidentiality

As one senior health regulator indicated ‘*Trade is an issue with new agreements as we want to ensure that standards are not lowered*’. Another environmental regulator suggested that they need to ‘*consider formal obligations. Is a measure justified under statute?*’<sup>347</sup>

### ***Avoiding barriers to trade***

Regulators also identified their efforts at avoiding barriers to trade as an influence on the regulatory development process. This issue is arguably more prominent under the current Canadian administration given the focus on regulatory cooperation with trading partners in efforts to ensure market access and the push to reduce regulatory burden on corporations while encouraging competitiveness. ‘*The number one consideration is how effective will the regulations be. How can we make them as effective as possible without burden for industry?*’ argued a senior regulator.

For many regulators the only time they consider the trade implication of their proposed regulations is during the preparation of the Regulatory Impact Analysis Statement (RIAs). Under the RIAs regulators must consider the impact of their proposed regulation with respect to ‘costs or savings to government, businesses, or Canadians and the potential impact on the Canadian economy and its international competitiveness’<sup>348</sup> These would include any potential trade and investment impacts and how they might be mitigated so as to ensure the least possible economic burden on Canadians and businesses.

As one health regulator put it ‘*RIAs are the key driver for trade considerations*’<sup>349</sup>

### ***Avoiding international trade and investment disputes***

The extent to which regulators seek to avoid international trade or investment disputes when developing regulations was of great interest to this research. This was not a widespread theme amongst the senior regulators that were interviewed. As noted previously however, 36% of survey respondents selected it as a factor that they consider, and there was some awareness regarding the possibility that new regulations or changes to regulations could result in a trade dispute. An analysis was undertaken to understand how this differed by Department and level of seniority.

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<sup>347</sup> Canadian Federal Regulator Interview transcripts – un-attributable quote due to confidentiality

<sup>348</sup> Treasury Board of Canada Secretariat. 2009. RIAS Writers Guide. Government of Canada Publication. Catalogue No. BT53-16/2009E-PDF. ISBN 978-1-100-15046-8

<sup>349</sup> Canadian Federal Regulator Interview transcripts – un-attributable quote due to confidentiality

Looking at the survey data collected on this issue, when a cross tabulation was performed, the importance placed on this did differ by department with the most concern to avoid disputes being shown among regulators at the Canadian Food Inspection Agency (57%), Transport Canada (75%) and Natural Resources Canada (75%). The number of respondents from these departments was small however and when we look at the larger responses from Environment Canada and Health Canada the number of regulators who see this as a concern is much lower at 45.5% and 30% respectively. None of the regulators from the Canadian Nuclear Safety Commission saw this as a concern.<sup>350</sup>

Direct logistic regression was performed to assess the impact of seniority levels of regulators on the likelihood that they would consider '*the avoidance of trade and investment disputes*' in the regulatory development process. The model contained five levels of seniority as independent variables (Director General, Director, Head of Section, Manager, Other).<sup>351</sup> The strongest predictor of a regulator's likelihood to consider trade and investment dispute avoidance as a factor was the level of Director General, recording an odds ratio<sup>352</sup> of 3.056. This indicated that regulators at the Director General level were 3 times more likely to identify this as a factor of concern, controlling for all other factors in the model. Directors were 1.5 times more likely and Head of Sections were 1.6 times more likely to see this as an influencing factor. Managers were .98 times less likely to see this as an important factor showing a negative B value<sup>353</sup> of -.018.<sup>354</sup> (Table 4) This suggests that the more senior a regulator the greater their awareness and the likelihood they would see this as an issue of concern.

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<sup>350</sup> SPSS crosstab analysis was undertaken which showed that the Chi Square test for independence indicated a significant association between government departments and the likelihood they consider the avoidance of trade and investment disputes as an important factor in regulatory development,  $\chi^2(9, n=125)=19, p=0.024, phi=0.392$ .

<sup>351</sup>The full model under the Hosmer and Lemeshow Test<sup>351</sup> showed goodness of fit with significance value of  $1 > .05$ . The model as a whole explained between 3% (Cox and Snell R square) and 4% (Nagelkerke R squared)<sup>351</sup> of the variability based on seniority level and correctly classified 64.8% of cases. None of the independent variables showed a unique statistically significant contribution to the model suggesting that beyond the analysis of this data it may not be generalizable.

<sup>352</sup> Julie Pallant in SPSS Survival Manual quotes Tabachnick and Fidell's 2007 book Using multivariate statistics (5<sup>th</sup> edn). Boston: Pearson Education, 'the odds ratio represents the change in odds of being in one of the categories of outcome when the value of a predictor increases by one unit. P.177

<sup>353</sup> Julie Pallant's SPSS Survival Manual (4<sup>th</sup> edn.). McGraw Hill. 2010 explains that B values are 'equivalent to the B values obtained in a multiple regression analysis'. The positive or negative direction of the B value indicates the direction of the relationship where 'negative B values indicate that an increase in the independent variable score will result in a decreased probability of the case recording a score of 1 in the dependant variable.

<sup>354</sup> These results are presented in a format recommended by Julie Pallant's SPSS Survival Manual (4<sup>th</sup> edn.). McGraw Hill. 2010

**Table 4 – Logistic regression predicting impact of seniority on the likelihood of a regulator considering trade and investment dispute avoidance as a factor**

	B	S.E.	Wald	df	Sig.	Exp (B)	95% C.I. for EXP (B)	
							Lower	Upper
<b>Director General</b>	1.117	.743	2.260	1	.133	3.056	.712	13.107
<b>Director</b>	.417	.662	.397	1	.529	1.517	.415	5.550
<b>Head of Section</b>	.481	.707	.463	1	.496	1.618	.405	6.466
<b>Manager</b>	-.018	.783	.001	1	.982	.982	.212	4.553
<b>Constant</b>	-1.012	.583	3.002	1	.083	.364		

Among the few that mentioned this as an issue in the face-to-face interviews, they saw it as a peripheral influence and something about which they would seek legal advice, but not a factor that would shape the HSE regulation. Generally the type of ‘trade dispute’ was quite vague and did not denote any particular knowledge of trade versus investment disputes, state-to-state versus investor-to-state dispute settlement mechanisms, nor differentiate between the possible regional, bilateral or multilateral fora. A few regulators suggested the need to manage the expectation or perception of foreign investors in order to avoid such a challenge. These regulators were among the few that had had specific experiences with NAFTA Chapter 11. Even in these cases it was made clear that the social mandate was the primary driver in regulatory development and that the desire to avoid a trade dispute simply led to a heightened awareness of the issue and did not alter the outcome. *‘I don’t want to step into a major trade issue. At the same time, it is not our primary mandate which is the protection of health and the environment’*, suggested one senior environmental regulator with experience of NAFTA chapter 11 disputes.

A sub theme was the role played by political interests in the process of regulatory development or in the implementation of regulations such as environmental assessments. As one senior environmental regulator put it *‘trade difficulty arises when there is political interest in a project’*<sup>355</sup>

#### ***Not considering trade and investment***

In efforts to probe awareness of Canada’s international trade commitments and specifically the extent to which they impact regulatory decision making, it became clear that trade and investment are not drivers at all for many health, safety and environmental regulators (20% of those surveyed stated that they are not of concern). There was a lack of understanding of Canada’s trade and investment obligations and no real awareness or widespread concern about the possible impact of investment disputes. Regulators were putting health and safety

<sup>355</sup> Canadian Federal Regulator Interview transcripts – un-attributable quote due to confidentiality

first, saw science as a key driver and as such were concerned with ensuring a risk based, objective, solid science basis to justify adding a regulation in the area of health, safety and the environment. They were consistently clear on this issue.

*Trade commitments are 'not front of mind'* - senior environment regulator

*Trade is 'not a priority'* – senior environment regulator

*'Trade doesn't change what we measure. The results are the results'* – senior health regulator

*'NAFTA Chapter 11 is not on our radar'*<sup>356</sup> – senior health regulator

## **b. The most relevant trade and investment commitments to the regulatory development process**

As outlined above, international trade and investment is from time to time a consideration in the regulatory development process in a number of ways, including some desire to avoid international trade disputes. It was important however to determine to what extent regulators differentiated between international trade and investment agreements such as NAFTA and other international trade commitments at the bilateral and multilateral level. Additionally it was important that they differentiate between the types of trade commitments that were most relevant, such as investment (which could expose their government to ISDS challenges to HSE regulation) versus commitments on SPS or TBT.

### **Types of trade and investment commitments by fora**

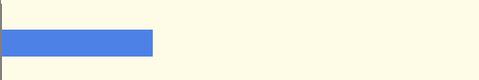
Regulators were asked in the electronic survey which agreements they considered most relevant to the regulatory development process. The largest percentage indicated the relevance of NAFTA at 74% followed by the WTO at 49% and other bilateral agreements at 32%. Only 7% of respondents indicated investment agreements or Foreign Investment Protection Agreements (FIPAs) as being of relevance as outlined in Table 5 below. When level of seniority was factored into the analysis, there was consistent and unanimous support among regulators regarding the relevance of NAFTA to regulatory decision making. At every level of management, over 70% of regulators overwhelmingly indicated this was the case. Director Generals were more inclined than other regulators to identify the WTO as relevant. Most interestingly, all levels of regulator indicated that FIPAs were not relevant, with 84% of Director Generals, 95.5% Directors, 92% Sector Heads, 94% Managers and 100% of technical

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<sup>356</sup> Canadian Federal Regulator Interview transcripts – un-attributable quote due to confidentiality

regulators indicating they did not find them relevant.<sup>357</sup> This is not surprising as the profile of the FIPA in Canada has been quite low (until the recent completion of negotiations towards the Canada-China FIPA which substantially raised the profile), and no ISDS challenges have been launched against the government’s regulatory measures under FIPAs to date.

**Table 5 – Regulators’ views on type of trade and investment agreement most relevant**

<b>9. Where trade is a factor, which types of trade commitments are relevant for you to consider when making a regulatory decision? You can identify as many as are relevant.</b>				
#	Answer		Response	%
1	World Trade Organization (WTO) commitments		57	49%
2	North American Free Trade Agreement (NAFTA) commitments		87	74%
3	Bilateral Free Trade Agreement (FTA) commitments		37	32%
4	Foreign Investment Protection Agreement (FIPA) commitments		8	7%
5	Other		24	21%

Source: Qualtrics Survey of Canadian Federal Regulators – Report May 22 2013

Additionally, direct logistic regression was performed to assess whether regulators were more likely to consider ‘*the avoidance of trade and investment disputes*’ in the regulatory development process with respect to different trade treaties. The model contained four trade treaties as independent variables (WTO, NAFTA, FTA, FIPA).<sup>358</sup> Two of the independent variables showed a unique statistically significant contribution to the model (WTO, FTAs). The strongest predictor of a regulator’s likelihood to consider trade and investment dispute avoidance as a factor was with respect to the WTO, recording an odds ratio<sup>359</sup> of 5,526. This indicated that regulators were 5 times more likely to consider ‘*the avoidance of trade and investment disputes*’ with respect to the WTO, controlling for all other factors in the model. They were 4 times as likely under FTAs (OR=4.226) and 2.5 times as likely under NAFTA

<sup>357</sup> An SPSS cross-tabulation was undertaken to look at the relationship between level of seniority and relevance of Canada’s various trade commitment. A Chi Square test for independence indicated no significant association between level of seniority and relevance of any of the international trade and investment commitments by agreement type. On the WTO the test showed  $\chi^2(4, n=118)=5.99, p=.20, \phi=.22$ , on NAFTA  $\chi^2(4, n=119)=2.49, p=.64, \phi=1.5$ , on FTA  $\chi^2(4, n=119)=4.22, p=.37, \phi=.19$ , on FIPA  $\chi^2(4, n=119)=3.97, p=.41, \phi=.41$

<sup>358</sup> The full model containing all predictors was statistically significant,  $X^2(4, N=116) = 33.42, p<.001$ <sup>358</sup>, indicating that the model was able to distinguish between respondents who did and did not consider the avoidance of trade and investment disputes’ as relevant to the regulatory development process. The model as a whole explained between 25% (Cox and Snell R square) and 34.3% (Nagelkerke R squared)<sup>358</sup> of the variability based on type of agreement and correctly classified 74.1% of cases.

<sup>359</sup> Julie Pallant in SPSS Survival Manual quotes Tabachnick and Fidell’s 2007 book Using multivariate statistics (5<sup>th</sup> edn). Boston: Pearson Education, ‘the odds ratio represents the change in odds of being in one of the categories of outcome when the value of a predictor increases by one unit. P.177

(OR=2.528). Finally they were 0.819 times less likely to consider this issue under FIPAs where the B value was -.204 and the odds ratio was .816.<sup>360</sup> This result suggests that when developing regulations, regulators are most concerned about disputes that might arise under the WTO followed by FTAs and NAFTA. They are not concerned about disputes arising under FIPAs.

**Table 6 – Logistic regression predicting impact of different trade treaties on the likelihood a regulator would consider the avoidance of trade and investment disputes in the regulatory development process**

	B	S.E.	Wald	df	Sig.	Exp (B)	95% C.I. for EXP (B)	
							Lower	Upper
<b>WTO</b>	1.709	.474	12.988	1	.000	5.526	2.181	13.999
<b>NAFTA</b>	.927	.603	2.366	1	.124	2.528	.776	8.241
<b>FTA</b>	1.441	.487	8.746	1	.003	4.226	1.626	10.983
<b>FIPA</b>	-.204	1.010	.041	1	.840	.816	.113	5.910
<b>Constant</b>	-2.741	.635	18.598	1	.000	.065		

Again this finding is interesting for several reasons. First, the likelihood of a trade and investment dispute arising under Canada’s WTO commitments is quite low and yet it plays a bigger role in the minds of regulators. Furthermore such a dispute would involve a state to state action rather than an investor state challenge. Similarly, the likelihood of regulators taking the ‘*the avoidance of trade and investment disputes*’ into account with respect to FTAs as separate from NAFTA is also surprising given the absence of any history of disputes under Canada’s FTAs (apart from NAFTA). This lends some credibility to the assumption that regulators do not fully understand the concept of a ‘dispute’ in this regard and are most likely considering their involvement within these fora on committees dealing with TBT and SPS issues. This is probed below.

### **Types of trade and investment commitments by agreement**

This analysis was also interested in understanding whether regulator’s consideration of disputes under these agreements were with respect to investment commitments or other areas. This is obviously crucial to the research question. To this end, regulators were questioned about the types of commitments they felt had an impact on the regulatory development process under both NAFTA and the WTO with a view to understanding the relative importance of investment agreements.

<sup>360</sup> These results are presented in a format recommended by Julie Pallant’s SPSS Survival Manual (4<sup>th</sup> edn.). McGraw Hill. 2010

**Table 7 – Regulators’ views on the relevance of different NAFTA chapters**

<b>11. For greater clarity please indicate which NAFTA chapters have the most impact on your regulatory decision making process?</b>						
#	Question	SPS Chapter 7 (Sanitary & Phytosanitary Measures)	TBT Chapter 3 (Technical Barriers to Trade)	Investment Chapter 11	Services Chapter 12	Total Responses
1	Has a big impact	18	25	9	2	54
2	Has a small impact	16	33	23	13	85
3	Has no impact	41	32	45	56	174

Source: Qualtrics Survey of Canadian Federal Regulators – Report May 22 2013

As tables 7 and 8 demonstrate, it was the agreements on Sanitary and Pytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) measures that regulators felt had the greatest impact under both NAFTA and the WTO. The majority of regulators felt that NAFTA Chapter 11 on investment and the investment provisions of the WTO (TRIMS) had no, or very limited impact on the regulatory development process.

**Table 8 – Regulators’ views on the relevance of different WTO agreements**

<b>10. For greater clarity, please indicate which WTO agreements have the most impact on your regulatory decision making process?</b>						
#	Question	SPS (Sanitary & Phytosanitary Measures)	TBT (Technical Barriers to Trade)	TRIPS (Trade Related Intellectual Property Rights)	TRIMS (Trade Related Investment Measures)	Total Responses
1	Has a big impact	22	25	5	2	54
2	Has a small impact	13	28	15	12	68
3	Has no impact	45	34	57	60	196

Source: Qualtrics Survey of Canadian Federal Regulators – Report May 22 2013

A cross tabulation was undertaken to determine whether level of seniority had an influence on regulator views about the impact of NAFTA Chapter 11. All levels of regulator felt strongest that NAFTA Chapter 11 did not have a big impact with Head of Section regulators showing the largest inclination at 100%.<sup>361</sup> This is a particularly important finding. While it is not surprising that these regulators will feel the influence of the government’s commitments on SPS and TBT as these agreements go to the heart of their work and requirements for notification. At the same time the fact that they feel very little impact in

<sup>361</sup> A cross tabulation in SPSS was undertaken to look at the relationship between level of seniority and views on the impact of NAFTA Chapter 11. The Chi-Square test for independence indicated no significant association for ‘no impact’  $\chi^2(4, n=97)=2.42, p=.66, phi=.16$ , or ‘small impact’ it showed  $\chi^2(4, n=98)=4.46, p=.35, phi=.21$

their regulatory decision making from NAFTA Chapter 11 on investment is directly relevant to our understanding of any possible chilling effect.

The in-depth interviews reinforced this message. There was little differentiation among regulators between types of trade and investment commitments. More emphasis was placed on WTO and across all agreements on SPS and TBT measures. These were seen as most relevant given their notification requirements. Additionally, many regulators are involved in the SPS and TBT committees set up under NAFTA and the WTO. There was very little awareness of the existence of investment agreements, either NAFTA Chapter 11, bilateral investment treaties (or FIPAs as they are known in Canada) or within the WTO (TRIMS). Similarly there was little awareness of the existence of investor state dispute settlement (ISDS) provisions or the types of disputes which might arise under such provisions. Where there was experience within a department of a NAFTA Chapter 11 challenge there was slightly more awareness.

Direct logistic regression was performed to assess whether the views of regulators about the impact of NAFTA Chapter 11 on decision making was correlated with the likelihood that these same regulators would consider *'the avoidance of trade and investment disputes'* in the regulatory development process. The model contained three impacts of NAFTA Chapter 11 on decision making as independent variables (NAFTA Chapter 11 had a *'big impact'*, *'small impact'* or *'no impact'*). Only one of the independent variables made a unique statistically significant contribution to the model (NAFTA Chapter 11 has *no impact* on decision making).<sup>362</sup> Not surprisingly regulators were less likely (OR = 0.148) to consider *'the avoidance of trade and investment disputes'* in the regulatory development process where they believed NAFTA Chapter 11 had *no impact*, controlling for all other factors in the model.<sup>363</sup> Regulators were 1.2 times more likely to consider this issue when they felt NAFTA Chapter 11 had a *small impact*. This is outlined in Table 9 below.

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<sup>362</sup> The full model containing all predictors was statistically significant,  $X^2(3, N=96) = 20.098, p < .001$ <sup>362</sup>, indicating that the model was able to distinguish between respondents who did and did not consider the avoidance of trade and investment disputes' as relevant to the regulatory development process. The model as a whole explained between 18.9% (Cox and Snell R square) and 25.7% (Nagelkerke R squared)<sup>362</sup> of the variability based on the impact of NAFTA Chapter 11 and correctly classified 72.9% of cases.

<sup>363</sup> These results are presented in a format recommended by Julie Pallant's SPSS Survival Manual (4<sup>th</sup> edn.). McGraw Hill. 2010

**Table 9 – Logistic regression predicting the impact of regulators’ views about the impact of NAFTA Chapter 11 on decision making with the likelihood that these same regulators would consider ‘the avoidance of trade and investment disputes’ in the regulatory development process**

	B	S.E.	Wald	Df	Sig.	Exp (B)	95% C.I. for EXP (B)	
							Lower	Upper
<b>Big Impact</b>	-1.658	.923	3.230	1	.072	.190	.031	1.162
<b>Small Impact</b>	.223	.632	.124	1	.724	1.250	.362	4.318
<b>No Impact</b>	-1.910	.601	10.098	1	.001	.148	.046	.481
<b>Constant</b>	.405	.456	.789	1	.374	1.500		

### c. Experience with trade disputes and concern over investment commitments

Another key component of assessing awareness of Canada’s investment commitments and their impact was to gauge the extent to which regulators had knowledge of the investor state dispute provisions of NAFTA Chapter 11 and the possible policy and cost implications of a challenge.

Regulators were asked whether they were aware of any NAFTA Chapter 11 disputes or threats of a dispute launched against their area of regulatory policy. Very few regulators were aware of any such threats with only 12% claiming awareness. This was very much in line with the in-depth discussions held with senior regulators where there was very little awareness or concern about NAFTA Chapter 11 disputes.

Considering responses by government department, there was zero awareness of NAFTA Chapter 11 disputes amongst regulators from the Canadian Nuclear Safety Commission (CNSC), the Canadian Food Inspection Agency (CFIA), the Department of Fisheries and Oceans (DFO), Transport Canada (TC) and the National Energy Board (NEB) that responded to the survey. Additionally, of more significance 96% of Health Canada (HC) and 97% of Environment Canada (EC) regulators were not aware of NAFTA Chapter 11 challenges despite the fact that a number of past and current challenges would have impacted these departments. Finally, less surprising was the fact that 40% of the Pest Management Review Agency (PMRA) and 77% of the Canadian Environmental Assessment Agency (CEAA) regulators had awareness of NAFTA Chapter 11 disputes reflecting a number of high profile past and present cases<sup>364</sup> in their organizations.<sup>365</sup> Understanding whether this awareness

<sup>364</sup> Both *Chemtura v. Government of Canada* and *Dow AgroScience v. Government of Canada* involved bans on pesticides which come under the remit of the PMRA. The ongoing case *Clayton/Bilcon v. Government of Canada* involves the rejection of a basalt quarry and marine terminal following a federal environmental review within the remit of CEAA.

led regulators to take these disputes into consideration when developing regulations, was the next stage in the process of trying to determine whether the regulatory chill hypothesis was potentially viable.

**Table 10 – Regulator awareness of NAFTA Chapter 11 disputes**

<b>13. Have there been any NAFTA Chapter 11 Investor State Dispute cases launched against your area of regulatory policy that you are aware of?</b>				
#	Answer		Response	%
1	I am aware of a NAFTA Chapter 11 Investor State Dispute against my area of regulation (please describe below)		14	12%
2	I am not aware of any NAFTA Chapter 11 Investor State Dispute against my area of regulation		100	88%
	Total		114	100%

Source: Qualtrics Survey of Canadian Federal Regulators – Report May 22 2013

Among those regulators that were aware as Diagram 11 demonstrates, 42% claimed that despite this awareness it did not influence the regulatory development process at all, while 17% claimed it influenced the process ‘very much’ and 25% ‘some’.

**Table 11 – Regulators’ view on the influence of NAFTA Chapter 11 disputes**

<b>15. If you have answered yes to any of the last three questions, to what degree does this influence your decision making within the regulatory development/ management process?</b>				
#	Answer		Response	%
1	Very much		10	17%
2	Some		15	25%
3	Not very much		10	17%
4	Not at all		25	42%
	Total		60	100%

Source: Qualtrics Survey of Canadian Federal Regulators – Report May 22 2013

In an effort to look at this issue in more depth and to understand the extent to which awareness of disputes had an impact on regulatory decision making, a number of additional cross tabulations were undertaken with the survey data.

<sup>365</sup> SPSS cross tabulation was undertaken to look at the relationship between government departments and awareness of NAFTA Chapter 11 disputes. A Chi-square test for independence indicated a significant association between government department and awareness of Chapter 11,  $\chi^2(9, n=114)=52.41, p=.000, phi=.68$

First we looked at whether a regulator's level of awareness of a NAFTA Chapter 11 dispute or threat affected the extent to which it influenced their regulatory development process. Do they consider this influence more than regulators with no awareness? The results of the cross tabulation suggest that those regulators who were aware of disputes in their areas felt it impacted their decision making only somewhat 28.6% or not very much 28%. Only 21.4% said it impacted their decision on regulatory development process very much.<sup>366</sup> Similarly, the analysis looked at the extent to which a regulator's awareness of NAFTA Chapter 11 disputes or threats, was correlated with their identification of '*the avoidance of trade and investment disputes*' as influencing their regulatory decision making. The results of this analysis suggest that close to two thirds of regulators who were aware of disputes in their area did not also consider '*the avoidance of trade and investment disputes*' as influencing their regulatory decision making.<sup>367</sup> This finding is interesting as it suggests that even when a regulator has awareness of disputes, it is not a key factor in their regulatory development decision making.

#### 4. CONCLUSION

Regulators are focussed on a number of factors in the regulatory development process which include complying with international standards and commitments, harmonizing regulations with the US and internationally, responding to health, safety and environmental needs, responding to advances in science and technology, responding to the expectations of stakeholders such as the provinces, NGOs and the general public, facilitating international trade and responding more recently to domestic streamlining and modernization initiatives.

Trade and investment while not a priority was a consideration in the context of harmonizing regulation with trade partners, ensuring international transparency and disclosure through SPS and TBT commitments, ensuring compatibility with new and existing trade commitments, avoiding barriers to trade to maintain Canada's overall competitiveness and finally, avoiding trade disputes.

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<sup>366</sup> Cross tabulation in SPSS did not show a significant relationship between awareness of Chapter 11 disputes on decision making in the regulatory development process. A Chi-square test for independence indicated no significant association,  $\chi^2(3, n=60)=3.69$ ,  $p=.30$ ,  $\phi=.25$

<sup>367</sup> Cross tabulation in SPSS did not show a significant relationship between awareness of Chapter 11 disputes and whether they also considered the avoidance of trade and investment disputes in the regulatory development process. A Chi-square test for independence (with Yates Continuity Correction) indicated no significant association,  $\chi^2(1, n=113)=.07$ ,  $p=.79$ ,  $\phi=.57$

After completing in-depth interviews with over fifty regulators and the electronic survey of 140 regulators, the general impression was that there was very little to no knowledge of NAFTA Chapter 11 across all the regulatory departments.

Despite very low levels of awareness, the more senior a regulator the greater their awareness of trade and investment disputes and the greater the likelihood they would see this as an issue of concern. Direct regression analysis showed that regulators at the Director General level were 3 times more likely to identify this as a factor of concern, controlling for all other factors in the model. Directors were 1.5 times more likely and Head of Sections were 1.6 times more likely to see this as an influencing factor.

NAFTA was seen as the most relevant agreement by regulators followed by the WTO and other bilaterals. Most interestingly, all levels of regulator indicated that FIPAs were not relevant, with 84% of Director Generals, 95.5% Directors, 92% Sector Heads, 94% Managers and 100% of technical regulators indicating they did not find them relevant.

The strongest predictor of a regulator's likelihood to consider trade and investment dispute avoidance as a factor was with respect to the WTO, recording an odds ratio of 5,526. This indicated that regulators were 5 times more likely to consider '*the avoidance of trade and investment disputes*' with respect to the WTO, controlling for all other factors in the model. This was followed by FTAs and NAFTA.

When we spoke about international trade and investment, there was no differentiation between the different types of trade fora or agreements or their implications. Most references to trade commitments referred to SPS or TBT commitments under the WTO or NAFTA. NAFTA Chapter 11 did not rank as an influencing factor.

It was the agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) measures that regulators felt had the greatest impact under both NAFTA and the WTO. The majority of regulators felt that NAFTA Chapter 11 on investment and the investment provisions of the WTO (TRIMS) had no, or very limited impact on the regulatory development process. All levels of regulator felt strongest that NAFTA Chapter 11 did not have a big impact with Head of Section regulators showing the largest inclination at 100%.

Where there had been a NAFTA dispute that had impacted one of their regulatory measures, the level of knowledge was still quite vague and the understanding of the implications or costs associated with such a challenge was not high. Their experience would have made them more aware and more likely to flag future regulatory changes for legal advice but this did not impact their decision making. These disputes were seen as one off incidents which did not have a bearing on future regulation.

Very few regulators were aware of any such threats with only 12% claiming awareness. This varied by department with 96% of Health Canada (HC) and 97% of Environment Canada (EC) regulators not aware of NAFTA Chapter 11 challenges despite the fact that a number of past and current challenges would have impacted these departments. Finally, less surprising was the fact that 40% of the Pest Management Review Agency (PMRA) and 77% of the Canadian Environmental Assessment Agency (CEAA) regulators had awareness of NAFTA Chapter 11 disputes reflecting a number of high profile past and present cases<sup>368</sup> in their organizations.

Among those regulators that were aware of NAFTA Chapter 11 disputes, 42% claimed that despite this awareness it did not influence the regulatory development process. The results of the cross tabulation suggest that those regulators who were aware of disputes in their areas felt it impacted their decision making only somewhat 28.6% or not very much 28%. Only 21.4% said it impacted their decision on regulatory development process very much.

Taken together, the conclusions in Chapter 4 and Chapter 5 suggest a number of things with respect to the hypothesis on regulatory chill. First, HSE regulatory trends showed a steady and increasing level of stringency in comprehensiveness over the last decade with only a minor demonstrable impact across areas of regulation most frequently subjected to NAFTA Chapter 11 challenges as reflected through both observed trends in regulatory growth or levels of stringency as well as by the presence of a statistically significant impact in 2002 and 2007.

Second, there was very little awareness among HSE regulators about the existence of IIAs and particularly NAFTA Chapter 11. Regulators did not identify trade and investment commitments as an influencing factor in the regulatory development process and where they did merit consideration it was predominantly with respect to the need to ensure trade facilitation with trading partners, meet transparency requirements under international

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<sup>368</sup> Both *Chemtura v. Government of Canada* and *Dow AgroScience v. Government of Canada* involved bans on pesticides which come under the remit of the PMRA. The ongoing case *Clayton/Bilcon v. Government of Canada* involves the rejection of a basalt quarry and marine terminal following a federal environmental review within the remit of CEAA.

agreements or not at all. This did not differ markedly by Federal Department or by level of seniority of the regulator.

Based on the hypothesis of regulatory chill, there did not appear to be evidence of the regulatory trends nor regulator awareness one would expect if chill on the back of IIA disputes were a potential consideration in the Canadian context. Chapter 6 will look at the issue of regulatory chill in the context of global tobacco control regulations. This will also allow for a comparison of a developed versus developing country context as well as the possibility of cross border regulatory chill.

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## Chapter 6: Case Study 2: Tobacco control regulation – A global look at investment and regulation

*'A particularly disturbing trend is the use by the tobacco industry of international trade and investment agreements as a vehicle to seek enhanced market access and protection from regulation.'*

Dr. Margaret Chan, Director General WHO <sup>369</sup>

### 1. INTRODUCTION

The tobacco industry has historically been very litigious in its approach to addressing tobacco control measures imposed by governments globally concerned with the health impact of tobacco use. In recent years the industry has turned to the increased use of the ISDS mechanism under IIAs to challenge legislation on everything from health warnings to plain packaging in emerging market and developed countries alike. Global tobacco control regulations provide a unique opportunity to investigate the potential chilling impact of IIAs, particularly with respect to cross-border chill where the experiences of one country impacts decision making in another.

#### **Methodological overview of Case Study 2<sup>370</sup>**

Interviews were conducted with senior global tobacco control regulators from ten countries, representing four regions during the fifth session of the Conference of the Parties (COP5) of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC). The FCTC conference took place in Seoul, Republic of Korea, from 12 to 17 November 2012. The purpose of the interviews was to gain an understanding of the influences on the regulatory development process and particularly the role played by international trade and investment commitments as well as the impact of recent IIA challenges to tobacco control measures introduced in Uruguay and particularly Australia.

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<sup>369</sup> Speech by Margaret Chan, Director General WHO in February 2013, Harvard University Conference on Governance of Tobacco in the 21<sup>st</sup> Century: Strengthening National and International Policy for Global Health and Development, Cambridge, Massachusetts.

<sup>370</sup> Chapter 3 provides a detailed outline of the methodology

In addition to this an online survey of global tobacco control regulators was conducted in two waves between January and March 2013. This survey was aimed at reaching a broader range of regulators and on probing similar themes to those addressed in the in-depth interviews. There were 28 countries that responded in total with representation from North America, Latin America, Africa, Asia and Europe.

The views of regulators that have emerged from these interviews together with those outlined in the survey findings, and the outcome of a quantitative analysis of countries' reports filed in 2012 and 2013 on progress with tobacco control regulations as reported to the WHO Framework Convention on Tobacco Control (FCTC), provide a triangulation of data to test the expectations of the hypothesis on regulatory chill.

This chapter will first provide an understanding of the evolution of global tobacco control regulations including the establishment of the WHO FCTC and general trends in tobacco control initiatives worldwide. Second it will outline the tobacco industry response including litigation and challenges that have been launched under IIAs globally. This will then provide the global context on tobacco control for testing both the first 'expectation' on trends in regulation as well the second 'expectation' on the role of international trade and investment in the regulatory development process.

## **2. THE EVOLUTION OF GLOBAL TOBACCO CONTROL REGULATIONS**

The global tobacco epidemic and its related public health implications had reached a pinnacle by the 1990s. Tobacco use was seen as 'a leading cause of premature death'<sup>371</sup>, had resulted in the loss of 3.5 million lives in 1998 with the expectation that deaths could approach 10 million a year by 2030 if left unchecked. The largest impact was being felt in the developing world which accounted for 70% of the deaths. This problem was exacerbated by the strength and wealth of an aggressive tobacco industry intent on promoting tobacco use, the addictive nature of nicotine and the lack of a global approach to tobacco regulation.<sup>372</sup>

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<sup>371</sup> World Health Organization. 2009. History of the WHO Framework Convention on Tobacco Control. ISBN 978241563925. P. 1

<sup>372</sup> Ibid.

### a. The Framework Convention on Tobacco Control (FCTC)

The ‘urgent public health issues’ provided countries with a strong rationale for coordinating tobacco control efforts.<sup>373</sup> The benefits of an international instrument aimed at controlling tobacco use was formally recognised in 1995 by the World Health Assembly (WHA), followed the year later by the initiation of steps to develop a WHO Framework Convention on Tobacco Control.<sup>374</sup> Negotiations for such a treaty began in 1999 culminating in the adoption of the final text in 2003 by the WHA and entered into force with the support of 40 member countries in 2005. That number has since grown to reach 174.<sup>375</sup>

The process of negotiation within the auspices of the WHO helped raise the political profile of the international health problems caused by tobacco use and served to raise awareness of both the key issues and possible interventions, leading to a ‘global agenda for action’.<sup>376</sup> The preamble of the treaty highlights the important commitment of the signatories to ‘give priority to their right to protect public health’.<sup>377</sup> The WHO FCTC consists of broad obligations and requirements (both binding and non-binding) on member countries supported by implementation guidelines and tools focussed on encouraging them to adopt domestic measures aimed at reducing both the demand for and supply of tobacco products. The decision by Parties to create a ‘binding international instrument’ has been beneficial with respect to the obligations it places on signatories to adopt and strengthen tobacco control regulations, as well as ensuring the instrument is ‘subject to the law of treaties, including the presumption against a conflict between two conventions.’ This gives it equal status to other binding international instruments.<sup>378</sup>

The obligations and requirements related to the reduction of demand cover price and tax measures focussed on reducing consumption (Article 6), measures on protection from tobacco smoke exposure (Article 8), the regulation of product content (Article 9), product disclosures (Article 10), packaging and labelling (Article 11), measures aimed at

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<sup>373</sup> Lannan, Kate, ‘The WHO Framework Convention on Tobacco Control: the international context for plain packaging’, in *Public Health and Plain Packaging of Cigarettes*, edited by Tania Voon, Andrew D. Mitchell and Jonathan Liberman with Glyn Ayres, 11-29. Edward Elgar, 2012

<sup>374</sup> WHO FCTC Secretariat. The history of the WHO Framework Convention on Tobacco Control. <http://www.who.int/fctc/about/history/en/>

<sup>375</sup> Lannan, Kate, ‘The WHO Framework Convention on Tobacco Control: the international context for plain packaging’, in *Public Health and Plain Packaging of Cigarettes*, edited by Tania Voon, Andrew D. Mitchell and Jonathan Liberman with Glyn Ayres, 11-29. Edward Elgar, 2012

<sup>376</sup> World Health Organization. 2009. History of the WHO Framework Convention on Tobacco Control. ISBN 978241563925. P. 20

<sup>377</sup> Lannan, Kate, ‘The WHO Framework Convention on Tobacco Control: the international context for plain packaging’, in *Public Health and Plain Packaging of Cigarettes*, edited by Tania Voon, Andrew D. Mitchell and Jonathan Liberman with Glyn Ayres, 11-29. Edward Elgar, 2012

<sup>378</sup> Ibid

strengthening public awareness (Article 12), a ban on advertising, promotion and sponsorship (Article 13) and measures to promote cessation of use and dependence (Article 14). The obligation and requirement related to the reduction of supply include measures aimed at eliminating the illicit trade in tobacco products (Article 15), prohibiting the sale of tobacco products to minors (Article 16), and promoting viable alternative activities for tobacco workers, growers and sellers (Article 17). The overall goal is the strengthening of both 'national and international coordination in the fight against the tobacco epidemic'<sup>379</sup> and to contribute to the protection of human health from the consequences of smoking and exposure to tobacco smoke.<sup>380</sup>

Those tobacco control measures which have garnered the most attention from the general public and resulted in the most aggressive responses from the tobacco industry have been those dealing with the packaging and labelling of tobacco products (Article 11) and those encouraging a comprehensive ban on advertising promotion and sponsorship of tobacco products (Article 13).

### ***Article 11***

Article 11 of the FCTC is focussed on the establishment of measures dealing with the packaging and labelling of tobacco products. The FCTC Guidelines for the implementation of Article 11 argue that 'well-designed health warnings and messages on tobacco product packages have been shown to be a cost-effective means to increase public awareness of the health effects of tobacco use and to be effective in reducing tobacco consumption.'<sup>381</sup> The convention specifies that health warnings and messages should be 'large, clear, visible and legible' while ensuring maximum visibility' and 'should be 50% or more, but no less than 30%, of the principal display areas.' Parties are encouraged to make use of coloured pictures or pictograms in their health warnings as well as ensure that health warnings are rotating given that 'evidence suggests that the impact of health warnings and messages that are repeated tend to decrease over time.'<sup>382</sup>

Article 11 also encourages parties to ensure the tobacco product packaging and labelling is not misleading or deceptive with respect to the product and health effects of its use. Finally, Article 11 asks parties to consider adopting plain packaging measures. Plain packaging is

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<sup>379</sup> Ibid

<sup>380</sup> Gruszczynski, Lukasz, 'The WHO Framework Convention on Tobacco Control as an International Standard under the TBT Agreement?' *Transnational Dispute Management* (2012) P.4

<sup>381</sup> Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labelling of tobacco products)

<sup>382</sup> Ibid.

defined as ‘measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style.’<sup>383</sup>

### ***Article 13***

Article 13 of the FCTC is focussed on the establishment of measures dealing with tobacco advertising, promotion and sponsorship. The FCTC Guidelines for the implementation of Article 13 argue that parties should consider instituting a comprehensive ban on tobacco advertising, promotion and sponsorship<sup>384</sup>, banning the visibility of tobacco products at points of sale, the internet sales of tobacco, ‘brand stretching’ and ‘brand sharing’<sup>385</sup>, and adopting plain packaging requirements. The guidelines argue that there is well documented evidence that such a ban results in a decrease in tobacco use.

To date, both prior to and under the auspices of the WHO FCTC, countries have implemented a wide variety of tobacco control measures aimed at addressing the issues of packaging and labelling as well as advertising promotion and sponsorship. Specific measures aimed at banning tobacco products from the point of sale, mandating large health warnings (covering over 50% of the front and back of packaging) including those which make use of coloured pictograms as well as a complete ban on tobacco advertising, promotion and sponsorship have become increasingly common among developed and developing countries. While many countries have also given consideration to adopting measures on plain packaging, to date only Australia has passed a law to this effect. *The Tobacco Plain Packaging Act* was passed in 2011 and became law in 2012. The Australian law prohibits ‘the use of logos, brand imagery, symbols, other images, colours and promotional text on tobacco products and tobacco product packaging’.<sup>386</sup> Additionally ‘packaging must be a standard drab dark brown colour in

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<sup>383</sup> Ibid.

<sup>384</sup> The Guidelines for implementation of Article 13 of the WHO Framework Convention on Tobacco Control (Tobacco Advertising, Promotion and Sponsorship) argues that a comprehensive ban would include ‘all advertising and promotion, as well as sponsorship, without exception; direct and indirect advertising, promotion and sponsorship; acts that aim at promotion and acts that have or are likely to have a promotional effect; promotion of tobacco products and the use of tobacco; commercial communications and commercial recommendations and actions; contribution of any kind to any event, activity or individual, advertising and promotion of tobacco brand names and all corporate promotion; and traditional media and all media platforms, including internet, mobile telephones and other new technologies as well as films.’

<sup>385</sup> The Guidelines for implementation of Article 13 of the WHO Framework Convention on Tobacco Control (Tobacco Advertising, Promotion and Sponsorship). Brand stretching ‘occurs when a tobacco brand name, emblem, trademark, logo or trade insignia is connected with a non-tobacco product or service to cause an association while brand sharing ‘occurs when a brand name, emblem, trademark, logo or trade insignia on a non-tobacco product or service is connected with a tobacco product or tobacco company’ to cause an association.

<sup>386</sup> ‘Australia’s World First Plain Packaging’, McCabe Centre for Law & Cancer website. Accessed 12 December 2013. <http://www.mccabecentre.org/focus-areas/tobacco/australias-world-first-plain-packaging>

matt finish'<sup>387</sup>. As the first country to adopt such measures, Australia is both a regulatory leader and a target for aggressive litigation by the global tobacco industry.

## **b. The tobacco industry and its response**

The tobacco industry has long had a history of litigation, challenging tobacco control laws in domestic courts and through international fora. In more recent years there have been a number of landmark challenges launched by the tobacco industry through international trade and investment treaties, largely aimed at fighting 'the effective implementation of the tobacco control measures in the WHO FCTC.'<sup>388</sup> The case of Australia's plain packaging legislation provides an interesting point of reference as it has faced legal challenges in domestic Australian courts, under investor-state provisions of the bilateral investment treaty between Australia and Hong Kong and at the World Trade Organization (WTO). In general the industry arguments are that tobacco control policies, such as Australia's plain packaging legislation infringe the intellectual property rights of tobacco companies and would not be justifiable on public health grounds because such measures are not proven to be effective at reducing tobacco consumption and finally that these measures amount to an 'acquisition of property without just terms'<sup>389</sup>. Furthermore the industry argues that such policies will hurt small business retailers and increase illicit trade in tobacco products.<sup>390</sup>

### **Litigation through domestic courts**

The tobacco industry has historically been very active in domestic courts challenging tobacco control legislation. They have threatened and launched constitutional challenges to plain packaging proposals and legislation mandating a comprehensive ban on advertising in Canada in the 1990s and more recently unsuccessfully challenged the constitutionality of Australia's plain packaging legislation and the Government of Norway's visual display ban of tobacco products at point of sale.

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<sup>387</sup> Ibid.

<sup>388</sup> Lannan, Kate, 'The WHO Framework Convention on Tobacco Control: the international context for plain packaging', in *Public Health and Plain Packaging of Cigarettes*, edited by Tania Voon, Andrew D. Mitchell and Jonathan Liberman with Glyn Ayres, 11-29. Edward Elgar, 2012

<sup>389</sup> Evans, Simon and Jason Bosland, 'Plain packaging of cigarettes and constitutional property rights', in *Public Health and Plain Packaging of Cigarettes*, edited by Tania Voon, Andrew D. Mitchell and Jonathan Liberman with Glyn Ayres, 48-80. Edward Elgar, 2012

<sup>390</sup> Liberman, Jonathan and Michelle Scollo, Becky Freeman and Simon Chapman, 'Plain tobacco packaging in Australia: the historical and social context', in *Public Health and Plain Packaging of Cigarettes*, edited by Tania Voon, Andrew D. Mitchell and Jonathan Liberman with Glyn Ayres, 30-47. Edward Elgar, 2012

### *JT International SA vs. Commonwealth of Australia*

In this case Australia British American Tobacco, Imperial Tobacco, Japan Tobacco and Philip Morris International challenged the Australian Government's 2011 plain packaging legislation arguing it restricted intellectual property rights and amounted to an 'acquisition of property without just terms'<sup>391</sup>. The Australian High Court held that the Act was valid as it did not constitute an acquisition of property or an infringement of intellectual property rights in August 2012. As Liberman argues, 'The outcome of the litigation vindicated the Australian Government's decision to stare down the tobacco industry's legal threats, bluff and bluster.'<sup>392</sup>

### *Philip Morris Norway AS vs. Statenv/Helse-Og Omsorgsdepartementet*

Philip Morris challenged the Government of Norway's visual display ban of tobacco products before the Oslo District Court in 2010. The Oslo District Court requested guidance from the Court of Justice of the European Free Trade Association States (EFTA Court) asking whether a visual display ban on tobacco products constituted an obstacle to trade and whether it is justifiable on public health grounds.<sup>393</sup> The court ruled that the measure was suitable for the protection of human health. While the EFTA court agreed that such a measure did hinder the free movement of goods it left it up to the national court to determine if the measure was justified for the protection of public health.

## **Litigation under IIAs**

Challenges to tobacco control measures under IIAs is a very recent phenomena but one which has caused growing concern among health regulators worldwide and raised fears about the possible cross border chilling effects. The most high profile cases are those by Philip Morris International challenging both the Government of Australia's plain packaging legislation through the Australia-Hong Kong BIT and the Government of Uruguay's law on health warnings via the BIT between Uruguay and Switzerland. The ISDS cases against Australia and Uruguay are still underway at the time of writing.

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<sup>391</sup> Evans Simon and Jason Bosland, 'Plain packaging of cigarettes and constitutional property rights', in *Public Health and Plain Packaging of Cigarettes*, edited by Tania Voon, Andrew D. Mitchell and Jonathan Liberman with Glyn Ayres, 40-80. Edward Elgar, 2012

<sup>392</sup> Liberman, Jonathan, 'Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia', *American Journal of Law & Medicine*, 39(2013): 361-381. P.380

<sup>393</sup> Alemanno, Alberto, 'The Philip Morris Norway Judgement: The First International Challenge to Point of Sale Tobacco Display Bans', *Transnational Dispute Management* (2012) P.4

### ***Philip Morris Asia Limited vs. The Commonwealth of Australia***

Philip Morris Asia launched an investor state dispute challenge against Australia in June 2011 under the bilateral investment treaty between Australia and Hong Kong<sup>394</sup> over its plain packaging legislation. PMI are arguing that these tobacco control measures constitute an expropriation of its intellectual property and that it has not been afforded fair and equitable treatment. The Australian Government is arguing for rejection of the claim based on jurisdiction<sup>395</sup> and counters the claim of expropriation. A ruling on the issue of jurisdiction is expected in early 2014.

### ***Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v. Oriental Republic of Uruguay***

In 2010 Philip Morris challenged Uruguay's measures on health warnings covering 80% of cigarette packaging surface under the investor state provisions of the bilateral investment treaty between Switzerland and Uruguay. PMI has argued that the tobacco control measures are discriminatory, fail to provide fair and equitable treatment, constitute indirect expropriation and violate intellectual property commitments under TRIPS. In July 2013 the World Bank arbitration tribunal UNCITRAL agreed to hear the claim. A decision is expected in the next 2 to 3 years.

## **At the WTO**

The multilateral trade forum has also become a venue for challenges to tobacco control regulations from other countries concerned about the broader policy implications. This also raises the spectre that the tobacco industry has succeeded in its indirect influence on developing countries in its attempt to curtail aggressive tobacco control regulations which threaten its livelihood.<sup>396</sup>

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<sup>394</sup> Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments

<sup>395</sup> The arguments on jurisdiction relate to the objections raised by Australia regarding the fact that Philip Morris Asia only made its investment in Australia after the government had already announced its intention to pursue plain packaging. This point is raised in Voon, Tania and Andrew D. Mitchell, 'Implications of international investment law for plain tobacco packaging: lessons from Hong Kong-Australia BIT', in *Public Health and Plain Packaging of Cigarettes*, edited by Tania Voon, Andrew D. Mitchell and Jonathan Liberman with Glyn Ayres, 137-172. Edward Elgar, 2012

<sup>396</sup> According to the McCabe Centre for Law and Cancer' it has been reported that the tobacco industry has been providing support to countries that are challenging Australia's laws. According to [Bloomberg](#), British American Tobacco is contributing to Ukraine's and Honduras' legal costs, and Philip Morris to those of the Dominican Republic. The two companies told the [Financial Times](#) back in April 2012 that they were providing such support.' <http://www.mccabecentre.org/blog-main-page/waiting-out-the-legal-challenges>

*Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*

Since September 2012, the Ukraine, Cuba, Dominican Republic, Honduras and Indonesia have all launched complaints against Australia's plain packaging legislation at the World Trade Organization. In a few cases dispute panels have been established to hear these complaints. The biggest concern amongst these developing countries is that the Australian measures are impacting intellectual property rights and Australia's commitments under TRIPs, and the validity of registered trademarks and that these measures are more restrictive than necessary to achieve the stated public health goals, violating the agreement on Technical Barriers to Trade (TBT). According to the International Centre for Trade and Sustainable Development, the Dominican Republic, is most concerned about 'the difficulties that producers in small and medium-sized economies would face in remaining competitive in the tobacco market due to the bill.'<sup>397</sup> A number of countries have come out in formal support of Australia at the WTO including Uruguay, New Zealand and Norway. A ruling is not expected before the middle of 2014.

**Concern about chill and calls for reform of IIA ISDS**

While litigation has long been an instrument of choice for the tobacco industry, these cases raise the specter of an entirely different vehicle for challenging the tobacco control measures of governments and the autonomy of governments to regulate in the public interest. Concerns about regulatory chill have been raised in this context. A New York Times article in December 2013 highlights concerns by tobacco opponents that the tobacco industry strategy is 'intimidating low-and middle-income countries from tackling one of the gravest health threats facing them: smoking.'<sup>398</sup> While the article claims the four African countries of Namibia, Gabon, Togo and Uganda have all 'received warnings from the tobacco industry that their laws run afoul of international treaties', it also goes on to highlight Uruguay's acknowledgement that its own BIT defense against Philip Morris International was only made possible through financial support by former New York Mayor Michael Bloomberg's foundation.<sup>399</sup>

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<sup>397</sup> International Centre for Trade and Sustainable Development, 'Australian Cigarette Packaging Law Hits a Nerve with Developing Countries', ICTSD Intellectual Property Programme. Volume 15, Number 22, 15 June 2011

<sup>398</sup> Sabrina Tavernise, 'Tobacco Firms' Tactics Limit Poorer Nations' Smoking Laws', The New York Times, December 13, 2013.

<sup>399</sup> Ibid.

Public policy advocates and legal scholars have also raised recommendations on how this issue might be addressed given the important public health concerns raised by tobacco products and the aggressive use of IIAs by the tobacco industry. Among the recommendations have been calls for the exclusion of an ISDS mechanism in future treaties,<sup>400</sup> for treaties to 'include an exemption for investments involving 'dangerous good'<sup>401</sup>, constituting a new addition to general exemptions but specific to tobacco control measures'<sup>402</sup>, and a reformulation of the IIA provisions most commonly invoked in ISDS arbitrations on expropriation and fair and equitable treatment to 'ensure that a State's policy space will be protected.'<sup>403</sup> If all else fails, it has been argued countries always have the option of non-compliance with arbitral rulings given the challenges that tobacco companies would likely have enforcing them with respect to 'considerations of public policy and sovereign immunity.'<sup>404</sup>

### **The influence of legal action by the tobacco industry**

During the course of this research, tobacco regulators were asked whether they faced legal challenges by the tobacco industry and whether the industry had an influence on their regulatory development process. Broadly speaking regulators fell into three groups, those for whom the industry had a small influence, those for whom the tobacco industry was active but yielded little influence and those for whom the actions of the industry and their influence were strong.

Those who argued that the tobacco industry had a small influence on their regulatory decision making were from both developed and developing countries. They had not faced litigation either through their domestic court systems (sometimes due to the weakness of the legal systems themselves) or through any kind of international agreement or forum. This

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<sup>400</sup> This proposal reflects the position adopted by the Government of Australia in the 2011 Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement : Trading Our Way to More Jobs and Prosperity (.  
<http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx>)and has been proposed by numerous public policy advocates and scholars including a petition signed by a large

number of respected jurists from Australia, New Zealand, the USA, Canada, Peru and Chile in May 2012 ('An Open Letter From Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement' May 8, 2012 <http://tpplegal.wordpress.com/open-letter/>)

<sup>401</sup> Nottage, Luke, 'Consumer Product Safety Regulation and Investor-State Arbitration Policy and Practice after Philip Morris Asia v. Australia', *Transnational Dispute Management*, (2012) Volume 9, Issue 5. [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

<sup>402</sup> Lester, Simon, 'Free Trade and Tobacco', *Transnational Dispute Management*, (2012) Volume 9, Issue 5. [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

<sup>403</sup> Rojidi, Faraz and Junianto James Losari and Alberto Madero, 'No Coverage for Tobacco Industries With Regard to Tobacco-Control Measures-The Future of International Investment Agreements?', *Transnational Dispute Management*, (2012) Volume 9, Issue 5. [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

<sup>404</sup> Voon, Tania and Andrew D. Mitchell, 'Implications of international investment law for plain tobacco packaging: lessons from Hong Kong-Australia BIT', in *Public Health and Plain Packaging of Cigarettes*, edited by Tania Voon, Andrew D. Mitchell and Jonathan Liberman with Glyn Ayres, 137-172. Edward Elgar, 2012

group were adamant that the industry had little influence in their countries and that they were not a driver of policy development.<sup>405</sup>

The second group had experienced an active industry response to their tobacco control initiatives either through domestic courts or through regional trade bodies yet felt this did not influence their regulatory decision making. In these cases the regulators had managed to overcome the legal challenges by winning their cases and passing the legislation in question, and had therefore persevered with their regulatory initiatives despite the tactics of the tobacco industry. This second group had vocal proponents from both developed and developing countries.<sup>406</sup>

Finally, the third group felt a strong influence by the tobacco industry in their regulatory development process. A number of developing countries argued that they had faced legal challenges in their domestic court which had succeeded in blocking government support for their policies. Additionally, one country regulator talked about the influence of the tobacco industry resulting from its close ties to the political presidency. Developed countries discussed how the tobacco industry had openly lobbied against the consideration of plain packaging measures and threatened litigation. These countries identified the cross border influence of judicial action by the tobacco industry and were vocal about the fact that they wanted to ‘wait and see’ what happened in Australia prior to initiating their own measures on plain packaging. There was awareness and concern about the resourcefulness of the tobacco industry in their efforts at treaty shopping.<sup>407</sup> While this sets the context, the remainder of this chapter will seek to test the expectation of the hypothesis on regulatory chill.

### **3. TESTING EXPECTATION 1: TRENDS IN TOBACCO CONTROL REGULATION OVER LAST DECADE**

**Expectation 1 – We would expect HSE regulatory trends to reflect regulatory chill through the level of uptake in key tobacco control measures in the wake of IIA challenges**

In an effort to understand the trends in tobacco control regulation we have looked at the analysis of countries’ measures undertaken by the Canadian Cancer Society as well as our own independent analysis of country reports submitted to the WHO FCTC in 2011 or 2012.

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<sup>405</sup>In-depth interviews with Tobacco Control regulators – non attributable comment due to confidentiality

<sup>406</sup>Ibid

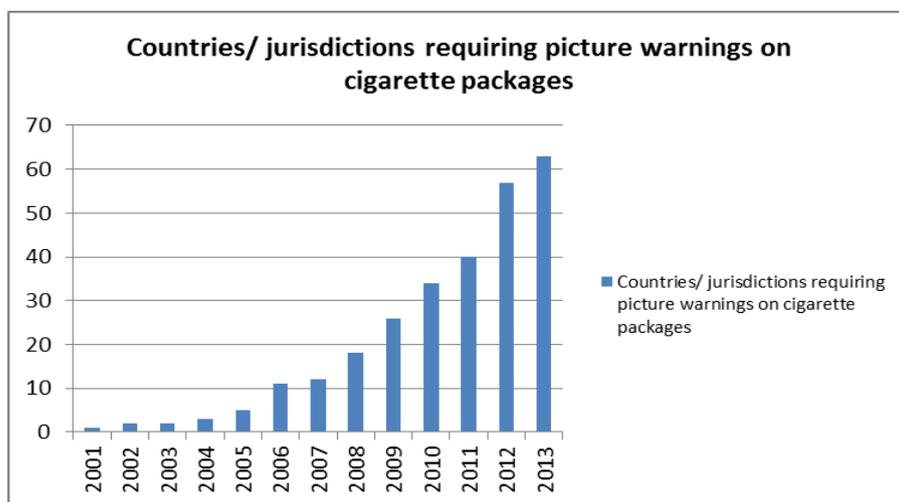
<sup>407</sup> Ibid.

### a. Trends in tobacco control regulations

The Canadian Cancer Society produced an International Status Report on Cigarette Package Health Warnings in 2012 which highlighted the upward trend in the number of countries adopting tobacco control measures in this area. It is interesting to note that 63 countries/jurisdictions have now adopted picture health warnings on tobacco packaging. Diagram 1 shows the evolution of this policy.<sup>408</sup>

Furthermore the increase in the number of countries which have adopted health warnings covering 30% and 50% of the package front and back has increased steadily since 2008. As the International Status Report highlights '47 countries/ jurisdictions have warnings covering at least 50% of the package front and back, up from 32 in 2010 and 24 in 2008.'<sup>409</sup> Despite the legal challenges faced by Uruguay for its 80% warnings outlined above, seven other countries from the same region rank in the top 37 countries in terms of the size of warnings on the front of package at 50% on average for Argentina, Bolivia, Chile, Honduras, Panama and Peru and 60% in the case of Ecuador.<sup>410</sup> While this regional trend is a fair distance from the 80% health warnings Uruguay has put in place it illustrates that the countries in the region remain among those countries moving in the direction of more aggressive warnings.

**Diagram 1 – Countries/ jurisdictions requiring picture warnings on cigarette packages**



Source: Canadian Cancer Society. Cigarette Package Health Warnings – International Status Report- 2012

<sup>408</sup> Canadian Cancer Society. Cigarette Package Health Warnings – International Status Report – Third Edition. October 2012

<sup>409</sup> Ibid.

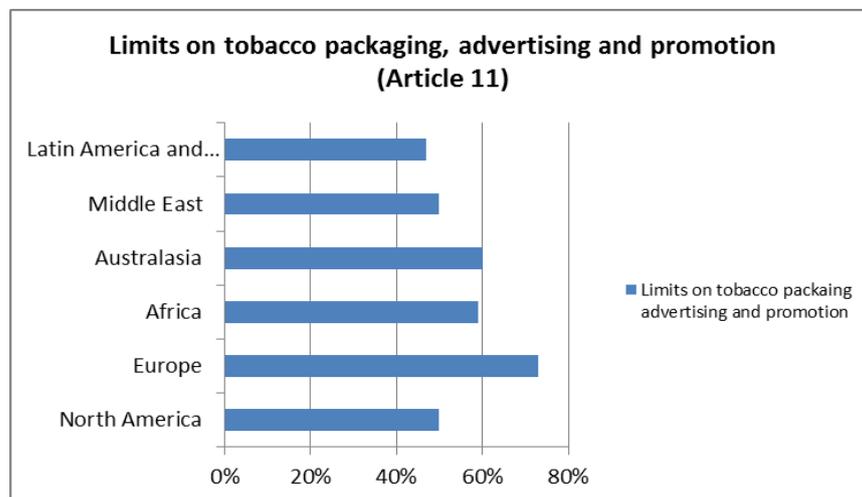
<sup>410</sup> Ibid.

## Level of uptake of tobacco control measures

Those 174 countries that are signatories to the WHO Framework Convention on Tobacco Control (FCTC) have committed to regularly report how they are meeting their obligations under the convention across all areas of tobacco control regulation. This analysis was particularly interested in understanding the extent to which countries have met their obligations in the areas of packaging and labelling of tobacco products (Article 11) and tobacco advertising, promotion and sponsorship (Article 13). As already mentioned these are areas which have been most commonly subject to tobacco industry litigation both through domestic courts as well as through international trade and investment treaties such as the WTO and IIAs in recent years.

To facilitate the analysis of uptake of tobacco control regulation by country and region a database was created for this research out of the raw data included in country reports submitted by parties to the convention in 2011 and 2012, indicating whether they had complied with Articles 11 and Article 13 of the FCTC convention. There were 131 reports submitted during this period and used for the purpose of this analysis.<sup>411</sup>

**Diagram 2 – Limits on tobacco packaging advertising and promotion**



Source: Analysis of WHO FCTC reports of the Parties submitted in 2011/2012

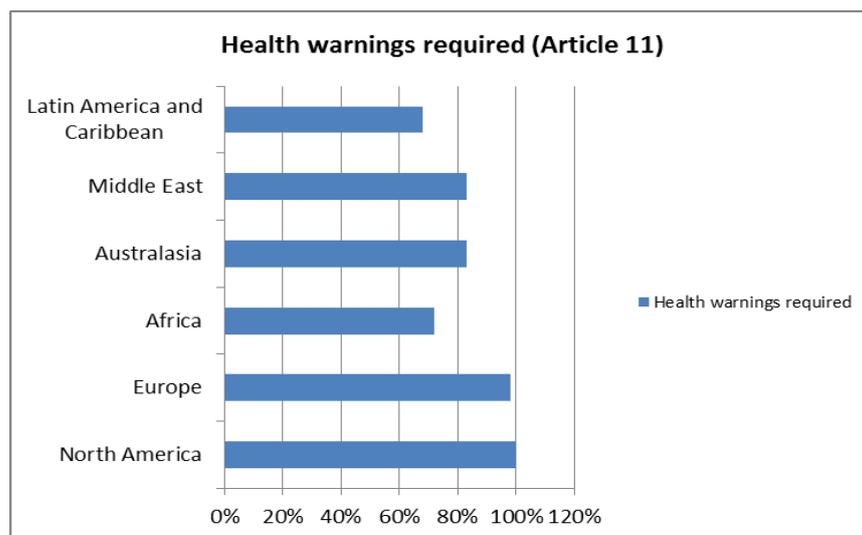
Under the country reporting system, Section 3.2.5.1 of Article 11 of the FCTC asks whether Parties have adopted and implemented measures requiring that tobacco products ‘do not

<sup>411</sup> Chapter 3 outlines the methodology used for this analysis. Only reports submitted in 2011 or 2012 were included. A number of countries had last submitted a report between 2008 and 2010. These were deemed too outdated for inclusion. Furthermore it is worth noting that there is an under-representation of reports include which were submitted in Arabic (x) however all reports submitted in English, Spanish and French were included.

carry advertising or promotion'<sup>412</sup>. While the strict interpretation of this requirement would be the adoption of plain packaging measures, we know that Australia is the only country to have done so.<sup>413</sup> Nevertheless based on their responses, countries appear to have adopted measures which are moving in that direction. The analysis of responses shows that at least 50% countries in all regions have placed such restrictions on tobacco packaging, advertising and promotion. In the case of Europe, 73.2% of countries have adopted restrictive measures and 60% in Australasia. Diagram 2 above outlines the findings

Section 3.2.5.3 of Article 11 in the country reports asks whether Parties have adopted and implemented measures requiring tobacco products 'carry health warnings describing the harmful effects of tobacco use'<sup>414</sup>. The analysis of responses shows a very high degree of compliance of countries across all regions. The highest uptake was in North America and Europe with 100% and 98% respectively, followed closely by Australasia at 82% and the Middle East at 82%. The lowest uptake is in the Latin American & Caribbean region with 68.4% of countries complying. Figure 3 below outlines the findings

**Diagram 3 – Health warnings required**



Source: Analysis of WHO FCTC reports of the Parties submitted in 2011/2012

As part of the reports, Section 3.2.5.8 and 3.2.5.9 of Article 11 asks those countries which have implemented health warnings whether they are ensuring that the health warnings occupy no less than %30 and 50% or more of the principal display area respectively. The analysis of responses shows a very high degree of compliance of countries with respect to 30% warning

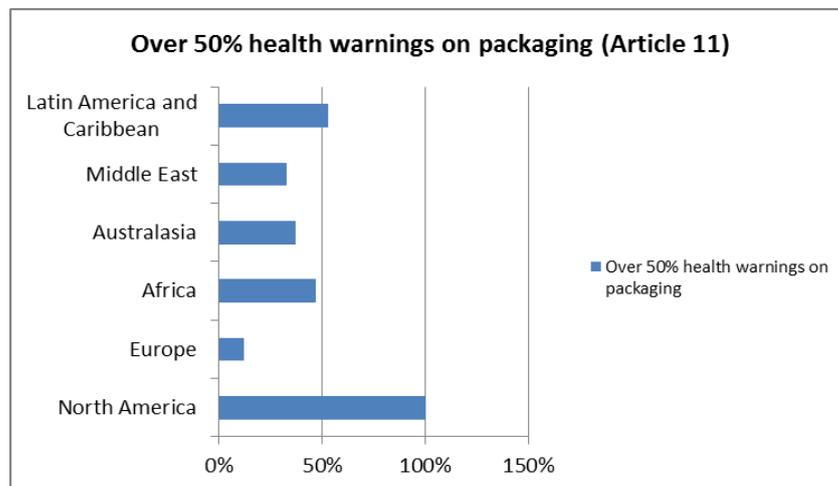
<sup>412</sup> FCTC Parties' reports - <http://www.who.int/fctc/reporting/en/>

<sup>413</sup> The Step by step instructions for the FCTC reporting says that Parties should indicate they have complied if they have put in place measures 'to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging). Many countries have interpreted this more liberally to include measures which 'restrict' rather than 'prohibit'. This was confirmed by an email exchange held with a senior European regulator whose country had responded accordingly.

<sup>414</sup> FCTC Parties' reports - <http://www.who.int/fctc/reporting/en/>

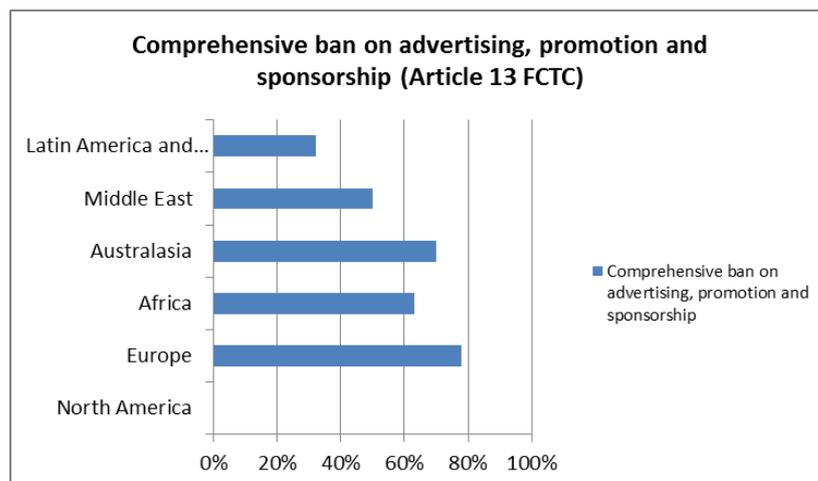
across all regions except Africa at 59.4%. The 50% warnings however have achieved a level of uptake of 47 countries, as outlined earlier by the Canadian Cancer Society. While there has been a steady increase in the number of countries adopting these measures, the percentage per region still remains relatively low with the exception of North America. Europe was the lowest at 12.2% followed by the Middle East at 33.3%, Australasia (36.7%), Africa (46.9%) and Latin America & Caribbean recording the highest uptake at (52.6%). This reinforces the earlier point made regarding the IIA case against Uruguay which we might have expected to have had a downward influence on the level of uptake of such a policy in the region. Diagram 4 below outlines the findings

**Diagram 4 – Over 50% health warnings on packaging**



Source: Analysis of WHO FCTC reports of the Parties submitted in 2011/2012

**Diagram 5 – Comprehensive ban on advertising, promotion and sponsorship**



Source: Analysis of WHO FCTC reports of the Parties submitted in 2011/2012

Finally, Section 3.2.7.1 of Article 13 in the country reports asks whether Parties have adopted and implemented measures ‘instituting a comprehensive ban on all tobacco advertising,

promotion and sponsorship'.<sup>415</sup> With the exception of North America (0%)<sup>416</sup> and Latin America & Caribbean at 31.6%, over 50% of countries in all regions have implemented such measures. The highest uptake was in Europe with 78% of countries adopting such measures. Diagram 5 above outlines the findings.

Overall this analysis shows that countries have been adopting tobacco control measures in the area of packaging, labelling, advertising and promotion at ever increasing rates since 2001. More particularly they have done so equally in regions where these measures have come under challenges by the tobacco industry through IIAs and other trade and investment instruments.

#### **4. TESTING EXPECTATION 2: THE ROLE OF INTERNATIONAL TRADE AND INVESTMENT IN THE REGULATORY DEVELOPMENT PROCESS**

##### **a. Influences on the regulatory development process**

In trying to understand the role played by international trade and investment commitments in influencing the regulatory development process, the in-depth interviews with regulators and the electronic survey probed the main influences.

##### **Survey**

Regulators were asked in the electronic survey to identify what factors influenced the development of tobacco control regulations. They identified domestic public health concerns as the most important followed by the FCTC protocol and guidelines. A country's trade and investment commitments tended to rank between 3<sup>rd</sup> and 5<sup>th</sup> among most countries with the least important influence being the views of tobacco industry stakeholders. Table 1 below illustrates.

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<sup>415</sup> FCTC Parties' reports - <http://www.who.int/fctc/reporting/en/>

<sup>416</sup> Canada faced a successful domestic constitutional challenge by the tobacco industry to its tobacco control legislation in the 1990s dealing with an advertising ban.

**Table 1 – Regulators’ views on the influences on the development of tobacco control regulations**

rs influence your development of tobacco control regulations? Please rank the influences below, where 1 indicates the most influential and 6 the least.								
#	Answer	1	2	3	4	5	6	Total Responses
1	Domestic public health concerns	17	6	4	0	0	1	28
2	The FCTC protocol and guidelines	7	12	5	3	1	0	28
3	The activities of neighboring countries	0	1	6	10	7	4	28
4	Your country's international trade and investment commitments	1	1	6	7	10	3	28
5	The views of key tobacco industry stakeholders	2	0	0	5	5	16	28
6	The views of other stakeholders such as Non-Governmental Organizations (NGOs) or the public	1	8	7	3	5	4	28
	Total	28	28	28	28	28	28	-

Source: Qualtrics Survey of Global Tobacco Regulators – Report May 22 2013

### Face-to-face interviews

During the in-depth interviews, regulators were similarly asked to outline and discuss the primary factors which influenced their regulatory development process, consistent with the survey results though in a slightly different order of importance. The main influencing factors for them were the FCTC obligations and guidelines, the health gap, regional obligations, the actions of other countries, domestic constraints, scientific research, industry influence but not international trade and investment.<sup>417</sup>

#### *FCTC obligations and guidelines*

The primary driver of regulatory development in the area of tobacco control was the FCTC obligations and the subsequent guidelines established for their implementation. Both developed and developing country regulators highlighted the importance of these obligations and the usefulness of the tools given to countries as they pursue new and more aggressive tobacco control regulations.

#### *The health gap*

A major influencing factor for developed countries was the public health gap. Identifying domestic health needs or concerns and developing regulatory policy to address it was seen as a primary goal for tobacco control regulators in the developed world.

<sup>417</sup> Quantitative coding of interview data was undertaken in order to identify the key categories and themes outlined here. Appendix 8 provides the coding and categories resulting from this analysis

### *Regional obligations*

Both developed and developing country regulators highlighted the role played by regional initiatives (such as the Gulf Countries joint efforts on health, education and sports) as well as the constraints of regional obligations and legislative frameworks (such as EU legislation and the *EU Tobacco Products Directive*).

### *Actions of other countries*

The actions of other country in the area of tobacco control was a driver for many developed and developing country regulators both in terms of the learning that can be provided with respect to implementation but also the effectiveness of new measures and the risks inherent in their adoption.

### *Domestic constraints*

Domestic constraints were a big theme among developed and developing countries regulators interviewed. Legal and constitutional constraints played a big role in developed countries, restricting their ability to pursue certain tobacco control regulations. Consideration of the impact of new regulations was important particularly with respect to the economic impact and any unintended consequences such measures might entail. Domestic public opinion was an influencing factor in this regard both with respect to the media, the NGO community and general consensus of opinion on tobacco regulation. Related to this was the level of political will or influence on high profile regulatory measures.

### *Scientific research*

Both developed and developing countries highlighted the importance they placed on scientific research as an influencing factor in their regulatory development. In some cases government researchers were employed directly, others relied on the scientific academic community both domestic and international.

### *Industry influence*

Industry influence was identified as an influencing factor in the regulatory development process by a number of developing countries interviewed.

### *Trade*

Finally, international trade and investment was not raised by regulators as an influencing factor when asked this broader question. There was some concern about the impact of the

illicit trade in tobacco products but not trade with respect to international commitments and litigation through IIAs.

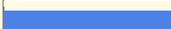
**b. Health Warnings and Plain Packaging - the factors influencing decision making**

Given the IIA challenges in Australia and Uruguay and in an attempt to gauge their impact, regulators were asked about their health warning and plain packaging policies and the factors which will influence their decisions in this regard.

**Health Warnings**

With respect to health warnings and the size of pictorial health warnings, regulators identified domestic public health concerns and the FCTC commitments and guidelines as the largest influences. The threat of an international trade or investment challenge was not a big factor, ranking last with only 18% of regulators surveyed selecting it as relevant.

**Table 2 – Regulators’ views on the factors influencing consideration of pictorial warnings**

<b>5. What factors are important to you when considering either the introduction of pictorial warnings or increases to the size of pictorial warnings on tobacco products? Please select as many of these as are relevant.</b>			
#	Answer		%
1	Domestic public health concerns		86%
2	Framework Convention on Tobacco Control commitments and guidelines		77%
3	The tobacco control policies of neighboring countries		41%
4	The tobacco control policies of world leaders in this area (eg: Australia, Canada, EU countries)		41%
5	The threat of litigation from the tobacco industry		27%
6	The threat of an international trade or investment challenge		18%

Source: Qualtrics Survey of Global Tobacco Regulators – Report May 22 2013

A cross tabulation analysis was conducted in SPSS to look at the degree to which regulators considered the threat of an international trade or investment dispute by geographical region. While it was a consideration by 50% of the regulators from the Middle East, the vast majority of the other regions said it was not (100% in North America, 87.5% in Europe, 85.7% in Africa and 66.7% in Australasia).<sup>418</sup>

<sup>418</sup> While this analysis was not statistically significant or therefore generalizable given the small number of respondents it provides insight into the views of this particular survey sample. A Chi Square test for independence indicated no significant association between geographical region and likelihood to see the threat of trade or investment disputes as an influence on the regulatory development process,  $\chi^2(4, n=21)=2.2, p=.70, \phi=.32$

**Table 3 – Cross tabulation of the influence of a threat of trade or investment dispute by geographical region**

	Threat trade or investment dispute impact		Total
	Yes	No	
<b>North America</b>	00.0%	100.0%	100.0%
<b>Europe</b>	12.5%	87.5%	100.0%
<b>Africa</b>	14.3%	85.7%	100.0%
<b>Australasia</b>	33.3%	66.7%	100.0%
<b>Middle East</b>	50.0%	50.0%	100.0%

Source: Qualtrics Survey of Global Tobacco Regulators – Report May 22 2013 – analysed using SPSS

### **Plain Packaging**

During the in-depth interviews, regulators fell into two groups, those who are not considering the introduction of plain packaging regulations and those that are considering it. Those who are not considering it were generally driven by a number of key and consistent factors. In the case of developing countries they generally argued that it was not a consideration because they had a long way to go in the development of their core and basic tobacco control regulations. They were usually focussed on the establishment and implementation of health warnings – either increasing the size and percentage of the cigarette package it would represent or whether or not to introduce pictograms. Additionally, developing countries were often concerned about the lack of political will or the fact that existing laws were not being enforced. Developed countries that were not considering the introduction of plain packaging measures were either watching and waiting the Australian example or were not clear on the effectiveness of the policy as a means of curbing the use of tobacco products given lack of empirical evidence to date.

Those countries that were considering the introduction of plain packaging measures were also universally interested in understanding the impact the policy would have domestically. Developing countries saw the challenges in dealing with domestic departmental differences particularly with respect to intellectual property concerns. Developed countries were concerned about the risks of introducing such a measure and the need to observe the results of Australia’s current legal challenges, the potential difficulty of getting political approval and the need to defer to regional jurisdiction in the case of the EU.

**Table 4 – Regulators’ stated policy on plain packaging**

<b>6. What is your country's position on the policy of plain packaging?</b>			
#	Answer		%
3	Plain packaging is not a priority for my country		23%
4	We have begun the formal process of considering plain packaging		18%
5	We will consider this policy sometime in the future		59%
	Total		100%

Source: Qualtrics Survey of Global Tobacco Regulators – Report May 22 2013

The electronic survey showed that the majority of countries at 59% will consider plain packaging sometime in the future while 18% have begun the formal process of consideration and 23% do not see it as a priority for their country. Table 4 above shows this breakdown. Furthermore when survey respondents were probed about the main influences on the plain packaging decision, regulators in the electronic survey identified domestic political support as the most important influence on the decision to pursue this policy. This was followed by the compatibility of plain packaging regulations with domestic or regional laws and policies. While 45% of regulators identified Australia’s WTO challenge as an influence, only 23% saw Australia’s BIT challenge as a factor. Table 5 below shows this breakdown. This finding is particularly interesting given our desire to understand the influence of IIA ISDS on regulation policy in this area. While this finding clearly demonstrates awareness of the Australia case and its influence on a country’s policy decision, this awareness is not with respect to the challenge under the Hong Kong Australia BIT.

**Table 5 – Factors of influence on plain packaging decision**

<b>7. Which factors will be influential in your decision to pursue plain packaging (either now or in the future)? Please select as many of these as are relevant.</b>			
#	Answer		%
1	Domestic political support for this policy		73%
2	The compatibility of plain packaging regulations with our domestic or regional laws and policies (e.g: EU law and directives)		50%
3	The FCTC Guidelines for Articles 11 & 13		45%
4	The outcome of the WTO challenge to Australia's plain packaging law		45%
5	The outcome of the Philip Morris investor-state challenge to Australia's plain packaging law		23%
6	Other		5%

Source: Qualtrics Survey of Global Tobacco Regulators – Report May 22 2013

A cross tabulation analysis was conducted in SPSS to look at the importance of Australia’s WTO and BIT challenges by region. With respect to the influence of Australia’s WTO challenge on the regulatory development process it was most important within the

Australasia region (with 75% of those from the region identifying it as an influence) and least important to North America and Latin America (with 100% of those from the region not identifying it as a factor) and Africa (75%).<sup>419</sup> Table 6 below outlines the results.

**Table 6– Cross tabulation of the influence of Australia’s WTO challenge on the regulatory development process by geographical region**

	Australia WTO Challenge		Total
	Yes	No	
<b>North America</b>	00.0%	100.0%	100.0%
<b>Europe</b>	44.4%	55.6%	100.0%
<b>Africa</b>	25.0%	75.0%	100.0%
<b>Australasia</b>	75.0%	25.0%	100.0%
<b>Middle East</b>	50.0%	50.0%	100.0%
<b>Latin America</b>	00.0%	100.0%	100.0%

Source: Qualtrics Survey of Global Tobacco Regulators – Report May 22 2013 – analysed using SPSS

**Table 7 – Cross tabulation of the influence of Australia’s BIT challenge on the regulatory development process by geographical region**

	Australia BIT Challenge		Total
	Yes	No	
<b>North America</b>	00.0%	100.0%	100.0%
<b>Europe</b>	33.3%	66.6%	100.0%
<b>Africa</b>	12.5%	87.5%	100.0%
<b>Australasia</b>	25.0%	75.0%	100.0%
<b>Middle East</b>	50.0%	50.0%	100.0%
<b>Latin America</b>	00.0%	100.0%	100.0%

Source: Qualtrics Survey of Global Tobacco Regulators – Report May 22 2013 – analysed using SPSS

Again of crucial interest was the fact that Australia’s BIT challenge was not seen as an influencing factor by most respondents from every region with the exception of the Middle East at 50%.<sup>420</sup> This is outlined in table 7 above.

The in-depth interviews suggested the influences on the decision making process regarding plain packaging were threefold.

<sup>419</sup> While this analysis was not statistically significant or therefore generalizable given the small number of respondents it provides insight into the views of this particular survey sample. A Chi Square test for independence indicated no significant association between geographical region and likelihood to see Australia WTO challenge as an influence on the regulatory development process,  $\chi^2(5, n=26)=4.99, p=.42, \phi=.44$

<sup>420</sup> 100% from North America, 66.6% from Europe, 87.5% from Africa, 75% from Australasia said it was not a factor. While this analysis was not statistically significant or therefore generalizable given the small number of respondents it provides insight into the views of this particular survey sample. A Chi Square test for independence indicated no significant association between geographical region and likelihood to see the Australia WTO challenge as an influence on the regulatory development process,  $\chi^2(5, n=26)=2.75, p=.74, \phi=.33$ .

*Countries were not ready and needed to focus on the basics first*

Countries were not ready to pursue plain packaging measures because they needed to focus on ensuring their basic framework of tobacco control regulation was in place and being enforced. This was predominantly a developing country issue.

*Trade implications*

Developed countries were concerned about the trade implications of introducing plain packaging measures driven by the on-going trade challenges faced by Australia. There were concerns with the possible impact on intellectual property rights and the general risk of litigation either domestically or through the WTO. In the case of developing countries, the influence of the tobacco industry was a big factor as was the experience of other countries. AS with the survey results, the Philip Morris BIT ISDS challenge was not raised and the focus was on the WTO.

*Legal and constitutional obligations*

Legal and constitutional obligations were another major influencing factor felt by developed countries. They were concerned with ensuring the compatibility of any new regulation with regional policy directives and their own domestic constitutions, given the degree of litigation from the tobacco industry. Finding the appropriate political will for such a policy was also an influencing factor. This was often tied to the high profile nature of Australia's political challenges with the plain packaging policy.

**c. The role of international trade and investment in the regulatory development process**

Beyond the specific example of plain packaging, regulators were asked more generally the extent to which a country's trade and investment commitments were relevant to the regulatory development process on tobacco control. In the electronic survey, roughly a third of regulators equally considered its relevance 'very much', 'some' and 'not very much'.

**Table 8 – Regulators’ views on the relevance of trade and investment commitments**

<b>8. To what extent do you consider your country's trade and investment commitments as relevant to the regulatory development process on tobacco control?</b>			
#	Answer		%
1	Very much		32%
2	Some		27%
3	not very much		32%
4	not at all		9%
	Total		100%

Source: Qualtrics Survey of Global Tobacco Regulators – Report May 22 2013

The in-depth interviews probed this question more deeply with a view to understanding the degree to which regulators considered these issues, their level of awareness of IIAs and the extent to which a legal challenge through an IIA would have an impact on their decision making.

There were a number of key themes in the answers given by regulators. Some regulators argued that trade and investment commitments were not an issue or that they were more focussed on other factors. Others considered trade and investment commitments with respect to the trade challenge experience of other countries. There was some acknowledgment that other domestic departments did consider trade and would therefore seek to influence health regulation in this regard and finally recognition that the consideration of trade and investment was a more recent consideration in the regulatory development process.<sup>421</sup>

***Trade is not an issue or influence***

Many regulators, almost entirely from developing countries claimed that international trade and investment was not an issue which influenced the regulatory development process. They were either not thinking about trade, not aware of trade challenges at home or when aware of trade challenges elsewhere did not see them as having an influencing role. One developed country regulator claimed that *‘international investment agreements mean nothing to me’* and they are *‘not on my radar screen.’*<sup>422</sup>

<sup>421</sup> Quantitative coding of interview data was undertaken in order to identify the key categories and themes outlined here. Appendix 8 provides the coding and categories resulting from this analysis

<sup>422</sup> In-depth interviews with Tobacco Control regulators – non attributable comment due to confidentiality

*They are focussed on things other than trade*

Another major theme raised by regulators was that they were focussed on more important factors than trade when developing tobacco control regulation. Health policy, and the guidelines and obligations of the FCTC and the EU were most commonly raised by developed and developing countries alike. This reflects the earlier answers they gave regarding the main influencing factors and the relative importance of trade and investment.

*Other country's trade challenges are of concern*

Trade seemed more of a concern among developed country regulators in the context of trade challenges faced by other countries. Most commonly raised was the case of Australia and the WTO challenges it was facing with respect to its plain packaging regulations.

*Other domestic departments consider trade*

While many regulators argued that trade and investment was not a consideration for them in the regulatory development process, a number highlighted the fact that other government departments in their countries were concerned about the trade implications of health policy and as such would try to influence the regulatory decision making process as a result. Equally, a number of developed country regulators did admit however that when other domestic departments (such as trade or commerce) were involved in the negotiation of new trade agreements, they as health regulators were interested in ensuring any new trade agreement allowed them to retain their regulatory space.

*Trade is a more recent consideration*

Finally a number of developed country regulators raised the fact that trade had become for them a new consideration alongside other public concerns when developing tobacco control regulations. When probed further, this more recent trade focus was almost exclusively on issues within the WTO and in particular the TBT, SPS & TRIPS agreements. This point is probed further in the next section.

**d. The most relevant trade and investment commitments to the regulatory development process**

Regulators were asked in the electronic survey to specify which trade and investment commitments were relevant when making a regulatory decision on tobacco control. The WTO was identified by 91% of regulators as an important factor. As outlined in table 9, 55% of respondents felt that regional agreements were a factor while only 27% of regulators identified bilateral investment treaties (BITs). This view was reflected in the in-depth interviews with little awareness of BITs and their potential for regulatory challenges and a greater focus on the potential impact of the multilateral trading system and agreements on TBT and SPS.

**Table 9 – Regulators’ views on types of trade and investment commitments of relevance**

#	Answer		%
1	World Trade Organization (WTO) commitments (such as TBT, SPS, TRIPS)		91%
2	Regional trade commitments (e.g.: EU, ASEAN, NAFTA)		55%
3	Bilateral Free Trade Agreement (FTA) commitments		32%
4	Bilateral Investment Treaty (BIT) commitments		27%
5	Other		0%

Source: Qualtrics Survey of Global Tobacco Regulators – Report May 22 2013

It was particularly interesting that regulators focussed on the WTO commitments as most relevant vis-à-vis others when making a regulatory decision on tobacco control, particularly given the fact that the tobacco industry BIT challenges to these regulatory measures have been the most prominent in Australia and Uruguay. While there is arguably industry support behind the country challenges at the WTO it has been less overt and the potential financial implications for member states less dramatic.

**e. Awareness of regulators**

Regulators were asked in the electronic survey to identify whether they were aware of any trade or investment challenges to tobacco control regulations in their countries. The majority at 73% claimed no awareness.

**Table 10 – Regulators’ awareness of trade and investment challenges**

<b>10. Have there been any trade or investment challenges to tobacco control regulations in your country?</b>			
#	Answer		%
1	I am aware of a trade or investment challenge against tobacco control in my country		27%
2	I am not aware of any trade or investment challenge against tobacco control in my country		73%
	Total		100%

Source: Qualtrics Survey of Global Tobacco Regulators – Report May 22 2013

A series of cross tabulations were conducted in SPSS to look at the extent to which regulators that were aware of trade or investment challenges were more likely to also take the Australian WTO and BIT challenges into consideration in their decision making on plain packaging or to consider the threat of trade and investment disputes as a factor in their decision making on pictorial health warnings.

First on the issue of plain packaging, the cross tabulation showed that 87.5% of those regulators who were aware of trade or investment challenges did not consider either the WTO challenge or the Philip Morris BIT challenge to Australia’s plain packaging law in their own decision making on plain packaging.<sup>423</sup>

**Table 11 – Cross tabulation on the impact of Australia’s WTO & BIT challenges on regulators with awareness of challenges**

	Awareness of a trade or investment challenge		Total
	Yes	No	
<b>Australia’s WTO Challenge</b>	12.5%	87.5%	100.0%
<b>Australia’s BIT Challenge</b>	12.5%	87.5%	100.0%

Source: Qualtrics Survey of Global Tobacco Regulators – Report May 22 2013 – analysed using SPSS

Second on the issue of pictorial health warnings the cross tabulation showed that 100% of those regulators who were aware of trade or investment challenges against tobacco control regulations did not consider the threat of such a dispute in developing regulation in the area of health warnings.<sup>424</sup>

<sup>423</sup> While this analysis was not statistically significant or generalizable given the small number of respondents it provides insight into the views of this particular survey sample. A Chi Square test for independence (with Yates Continuity Correction) indicated no significant association between geographical region and likelihood to see the threat of trade or investment disputes as an influence on the regulatory development process,  $\chi^2(1, n=26)=1.9, p=.17, \phi=-.36$

<sup>424</sup> While this analysis was not statistically significant or generalizable given the small number of respondents it provides insight into the views of this particular survey sample. A Chi Square test for independence (with Yates Continuity Correction) indicated no significant association between geographical region and likelihood to see the threat of trade or investment disputes as an influence on the regulatory development process,  $\chi^2(1, n=21)=.625, p=.429, \phi=-.30$

Finally a cross tabulation analysis was undertaken to look at which trade and investment agreements were most relevant to those regulators that had awareness of disputes in their country. 100% of those with awareness identified the WTO, 62.5% regional trade agreements as most relevant. Interestingly 75% of those who registered awareness of disputes in their country felt that FTAs and BITs were not relevant in their decision making.<sup>425</sup>

**Table 12– Cross tabulation of which trade and investment agreements are most relevant for regulators with awareness of challenges**

	Awareness of a trade or investment challenge		Total
	Yes	No	
<b>WTO most relevant</b>	100.0%	100.0%	100.0%
<b>Regional most relevant</b>	62.5%	37.5%	100.0%
<b>FTA most relevant</b>	25.0%	75.0%	100.0%
<b>BIT most relevant</b>	25.0%	75.0%	100.0%

Source: Qualtrics Survey of Global Tobacco Regulators – Report May 22 2013 – analysed using SPSS

The regulators interviewed made very general references to international trade. When discussing international trade challenges which gave them concern, they were almost exclusively referring to the WTO or domestic court challenges faced by Australia. There was very little direct references to the IIA challenges faced by Australia and no reference to the IIA challenge faced by Uruguay.

Regulators were concerned more generally however about litigation from the tobacco industry and the fact that this litigation was morphing in more recent times towards other types of legal challenges such as trade. The issue of forum shopping was raised by one regulator experienced with these matters, but it is clearly a trend that more and more regulators are becoming aware of.

Of interest was the fact that the concern over litigation and trade challenges was most felt among developed country regulators while those from developing countries had little experience of direct litigation given the weak nature of domestic institutions.

<sup>425</sup> While this analysis was not statistically significant or generalizable given the small number of respondents it provides insight into the views of this particular survey sample. A Chi Square test for independence (with Yates Continuity Correction) indicated no significant association between geographical region and likelihood to see the threat of trade or investment disputes as an influence on the regulatory development process,  $\chi^2(1, n=26)=.317, p=.574, \phi=.22$

## 5. CONCLUSION

Overall an analysis of available data showed very little empirical support for the regulatory chill hypothesis. With respect to the first expectation that we would expect trends in tobacco control regulation to reflect regulatory chill through the level of uptake in key tobacco control measures in the wake of IIA challenges, the analysis showed that:

Countries have been adopting tobacco control measures in the area of packaging, labelling, advertising and promotion at ever increasing rates since 2001. More particularly they have done so equally in regions where these measures have come under challenges by the tobacco industry through IIAs and other trade and investment instruments.

Latin American countries were among the highest implementers of 50%+ health warnings despite challenges faced by Uruguay under IIAs on this issue.

With respect to the second expectation that we would expect senior tobacco control regulators to be aware of IIAs and their implications and to take them into consideration in the regulatory development process, the analysis showed that:

The influence of trade and investment commitments was not a leading influencing factor or in the regulatory development process. The majority of regulators ranked it near the end of factors or in the face-to-face interviews did not identify it at all. More influential factors were the health gap, FCTC obligations, actions of other countries, domestic and regional obligations or domestic constitutional issues. Despite emerging experience with IIA litigation the threat of an international trade and investment challenges as a deciding factor on this policy ranked last.

On plain packaging, developing countries were generally more concerned with establishing more basic tobacco control regulations or ensuring the implementation of existing ones. Both developed and developing countries were interested in understanding the effectiveness of the policy and the legal constraints both domestic and regional as well as the challenge of gaining political support

While there was evidence that countries were adopting a 'wait and see' approach to tobacco control on policies such as plain packaging given the legal challenges against Australia, this

seemed to be more directly related to the challenges under the auspices of the WTO or domestic courts. The electronic survey demonstrates that this was particularly focused on Australia's WTO challenge and not the BIT challenge by PMI. A cross tabulation analysis shows that Australia's BIT challenges was not seen as important in the majority of regions.

More broadly on the issue, tobacco control regulators do not consider trade and investment commitments when developing tobacco control regulations except when it is championed by other domestic government departments.

Where trade commitments do play a role in the regulatory development process regulators identified the WTO (90%) as the most relevant influencing type of commitments. BITs ranked last among regulators with many showing a complete lack of awareness or understanding of their existence or potential impact. Where there was awareness, these regulators still identified the WTO as the most relevant and BITS as the least.

Views were expressed by both developed and developing countries regarding concerns about the influence of the tobacco industry on the regulatory development process. This influence was not driven directly by IIA challenges but rather domestic court challenges, threat of litigation (in many possible fora including IIAs) as well as close political ties.

The results of this analysis show little observable evidence regarding the expectations to support the hypothesis of regulatory chill with direct link to IIAs and ISDS challenges. As the same time there is certainly an awareness of the threat of challenges by the tobacco industry and recognition that trade is playing a larger part as a new vehicle for this threat. Domestic litigation and challenges through the WTO multilateral forum seem to be the most top of mind and may be having a chilling impact in their own right evidenced by the comments of both developed and developing countries describing a 'wait and see' attitude to adopting domestic policies in the area of plain packaging prior to the resolution of disputes against the Government of Australia.

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## Chapter 7: Understanding the level of chill – Cross case study analysis and key findings

### 1. INTRODUCTION

While legal scholars, civil society groups and the public press continue to raise concerns about the potential chilling impact of IIAs and ISDS provisions, particularly in the wake of high profile regional and bilateral trade and investment negotiations such as the TPP and TTIP and lingering doubts regarding NAFTA Chapter 11, the majority of scholars have looked at the merits of IIA investment disputes and found little evidence of potential for regulatory chill beyond a handful of anecdotal examples in both developed and developing countries.

This research was aimed at providing a more comprehensive and systematic approach to the consideration of regulatory chill, beyond the case-by-case approach which has characterized analysis of this issue to date. Both the findings of this research and the methodology used are aimed at addressing the gap in research to date by considering not only trends in regulation but the views and understanding of regulators themselves. Coe and Rubins make the point that the regulatory chill thesis ‘assumes that regulators are aware of international law, but are they? On the one hand, it is likely that legislators often attempt to acquaint themselves with the international ramifications of contemplated measures likely to affect foreign enterprises. Indeed, with the unprecedented public awareness of investor–state arbitration and the recent burgeoning of the associated docket, regulators may be more conscious of the prospect of liability than ever before.’<sup>426</sup> This research suggests that this is not the case, at least in the context of the Canadian regulatory environment and as outlined by a snapshot of developed and developing country tobacco control regulators globally.

This thesis has sought to engage with the theory on globalization and particularly the strand concerned about the impact of globalization on government policy autonomy. More specifically, the goal of this research was to understand the impact of International Investment Agreements (IIAs) on national regulatory autonomy. By probing trends in regulation as well as the level of awareness of IIAs by government regulators, the aim of this

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<sup>426</sup> Coe, Jack and Noah Rubins. 2005. Regulatory Expropriation and the Tecmed Case: Context and Contributions. In *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, edited by Todd Weiler, 597-667. London: Cameron May.

research was to identify the likelihood of constrained regulatory decision making or ‘regulatory chill’ amongst those governments who have faced challenges, or the threat of challenges, to their regulatory measures under IIAs. It was also interested in understanding whether any chilling effect was more likely in a developing country versus a developed country environment. Through the use of case studies on the Canadian regulatory environment under NAFTA Chapter 11 and on global tobacco control regulation under IIA investor state dispute settlement (ISDS) challenges, this research sought to answer the following question:

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**What has been the impact of international investment agreements on national regulatory autonomy in the areas of health, safety and environment? Is there evidence of a “chilling” impact on the regulatory development process?**

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The assumption of this thesis was that if the regulatory chill hypothesis was to hold or to be considered a viable possible outcome of IIA legal challenges, we would expect to find a number of observable outcomes in regulator behaviour and regulatory trends across the two case studies. First, one would expect trends in HSE regulation to reflect this chilling impact (through a stagnant or weakening regulatory environment or through the degree of uptake in regulatory policy), particularly in policy areas where regulatory measures were challenged under IIAs. Second we would expect to find a level of awareness and understanding among HSE regulators about the existence and content of IIAs. Any potential causal link between IIAs and regulatory chill also needed to demonstrate that beyond awareness, that IIAs had an influential role on regulators in the HSE regulatory development process.

## **2. KEY CONCLUSIONS WITH RESPECT TO THE REGULATORY CHILL HYPOTHESIS**

### **a. Main conclusion**

Overall this research found that the empirical evidence does not support the hypothesis on regulatory chill. While there are some findings which raise the possibility of influence by IIA ISDS cases on the regulatory development process or trends in regulation, there is no consistent observable evidence to suggest the possibility of regulatory chill.

### **b. Key findings in the Canada Case Study**

The case study on the Canadian regulatory environment found that the empirical evidence did not support the hypothesis on regulatory chill. Overall while the analysis found a declining

trend in the growth rate of new HSE regulations or regulatory changes it did not find evidence of a trend of stagnant or weakening regulations in the wake of NAFTA Chapter 11 challenges which would suggest possible regulatory chill. Additionally the empirical evidence found a low level of awareness among HSE regulators regarding NAFTA Chapter 11 and the potential threat of an ISDS challenge to regulation. The research revealed regulators rarely take Canada's trade and investment commitments into consideration when developing regulations, but when they do, they are more likely to be concerned about trade commitments under the WTO SPS and TBT agreements than NAFTA Chapter 11.

**Canada Case Study - Expectation 1 – We would expect HSE regulatory trends to reflect regulatory chill(through a stagnant or weakening regulatory environment), in the wake of IIA challenges**

In testing the first 'expectation' regarding the regulatory chilling impact of IIAs on HSE regulations in Canada we looked at a number of primary and secondary sources in an effort to achieve a triangulation of data.

An analysis of the Canada Gazette 1 and Canada Gazette 2 shows a declining trend in the growth rate of new regulations or regulatory changes, but an increasing trend in the stringency and comprehensiveness of regulations in health safety and environment. The analysis showed that the trends in adopted regulatory changes under Gazette 2 have been towards neutral regulatory change (58%) or regulatory increases (36%) with 566 regulations representing increases in regulations and 912 showing a more neutral change.

Senior Federal HSE regulators in Canada confirmed the point that regulations in HSE have generally been increasing in stringency and comprehensiveness driven by new areas now being regulated, deeper science requirements, a strong international influence, increasing public scrutiny and demands, and the push for harmonization of regulations with the US. Alongside this trend, a desire for regulatory efficiency and modernization has also resulted in a different way of regulating (a leading explanation for declining trends in the growth rate of regulations).

There was at the same time some evidence of a statistical correlation between Chapter 11 disputes on environment and health measures and the adoption of environment and health regulations during a few of the years between 1998-2013. There was a statistically significant impact shown by NAFTA Chapter 11 challenges to environmental or health

measures in two of the of the fifteen years suggesting that the presence of an investment dispute on the environment and health was likely to *decrease* the probability of the adoption of environmental regulations in 2002 and 2007. This raised the potential that these NAFTA disputes were having a dampening effect on regulators during the period in question. At the same time however, a NAFTA Chapter 11 challenge on environmental or health measures was also likely to *increase* the probability of the adoption of health regulations in 2013. This positive correlation suggests it was not a concern in the development of health regulations.

While not providing a clear perspective on trends in regulation the OECD confirms the Canadian focus on regulatory reform and a different way of regulating and highlights Canada's improvement in environmental policies as a reflection of increased stringency and comprehensiveness. Canada also receives praise for its steady performance on health and the environment from the Conference Board of Canada.

**Canada Case Study - Expectation 2 – We would expect senior HSE regulators to be aware of IIAs and their implications, and to take them into consideration in the regulatory development process**

In testing the second 'expectation' regarding the hypothesis on regulatory chill we probed regulator awareness and the extent to which they took international trade and investment into consideration in the regulatory development process.

The empirical analysis revealed that regulators are focussed on a number of factors in the regulatory development process which include complying with international standards and commitments, harmonizing regulations with the US and internationally, responding to health, safety and environmental needs, responding to advances in science and technology, responding to the expectations of stakeholders such as the provinces, NGOs and the general public, facilitating international trade and responding more recently to domestic streamlining and modernization initiatives.

Trade and investment, while not a priority was a consideration in the context of harmonizing regulation with trade partners, ensuring international transparency and disclosure through SPS and TBT commitments, ensuring compatibility with new and existing trade commitments, avoiding barriers to trade to maintain Canada's overall competitiveness and finally, and to some extent in avoiding trade disputes.

Despite very low levels of awareness, the more senior a regulator the greater their awareness of trade and investment disputes generally and the greater the likelihood they would see this as an issue of concern. Direct regression analysis showed that regulators at the Director General level were 3 times more likely to identify this as a factor of concern, controlling for all other factors in the model. Directors were 1.5 times more likely and Head of Sections were 1.6 times more likely to see this as an influencing factor.

The NAFTA agreement as a whole was seen as the most relevant agreement by regulators followed by the WTO and other bilateral FTAs. Most interestingly, all levels of regulator indicated that FIPAs were not relevant, with 84% of Director Generals, 95.5% Directors, 92% Sector Heads, 94% Managers and 100% of technical regulators indicating they did not find them relevant.

The strongest predictor of a regulator's likelihood to consider trade and investment dispute avoidance as a factor was with respect to the WTO, recording an odds ratio<sup>427</sup> of 5,526. This indicated that regulators were 5 times more likely to consider '*the avoidance of trade and investment disputes*' with respect to the WTO, controlling for all other factors in the model. This was followed by FTAs and NAFTA.

When we spoke about international trade and investment in the in-depth interviews, there was no differentiation between the different types of trade fora or agreements or their implications. Most references to trade commitments referred to SPS or TBT commitments under the WTO or NAFTA. NAFTA Chapter 11 did not rank as an influencing factor.

It was the agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) measures that regulators felt had the greatest impact under both NAFTA and the WTO. The majority of regulators felt that NAFTA Chapter 11 on investment and the investment provisions of the WTO (TRIMS) had no, or very limited impact on the regulatory development process. All levels of regulator felt strongest that NAFTA Chapter 11 did not have a big impact with Head of Section regulators showing the largest inclination at 100%.

Where there had been a NAFTA dispute that had impacted one of their regulatory measures, the level of knowledge was still quite vague and the understanding of the implications or

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<sup>427</sup> Julie Pallant in SPSS Survival Manual quotes Tabachnick and Fidell's 2007 book Using multivariate statistics (5<sup>th</sup> edn). Boston: Pearson Education, 'the odds ratio represents the change in odds of being in one of the categories of outcome when the value of a predictor increases by one unit. P.177

costs associated with such a challenge was not high. Their experience would have made them more aware and more likely to flag future regulatory changes for legal advice but this did not impact their decision making. These disputes were seen as one off incidents which did not have a bearing on future regulation.

Very few regulators were aware of any such threats with only 12% claiming awareness. This varied by department with 96% of Health Canada (HC) and 97% of Environment Canada (EC) regulators not aware of NAFTA Chapter 11 challenges despite the fact that a number of past and current challenges would have impacted these departments. Finally, less surprising was the fact that 40% of the Pest Management Review Agency (PMRA) and 77% of the Canadian Environmental Assessment Agency (CEAA) regulators had awareness of NAFTA Chapter 11 disputes reflecting a number of high profile past and present cases<sup>428</sup> in their organizations.

Among those regulators that were aware of NAFTA Chapter 11 disputes, 42% claimed that despite this awareness it did not influence the regulatory development process. The results of the cross tabulation suggest that those regulators who were aware of disputes in their areas felt it impacted their decision making only somewhat 28.6% or not very much 28%. Only 21.4% said it impacted their decision on regulatory development process very much.

Taken together, the conclusions in Chapter 4 and Chapter 5 suggest a number of things with respect to the hypothesis on regulatory chill. First, HSE regulatory trends showed a steady and increasing level of stringency in comprehensiveness over the last decade with only a minor demonstrable impact across areas of regulation most frequently subjected to NAFTA Chapter 11 challenges as reflected through both observed trends in regulatory growth or levels of stringency as well as by the presence of a statistically significant impact in 2002 and 2007. Second, there was very little awareness among HSE regulators about the existence of IIAs and particularly NAFTA Chapter 11. Regulators did not identify trade and investment commitments as an influencing factor in the regulatory development process and where they did merit consideration it was predominantly with respect to the need to ensure trade facilitation with trading partners, meet transparency requirements under international agreements or not at all. This did not differ markedly by Federal Department or by level of seniority of the regulator.

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<sup>428</sup> Both *Chemtura v. Government of Canada* and *Dow AgroScience v. Government of Canada* involved bans on pesticides which come under the remit of the PMRA. The ongoing case *Clayton/Bilcon v. Government of Canada* involves the rejection of a basalt quarry and marine terminal following a federal environmental review within the remit of CEAA.

Based on the hypothesis of regulatory chill, there did not appear to be evidence of the regulatory trends nor regulator awareness one would expect if chill on the back of IIA disputes were a potential consideration in the Canadian context.

**c. Key findings in the tobacco control case study**

The case study on tobacco control found that the empirical evidence did not support the hypothesis on regulatory chill. Overall the analysis found an increasing trend in the level of uptake of tobacco control regulations among countries worldwide, including in regions which were facing ISDS challenges under IIAs. Additionally the empirical evidence found a low level of awareness among tobacco control regulators regarding IIAs and the potential threat of an ISDS challenge to tobacco regulation. The research revealed that regulators rarely take trade and investment commitments into consideration when developing regulations and when they do, they are more likely to be concerned about trade commitments under the WTO SPS and TBT agreements than commitments under IIAs. Illustrative of this point was the fact that regulators from developed and developing countries see the influence of the WTO challenge against Australia's plain packaging legislation as an influencing factor in their own 'wait and see' approach on this issue.

**Tobacco Control Case Study - Expectation 1 – We would expect tobacco control trends to reflect regulatory chill(through the degree of uptake in regulatory policy), in the wake of IIA challenges**

Overall an analysis of available data showed very little empirical support for the regulatory chill hypothesis. With respect to the first expectation that we would expect trends in tobacco control regulation to reflect regulatory chill through the level of uptake in key tobacco control measures in the wake of IIA challenges, the analysis showed that:

Countries have been adopting tobacco control measures in the area of packaging, labelling, advertising and promotion at ever increasing rates since 2001. More particularly they have done so equally in regions where these measures have come under challenges by the tobacco industry through IIAs and other trade and investment instruments.

Latin American countries continue to be among the highest implementers of 50%+ health warnings despite challenges faced by Uruguay under IIAs on this issue.

**Tobacco Control Case Study - Expectation 2 – We would expect senior tobacco control regulators to be aware of IIAs and their implications, and to take them into consideration in the regulatory development process**

With respect to the second expectation that we would expect senior tobacco control regulators to be aware of IIAs and their implications and to take them into consideration in the regulatory development process, the analysis showed that:

A country's trade and investment commitments were not a leading influencing fact in the regulatory development process. The majority of regulators ranked it near the end of all factors identified and in the face-to-face interviews did not identify it at all. More influential factors were the public health gap, FCTC obligations, actions of other countries, domestic and regional obligations or domestic constitutional issues. Despite emerging experience with IIA litigation, the threat of an international trade and investment challenge as an influencing factor ranked last.

On plain packaging, developing countries were generally not considering it as a future policy as they were more concerned with establishing more basic tobacco control regulations or ensuring the implementation of existing ones. Both developed and developing countries were interested in understanding the effectiveness of the policy and the legal constraints both domestic and regional as well as the challenge of gaining political support

While there was evidence that countries were adopting a 'wait and see' approach to tobacco control on policies such as plain packaging given the legal challenges against Australia, this seemed to be more directly related to the challenges under the auspices of the WTO or domestic courts. The electronic survey demonstrates that this was particularly focused on Australia's WTO challenge and not the BIT challenge by PMI. A cross tabulation analysis shows that Australia's BIT challenges was not seen as important in the majority of regions.

More broadly on the issue, tobacco control regulators do not consider trade and investment commitments when developing tobacco control regulations except when it is championed by other domestic government departments.

Where trade commitments do play a role in the regulatory development process regulators identified the WTO (90%) as the most relevant influencing type of commitments. BITs

ranked last among regulators with many showing a complete lack of awareness or understanding of their existence or potential impact. Where there was awareness, these regulators still identified the WTO as the most relevant and BITS as the least.

Views were expressed by both developed and developing countries regarding concerns about the influence of the tobacco industry on the regulatory development process. This influence was not driven directly by IIA challenges but rather domestic court challenges, threat of litigation (in many possible fora including IIAs) as well as close political ties in developing countries between tobacco industry and political representatives.

The results of this analysis show little observable evidence regarding the expectations to support the hypothesis of regulatory chill with direct link to IIAs and ISDS challenges. As the same time there is certainly an awareness of the threat of challenges by the tobacco industry and recognition that trade is playing a larger part as a new vehicle for this threat. Domestic litigation and challenges through the WTO multilateral forum seem to be the most top of mind and may be having a chilling impact in their own right evidenced by the comments of both developed and developing countries describing a 'wait and see' attitude to adopting domestic policies in the area of plain packaging prior to the resolution of the dispute against the Government of Australia.

### **3. CROSS CASE THEMATIC CONCLUSIONS AND IMPLICATIONS FOR GLOBALIZATION THEORY**

There were a number of key themes which can be drawn within and across the Canada Case Study and the Tobacco Control Case Study which provide a perspective on the overall theory of globalization.

#### ***Globalization has not prevented policy divergence with respect to the impact of IIAs***

Just as globalization scholars have considered whether competitive pressure and the threat of exit by mobile firms and capital have had constraining influences on national policies, there is a view that the threat of litigation through rights provided private actors by IIAs will constrain the regulatory ability of the state, leading to regulatory chill. This research has found no empirical support for the hypothesis on regulatory chill across both the Canada Case Study and the Tobacco Control Case Study suggesting that international investment agreements, as one component of globalization, are not restricting national regulatory

autonomy in the area of health, safety and the environment. This result suggests policy divergence whereby globalization in the form of IIAs has not prevented different approaches to national policies, hindered national policy autonomy or resulted in a decline in social welfare policies.

***Policy diffusion and emulation appear to be leading to upward policy convergence***

Regulators across both case studies and therefore between developed and developing countries were quite consistent in the types of factors they identified as most influencing their regulatory development process. These tended to be focussed on the key HSE need, advances in science and technology, the recommendations of the international community or experiences of neighbouring countries, public opinion as well as domestic or sometimes regional constraints. Competitiveness and the desire to ensure low burden on industry was a unique driver in the Canadian context while there was little respect or willingness to engage with industry concerns among tobacco regulators.

The outcome of this analysis also showed support however for an upward convergence in regulation or a 'race-to-the top as described by Drezner<sup>429</sup>, but driven by ideational forces or policy diffusion, rather than any race to the bottom driven by competition for capital or investment. This policy diffusion or emulation as outlined by Simmon, Dobbin and Garret, is 'characterized by the voluntary adoption of policies put forward by experts and international organizations, rather than their adoption through coercion.'<sup>430</sup> This trend was evidenced first by the focus on harmonization as outlined in the Canada-US context across many key regulatory areas. Regulators placed harmonization with the US high on the list of influencing factors and the Gazette analysis revealed a series of regulatory increases in areas such as transport safety and the reduction of vehicle emissions to reduce greenhouse gases which were overwhelmingly motivated by a desire to align with higher US standards. Regulators also highlighted the influential nature of the work of international standard setting bodies such as the WHO organization on international food standards CODEX and the Intergovernmental Panel on Climate Control IPCC. These bodies set high level standards on food safety and emission standards, which countries such as Canada sought to emulate.

This trend in upward convergence was further reflected by the interest shown by tobacco control regulators in the policies pursued by neighboring countries and the overall

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<sup>429</sup> Drezner, Daniel W. 2001. 'Globalization and Policy Convergence.' *International Studies Review* 3: p.75-76

<sup>430</sup> Simmons, Beth A., Franck Dobbin and Geoffrey Garrett. 2008. *The Global Diffusion of Markets and Democracy*. Cambridge University Press.

importance they placed for regulatory development on global tobacco standards set and promoted through the FCTC. This upward convergence is reinforced in this research by both the regulatory trend towards increasing stringency and comprehensiveness of HSE regulations in Canada and the growing uptake of tobacco control regulations by countries across all regions.

***There is evidence of re-regulation not deregulation***

There seems to be a shift towards better regulation rather than less regulation. This reflects the concept of re-regulation as described by Vogel in which governments 'reorganized their control of private sector behaviour, but not substantially reduced the level of regulation' and the absence of a zero sum trade-off between governments and markets.<sup>431</sup> This new approach to regulating was very much in evidence in the case of Canada where regulators consistently claimed that efforts at modernization, efficiency improvement and streamlining of regulations were not done at the expense of regulatory stringency or comprehensiveness and continued to be driven by the core goals of meeting health, safety and environmental sustainability needs. The manifestation of this approach was a shift from process to output based regulations, a greater cost/benefit focus, the use of alternative control mechanisms as well as the movement to smarter focussed regulations. Initiatives such as the 2007 *Cabinet Directive on Streamlining Regulations* and the 2012 *Red Tape Reduction Plan* in Canada are a case in point. Again, the trend in HSE regulations as shown through our research which showed a declining trend in the growth rate of regulations but consistent levels of stringency and comprehensiveness reflected this.

***Evidence suggest regulatory chill should be considered in a broader trade and investment context***

As discussed earlier, the empirical evidence has shown that regulators across the two case studies demonstrated very little knowledge of IIAs or the ISDS mechanism. These agreements were not raised by regulators themselves and when asked directly they showed little awareness except in a few cases. Even when a regulator had first-hand experience of a NAFTA Chapter 11 or IIA challenge they were not entirely clear on the specifics or even the implication of such a challenge (financial or policy impact). The notion of trade and investment commitments was vague and did not have a consistent meaning amongst

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<sup>431</sup> Vogel, Steven. 1996. *Freer Markets, More Rules. Regulatory Reform in Advanced Industrial Countries*. Cornell University Press.

regulators. Furthermore the empirical findings suggest that even with awareness it was not an influencing factor.

While the impact of trade and investment was seen as a minor factor in the regulatory development process across both case studies, where it was a consideration it was almost exclusively with respect to the WTO or across all trade fora with respect to TBT and SPS commitments. This is not surprising given the involvement that health, safety and environmental regulators are likely to have with TBT and SPS issues within the WTO (for tobacco control and Canadian HSE regulators) and within NAFTA in the case of Canada. The high profile nature of WTO disputes and potential impact on the policies of member states is also most certainly a defining factor. Past cases at the WTO have been high profile and resulted in tribunal rulings on the trade compatibility of HSE measures, providing pressure for countries to undertake amendments to ensure compliance. The US-EU Beef Hormones Dispute regarding 'Measures Concerning Meat and Meat Products (Hormones)'<sup>432</sup>, The Mexico-US Tuna Dolphin Dispute regarding 'Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products'<sup>433</sup> and the US-Indonesia Cigarette Clove Dispute regarding 'Measures Affecting the Production and Sale of Clove Cigarettes'<sup>434</sup> all serve to highlight the stakes for developed and developing countries in this forum on HSE regulatory issues.

It is certainly conceivable that the possibility of challenges within this forum as well as an actual dispute such as the one launched by numerous countries against Australia's plain packaging legislation is having a chilling impact. The survey results certainly suggest that countries take this into account more than any other trade and investment factor. What is the implication of this for our question of regulatory chill? One key difference is that these WTO disputes are driven and championed by other countries rather than private actors (although the spectre of industry influence is large in many cases). This would in general suggest that the debate on regulatory chill needs to be recast with respect to the arguments put forward by public policy advocates, NGOs and the general public. Those scholars that have looked at the issue of the impact of IIAs have tended to take a narrow focus on one fora or another but rarely across all to consider the broader impact. The results of this research project suggest that scholars might be well placed to broaden the scope of their focus to encompass the influence of this larger set of trade and investment issues. It was clear from discussions with regulators that they did not often differentiate between fora, or tended to consider the impact

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<sup>432</sup> [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds26\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm)

<sup>433</sup> [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds381\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm)

<sup>434</sup> [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds406\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm)

of disputes across all fora (WTO, domestic litigation, FTA) as one set of factors on trade and investment which could have an impact on the regulatory development process.

#### **4. THE DEVELOPING COUNTRY PERSPECTIVE**

While this research has focussed primarily on the case of Canada, an effort has been made through the Tobacco Control Case Study to gain some insights into the impact of IIAs on developing countries. Many findings were consistent across all countries, however there were a number of factors which were specific to developing countries including the role played by weak domestic institutions, the larger potential financial impact of ISDS disputes and the frequent lack of expertise and experience aimed at navigating the trade and investment landscape.

##### ***Institutional weakness***

Perhaps a key differentiating factor between developed and developing countries rests with the relative strength of domestic institutions and their ability to support regulatory choices in the area of HSE. As Dani Rodrik has argued, 'globalization benefits countries with strong existing institutions while hindering the ability of nations to build institutions to address both regulatory and redistributive issues.'<sup>435</sup> This reality was evident in the case of developing countries on tobacco control regulation. It became apparent from the in-depth interviews that many developing countries were struggling to put in place the most basic levels of tobacco control policies before they could give any consideration to more advanced policies such as plain packaging. Furthermore, for those countries that had managed to establish a suite of strong tobacco control regulations, they were often consumed with ensuring that their existing regulations were actually being implemented. They were more vulnerable to intimidation but by the tobacco industry giving examples of how industry coercion (though not through the auspices of an IIA) often led to the cancelation of policy proposals or how collusion between the industry and officials at the political level was a factor hindering the establishment of strong policies.

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<sup>435</sup> Rodrik, Dani. 2007. *One Economics Many Recipes: Globalization, Institutions and Economic Growth*. Princeton University Press p. 195

### *Increased financial burden*

Another differentiator for developing countries was the potentially greater relative financial burden they face with respect to IIA ISDS challenges and the deterring impact this is likely to have on their desire to pursue policies which could result in a dispute. As discussed in Chapter 2, concerns in general about the cost of arbitration are driven by both the size of the awards as well as the costs of defending the state.<sup>436</sup> Most recently in 2012 ‘the highest known award of damages in the history of investment treaty arbitration featured in *Occidental v. Ecuador II* where the investor was awarded US\$1.77 billion plus pre and post award interest’<sup>437</sup> This is not a new trend and has been an issue of some concern for a number of years. On average the cost of an arbitration case is upwards of US\$8 million per party with legal fees making up 82% of this cost.<sup>438</sup> Furthermore, Uruguay’s acknowledgement that its own BIT defense against Philip Morris International was only made possible through financial support by former New York Mayor Michael Bloomberg’s foundation lends credence to this concern.<sup>439</sup>

There is a growing concern that developing countries, particularly in Latin America, may be feeling that the burdens of investment agreements (in terms of financial costs and loss of autonomy) outweigh the benefits and this may lead to scepticism and provide an incentive for them to withdraw both from the ICSID convention, as well as to renege on their agreements.<sup>440</sup> A 2009 UNCTAD report highlights the fact that ‘2008 saw the denunciation of 11 BITs.’ Ecuador alone denounced nine BITs, mainly with neighbouring Latin American countries. The report speculates that perceived effects of BITS on developing countries’ economic development as well as issues of compatibility with domestic laws may play a role.<sup>441</sup> To date Bolivia (in 2007), Ecuador (in 2010) and Venezuela (in 2012) have all withdrawn from the ICSID Convention and Argentina has announced its intention to do so as well.<sup>442</sup> This disillusionment with the arbitral process and concern over the costs of litigation appear to be having a disproportionate impact on developing countries.

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<sup>436</sup> UNCTAD. May 2013. Recent Developments in Investor-State Dispute Settlement (ISDS) p. 19

<sup>437</sup> *ibid.* Other cases of note were *EDF v. Argentina* with an award of \$13.73 million, *Deutsche Bank v. Sri Lanka* with an award of \$60.36 million and *SGS v. Paraguay* with an award of \$39.02 million.

<sup>438</sup> Gaukrodger, David and Kathryn Gordon. 2012. ‘Investor-state dispute settlement: A scoping paper for the investment policy community.’ *OECD Working Papers on International Investment*, No 2012/3 OECD Investment Division.

[www.oecd.org/daf/investment/workingpapers](http://www.oecd.org/daf/investment/workingpapers) p.19

<sup>439</sup> Sabrina Tavernise, ‘Tobacco Firms’ Tactics Limit Poorer Nations’ Smoking Laws’, *The New York Times*, December 13, 2013.

<sup>440</sup> *Ibid*

<sup>441</sup> UNCTAD – Recent Developments in International Investment Agreements (2008-June 2009) p 9

<sup>442</sup> International Institute for Sustainable Development (IISD) Investment Treaty News. April 2012.

<http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>

### ***Lack of trade expertise and experience***

Finally, many developing countries face challenges from the lack of available domestic trade and investment expertise. Gottwald identifies what he sees as the top three barriers for developing nations participation in the international investment arbitration process: ‘a lack of affordable access to legal expertise, a lack of transparency in the arbitration process, and uncertainty over the meaning of key treaty rights.’<sup>443</sup> This hinders their ability to negotiate treaties which reflect their interests (through appropriate carve outs for regulatory policy space) as well as their ability to defend themselves should an ISDS dispute arise. Moreover this absence of trade and investment experience and expertise is also felt amongst HSE regulators and accounts for the low level of awareness of these threats and their implications. Coupled with the financial constraints raised above, the overall possibility that a threat of an ISDS challenge could lead to a chilling of regulation in a developing country seems more plausible.

## **5. THE POLICY IMPLICATIONS AND OPTIONS**

While this empirical analysis does not support the regulatory chill hypothesis there remains much debate regarding the ability of governments to balance the protection of private investors with their ability to regulate in the public interest. This debate is likely to continue and there are a number of policy choices available to governments which might allow them to improve the precarious balance.

### ***Ensuring the right to regulate in future IIAs***

While this research has found no strong empirical support for the regulatory chill hypothesis, concerns among public policy advocates, scholars and the general public about the impact of trade and investment agreements and particularly the ISDS provisions of IIAs on government’s ability to regulate in the public interest remain a reality. The unintended use of the ISDS mechanism by private interests, including the tobacco industry, to challenge HSE measures highlight the need for governments to consider how to ensure that their regulatory space is preserved.

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<sup>443</sup> Gottwald, Eric. 2007. ‘Levelling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?’. *American University International Law Review*. 22:237, p 252

Many IIAs or model agreements (such as the US and Canadian model BITs) already have provisions which make explicit the government's right to regulate and ensure commitments by signatory governments on labour and environmental standards, provide explicit clarification of their intention with respect to contentious provisions such as those dealing with indirect expropriation and fair and equitable treatment, as well as carve-outs for HSE measures. Encouraging governments to consider such approaches is sensible, particularly given the learning that has taken place under NAFTA Chapter 11 and which has been a driver for such approaches to IIAs. Finally, a reformulation of IIAs provisions such as that dealing with fair and equitable treatment (FET) makes sense given that according to UNCTAD, it is 'the most likely provision to be invoked by an investor in an arbitral claim.'<sup>444</sup> The NAFTA Commission efforts to clarify the FET provision is a useful example in this regard, although it is debatable the extent to which tribunals have since taken it into consideration in their deliberations. These measures do however come with a trade-off in terms of the balance between a government's right to regulate and the protection of investors.

Given that one of the stated purposes of these agreements is the protection of investors, it is worth considering the extent to which governments wish to reduce this protection. While research from Lauge Poulsen suggests that both companies and international agencies do not consider them relevant as risk mitigation instruments<sup>445</sup>, the explosion of ISDS cases which had reached 244 by 2012, suggest that they are being used and as Salacuse and Sullivan argue, have 'achieved their first goal of fostering investment protection.'<sup>446</sup>

Furthermore, this protection which has traditionally been driven by a desire to overcome the lack of property rights in developing countries with weak institutions, has over the last fifteen years involved overcoming the problem of measures disguised as legitimate government regulation aimed at either protecting domestic industries or dealing with public pressure. Reference is often made to the NAFTA Chapter 11 cases *Ethyl v. Government of Canada*, *S. D. Myers v. Government of Canada* and *Methanex v. Government of Mexico* in this regard, as outlined in Chapter 2. These are the types of situations from which IIAs are trying to protect private investors and arguably remain an important component both for governments seeking to encourage inward investment and those aiming to ensure protection for their

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<sup>444</sup> UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, (New York and Geneva: United Nations, 2007), 32.

<sup>445</sup> Skovgaard Poulsen, Lauge. The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence. *Yearbook on International Investment Law and Policy 2009/2010* by K. Sauvant (ed.). Oxford: Oxford University Press, 2010) quoting from World Bank *World Development Report 2005: A better investment climate for everyone* (2005)

<sup>446</sup> Salacuse, Jeswald W. and Nicholas P. Sullivan. 2005. 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain.' *Harvard International Law Journal*, 46: 67-129. Reprinted as Chapter 5 in: Sachs, Lisa and Karl P. Sauvant. 2009. *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. Oxford University Press

investors abroad. Getting the right balance between these competing pressures is the challenge and should guide any efforts to further clarify policy space.

### ***Debating the continued inclusion of ISDS provisions in IIAs***

The continued calls for the exclusion of ISDS provisions in IIAs have been growing as evidenced by the petition signed by respected jurists from numerous Australasian and North and Latin American countries and sent to governments involved in the TPP negotiations.<sup>447</sup> This issue is most strongly advocated however with respect to concern over the misuse of ISDS provisions by the tobacco industry. The Australian Government's earlier decision not to include ISDS provisions in future IIAs has highlighted this issue and provided ammunition to civil society groups and public policy advocates that believe this is the best approach to preserving HSE policy space. While the Australian Government now seems to be providing room for a case by case consideration of this issue as evidenced by both its recently completed FTA with Korea and its participation in the TPP, a number of other proposals have been raised to deal with the tobacco industry threat.

Such proposals include calls for the exclusion of an ISDS mechanism in future treaties,<sup>448</sup> for treaties to 'include an exemption for investments involving a 'dangerous good'<sup>449</sup>, a new addition to general exemptions but specific to tobacco control measures'<sup>450</sup>, and a reformulation of the IIA provisions most commonly invoked in ISDS arbitrations on expropriation and fair and equitable treatment to 'ensure that a State's policy space will be protected',<sup>451</sup> as discussed above. If all else fails, countries always have the option of non-compliance with arbitral rulings given the challenges that tobacco companies would likely have enforcing them with respect to 'considerations of public policy and sovereign immunity.'<sup>452</sup>

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<sup>447</sup> Letter by 200 environmental, consumer and labour groups expressing opposition to the inclusion of ISDS in the TTIP. December 2013. [http://corporateeurope.org/sites/default/files/attachments/ttip\\_investment\\_letter\\_final.pdf](http://corporateeurope.org/sites/default/files/attachments/ttip_investment_letter_final.pdf)

<sup>448</sup> This proposal reflects the position adopted by the Government of Australia in the 2011 Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement : Trading Our Way to More Jobs and Prosperity (. <http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx>) and has been proposed by numerous public policy advocates and scholars including a petition signed by a large number of respected jurists from Australia, New Zealand, the USA, Canada, Peru and Chile in May 2012 ('An Open Letter From Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement' May 8, 2012 <http://tpplegal.wordpress.com/open-letter/>)

<sup>449</sup> Nottage, Luke, 'Consumer Product Safety Regulation and Investor-State Arbitration Policy and Practice after Philip Morris Asia v. Australia', *Transnational Dispute Management*, (2012) Volume 9, Issue 5. [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

<sup>450</sup> Lester, Simon, 'Free Trade and Tobacco', *Transnational Dispute Management*, (2012) Volume 9, Issue 5. [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

<sup>451</sup> Rojidi, Faraz and Junianto James Losari and Alberto Madero, 'No Coverage for Tobacco Industries With Regard to Tobacco-Control Measures-The Future of International Investment Agreements?' *Transnational Dispute Management*, (2012) Volume 9, Issue 5. [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

<sup>452</sup> Voon, Tania and Andrew D. Mitchell, 'Implications of international investment law for plain tobacco packaging: lessons from Hong Kong-Australia BIT', in *Public Health and Plain Packaging of Cigarettes*, edited by Tania Voon, Andrew D. Mitchell and Jonathan Liberman with Glyn Ayres, 137-172. Edward Elgar, 2012

On the issue of an exclusion of ISDS mechanisms from IIA treaties, this approach while popular among NGOs and public policy advocates would seriously undermine the investor protection component of the agreements. Given earlier arguments concerning the importance of such protections and evidence from the Australia case that this policy has been a difficult one to maintain, this does not appear to be the best solution to addressing concerns. The issue of expanding the general exceptions chapter is currently being considered by the USTR in the context of the TPP negotiations and the language used in this context allow 'health authorities in TPP governments to adopt regulations that impose origin-neutral science-based restrictions on specific tobacco products/ classes in order to safeguard public health.'<sup>453</sup>

### ***Addressing developing country challenges***

Addressing institutional weakness in developing countries is an enormous undertaking and one to which organizations such as the World Bank and United Nations has been deeply committed for decades.<sup>454</sup>

More manageable assistance in the areas of trade and investment policy is being tackled by UNCTAD the WTO and ICSID by way of technical assistance on the development of IIAs and the navigation of the arbitral process.<sup>455</sup> The focus of this technical assistance would be well placed to ensure the appropriate capacity building in the specific area of international investment agreements and to focus not only on those trade officials who will be negotiating future agreements but also on awareness building among country regulators particularly in sensitive areas such as HSE. HSE regulators in developing countries would benefit greatly from developing an awareness and understanding regarding the existence and impact of IIAs as well as ways to ensure that the regulatory development process does not contravene the trade and investment provisions to which their countries have committed. Greater awareness of the types of regulations which are likely to give rise to IIA ISDS challenges will help regulators make informed decisions regarding the regulatory options available to them to achieve their important health and environmental goals. While this effort could be driven

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<sup>453</sup> USTR, 'FACT SHEET: TPP Tobacco Proposal,' available at <http://www.ustr.gov/aout-us/press%20office/fact-sheets/2012/may/tpp-tobacco-proposal>. As outlined in Lester, Simon, 'Free Trade and Tobacco', *Transnational Dispute Management*, (2012) Volume 9, Issue 5. [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

<sup>454</sup>World Bank Institutional Development Fund <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:21016577~pagePK:41367~piPK:51533~theSitePK:40941.00.html> , UN Governance and Institution Building. <http://www.un.org/en/development/progareas/governance.shtml>

<sup>455</sup> UNCTAD's technical assistance and capacity building services <http://unctad.org/en/Pages/DITC/TNCD/Technical-Assistance-and-Capacity-Building-.aspx>, WTO technical assistance and training [http://www.wto.org/english/tratop\\_e/devel\\_e/teccop\\_e/tct\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm)

by the WTO and UNCTAD it would also benefit from collaborations with other international institutions dealing with specific HSE regulatory issues such as the WHO FCTC, CODEX and IPCC to name a few.

Greater efforts to address the paralysing costs of ISDS for smaller countries through reform of the arbitral process and innovative financing or cost sharing techniques would also go some way to tackling the imbalance faced by the developing world.

## **6. FOCUS AND LIMITATIONS OF ANALYSIS**

While the goal of this research has been to explore the impact of IIAs on government regulatory autonomy with a view to assessing the likelihood of regulatory chill through the observation of regulatory trends and awareness of HSE regulators, it has also sought to provide a comprehensive methodological approach which might be used to address this issue in the future. This research has sought to assess chill as a general phenomenon rather than on a case-by-case basis which has been the approach of past research. Past research on this issue has stressed the anecdotal examples or the outcome and impact of specific IIA ISDS challenges, but never looked comprehensively at the views and practices of regulators coupled with regulatory trends. The Canada Case Study has provided a perfect test case for such a broad and comprehensive assessment of chill given the country's unique experience with ISDS challenges to HSE measures over the last 15 years. The Tobacco Control Case Study served to support this analysis by providing a broader developed and developing country perspective on a global issue of importance.

There have however been a number of limitations to the analysis.

### ***Federal focus of the Canada Case Study***

The Canada case study was focussed exclusively on the federal level of regulation. This focus was driven by issues of time, cost and accessibility. As discussed in Chapter 4, the Canadian federal system involves the devolution of regulatory responsibility in many areas of HSE policy. By speaking with federal regulators this research provides a valuable and rich perspective on the issue of regulatory trends and the impact of trade and investment on the regulatory development process. It does not however reflect the perspective of those provincial regulators who have some responsibilities in overlapping areas and have been

responsible in some cases for the measures which have led to arbitration through NAFTA Chapter 11.

### *Sample size of the Tobacco Control Case Study*

While every attempt was made to identify and contact a large sample of government regulators, this was achieved primarily within the context of the primary case study on Canada. The Tobacco Control Case study served as a supportive piece of analysis but did not achieve a large enough sample size to be fully generalizable. Nevertheless it provided a counterbalance to the Canadian experience and helped to confirm some specific trends particularly with respect to the awareness and focus of regulators.

### *Reflecting the legal and political perspectives*

Similarly, this analysis has focussed on the views of senior HSE regulators and as such did not engage with international trade lawyers or politicians (although a number of past Canadian Health Ministers were interviewed during the course of this research). The view was taken that regulatory development and much decision making (with respect to regulatory options identified and those proposed for adoption) takes place at this level of government. The concerns raised from a legal perspective were reflected in the discussions held with regulators based on the advice they would have received during their own departmental policy deliberations and in the development of regulatory recommendations. Furthermore, there were obvious constraints both in gaining access to government's legal counsel, and in their general willingness or ability to discuss such sensitive issues even under guarantees of confidentiality.

## **7. AREAS FOR FUTURE STUDY**

While the focus of this research has been very specific, it has endeavored to provide a methodological approach for the consideration of regulatory chill. It would be interesting to use this methodological approach to delve further into the regulatory development and decision making process of HSE regulators both at the various levels of government in the Canadian context as well as across other NAFTA countries with a view to confirming the views and approaches of other governments who have faced a similar set of ISDS challenges.

On tobacco control, gaining access to a much larger sample of regulators for both in-depth interviews and more extensive survey would provide richer and more generalizable information on any potential cross border regulatory chill impact of IIA ISDS disputes.

## 8. CONCLUSION

As Layna Mosley claims ‘Only by specifying how varying dimensions of globalisation matter for government policy choices can we begin to gauge the overall – and often contending – effects of economic openness on policy making.’<sup>456</sup> This work has shown that there does not appear to be a specific impact of IIA ISDS on HSE regulatory decision making and therefore that the impact of private actors in the policy making process is perhaps less pronounced than many fear. It is clear that the tobacco industry efforts to influence governments through their aggressive lobbying and litigation, is having an impact though not as much through the vehicle of the IIA. At the same time there is a broader relationship between international trade and investment and the constraints or pressure a government might feel in its ability to regulate in the public interest. Regulators are interested in the views of their peers as expressed within multilateral and regional fora like the WTO and NAFTA in committees on SPS and TBT and this explains the relevance they placed on this fora and in particular on the WTO challenge to Australia’s plain packaging legislation. Future research will need to take this broader perspective into account in its efforts to assess regulatory chill as a more general phenomenon.

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<sup>456</sup> Mosley, Layna. 2005. Globalization and the State: Still Room to Move? *New Political Economy*. Vol. 10, N0.3

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APPENDIX 3 – LIST OF INTERVIEWS WITH CANADIAN FEDERAL REGULATORS

**List of semi- structured interviews conducted between  
April-September 2012**

**Government of Canada – Health, Safety and Environment Regulators**

<b>HEALTH CANADA</b>
<b>Trish MacQuarrie</b> - Director General Policy, Communications & Regulatory Affairs, Pest Management Regulatory Agency, Health Canada
<b>Denis Choiniere</b> - Director, Office of Regulations & Compliance, Tobacco Control Program, Health Canada
<b>Samuel Godefroy</b> – Director General, Food Directorate, Health Products and Food Branch, Health Canada
<b>Tina Green</b> – Director General, Consumer Product Safety Directorate, Health Canada
<b>Kaarina Stiff</b> - Director Program Bureau, Consumer Product Safety Directorate, Health Canada
<b>Helen Ryan</b> – Director, Consumer Product Safety Directorate, Health Canada
<b>John Moffet</b> - Director General, Environmental Stewardship Branch, Environment Canada
<b>Vincenza Galatone</b> - Executive Director, Chemical Sectors Directorate, Environmental Stewardship Branch, Environment Canada
<b>Beth Pieterston</b> – Director General, Environmental and Radiation health Sciences Directorate, Health Canada
<b>Doug Haines</b> - Director, Chemical Surveillance Bureau, Environmental and Radiation Health Services Directorate, Health Canada
<b>Christian Lavoie</b> – Director, Consumer and Clinical Radiation Protection Bureau, Health Canada
<b>Kendal Weber</b> - Director General, Policy, Planning & Regulatory Affairs, Health Products and Food Branch, Health Canada
<b>Louise Dery</b> – Director, Policy, Planning & Regulatory Affairs, Health Products and Food Branch, Health Canada
<b>David Lee</b> – Director, Office of Legislative and Regulatory Modernization, health Products and Food Branch, Health Canada
<b>Jocelyn Kula</b> – Manager, Office of Controlled Substances, Health Canada
<b>ENVIRONMENT CANADA</b>
<b>Steve McCauley</b> - Director General, Energy and Transportation Directorate, Environment Canada
<b>Ed Crupi</b> - Senior Regulatory Policy Advisor, Energy and Transportation, Environment Canada
<b>Tim Gardiner</b> - Director Waste Reduction and Management Division, Environment Canada
<b>Jacinthe Sequir</b> – Manager, Waste Policy, Waste Reduction and Management Division, Environment Canada
<b>Tanya Smyth-Monteiro</b> – Waste Reduction and Management Division
<b>Stewart Lindale</b> – Director, Legislative and Regulatory Affairs Directorate, Environment Canada
<b>Danielle Rodrigue</b> – Manager, Regulatory Affairs and Quality Management Legislative and Regulatory Affairs Directorate, Environment Canada
<b>Don Stewart</b> – Manager, Regulatory Policy Section, Legislative and Regulatory Affairs Directorate, Environment Canada
<b>Stephen deBoer</b> – Director General, Climate Change, International Affairs Branch, Environment Canada

<b>Dan McDougall</b> – Assistant Deputy Minister, International Affairs Branch, Environment Canada
<b>Lyne Monastesse</b> – Director, Bilateral Affairs, International Affairs Branch, Environment Canada
<b>Jean Boutet</b> – Senior Policy Analyst, International Affairs Branch, Environment Canada
<b>CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY</b>
<b>Elaine Feldman</b> - President, Canadian Environmental Assessment Agency
<b>Helen Cutts</b> - Vice President, Policy Development Sector, Canadian Environmental Assessment Agency
<b>TREASURY BOARD</b>
<b>Alan Neff</b> - Director, Regulatory Policy, Treasury Board Secretariat
<b>Jim Martin</b> - former head of Regulatory Affairs, Treasury Board Secretariat
<b>Glyn Chance</b> -, Executive Director, Regulatory Cooperation Secretariat, Treasury Board
<b>Jing Xu</b> , Director - Regulatory Cooperation Secretariat, Treasury Board
<b>FISHERIES AND OCEANS CANADA</b>
<b>Sharon Ashley</b> – Director General, Ecosystem Management, Department of Fisheries and Oceans Canada
<b>Jeff MacDonald</b> – Director General, Legislative and Intergovernmental Affairs, Department of Fisheries and Oceans Canada
<b>Nigel Harrison</b> –Senior Regulatory Analyst, Legislation and Regulatory Affairs , Fisheries and Oceans Canada
<b>Julie Thompson</b> – Director, Environmental Response, Canadian Coast Guard, Department of Fisheries and Oceans Canada
<b>Paul Gaskin</b> – Director, Department of Fisheries and Oceans Canada
<b>TRANSPORT CANADA</b>
<b>Donald Roussel</b> – Director General, Marine Safety and Security, Safety and Security Group, Transport Canada
<b>Kash Ram</b> – Director General, Road Safety and Motor Vehicle Regulation, Safety and Security Group, Transport Canada
<b>Merz Rusom</b> – Director, Motor Vehicle Standards, Research and Development, Safety and Security Group, Transport Canada
<b>Geoffrey Oliver</b> – A/Director General, Aviation Safety, Safety and Security Group, Transport Canada
<b>Joanne St.-Onge</b> – Director, Regulatory Affairs, Safety and Security Group, Transport Canada
<b>CANADIAN NUCLEAR SAFETY COMMISSION</b>
<b>Jason Cameron</b> – Director General, Strategic Planning Directorate, Canadian Nuclear Safety Commission
<b>Greg Rzentkowski</b> – Director General, Directorate of Power Reactor Regulation, Canadian Nuclear Safety Commission
<b>Peter H Elder</b> – Director General, Directorate of Nuclear Cycle and Facilities Regulation, Canadian Nuclear Safety Commission
<b>HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA (HRSDC)</b>
<b>Brenda Baxter</b> – Senior Director, Occupational Health & Safety, Program Development and Guidance Directorate, HRSDC
<b>Bawan Saravana</b> – Director, Occupational Health & Safety, Program Development and

Guidance Directorate, HRSDC
<b>Janine Aussen</b> – Manager Operations, Occupational Health & Safety, Program Development and Guidance Directorate, HRSDC
<b>CANADIAN FOOD INSPECTION AGENCY (CFSA)</b>
<b>Colleen Barnes</b> – Executive Director, Program, Regulatory & Trade Policy, CFSA

### **Government of Canada – Former Cabinet Ministers**

<b>The Honourable Marc Lalonde</b> - former Canadian Minister of Health, Finance and current international arbitrator
<b>The Honourable David Dingwall</b> - former Canadian Minister of Health 1996

### **Canadian NGO community**

<b>Howard Mann</b> - Associate and Senior Law Advisor, International Institute for Sustainable Development (IISD)
<b>Cynthia Callard</b> -Executive Director, Physicians for a Smoke Free Canada
<b>Neil Collishaw</b> - Research Director, Physicians for a Smoke Free Canada

### **Academics**

<b>Eric Neumeyer</b> - Professor of Environment and Development and Head of the Department of Geography and Environment, London School of Economics
<b>Todd Weiler</b> - Investment Treaty Arbitration
<b>Ben McGrady</b> - Project Director, Initiative on Trade, Investment and Health, O’Neil Institute for National and Global Health Law, Georgetown University
<b>Kyla Tienhaara</b> - Research Fellow at the Regulatory Institutions Network
<b>Lauge Poulsen</b> - Research Fellow, London School of Economics
<b>Jonathan Bonitcha</b> - Research Fellow, London School of Economics
<b>David Schneiderman</b> - University of Toronto Faculty of Law, Canada
<b>Gus Van Harten</b> - Osgoode Hall Law School, York University, Canada

### **International organizations**

<b>Meg Kinnear</b> – Secretary General, ICSID, World Bank
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### **Tobacco Industry**

<b>Marie-Josée Lapointe</b> - former communications director with the Canadian Tobacco Manufacturers Council CTMC
<b>Pierre Fortier</b> - former executive with Imperial Tobacco

**Semi-Structured in-depth interviews with  
Federal Canadian Department/ Agency Regulators**

**Interview Questions**

**My project**

*I am looking at the impact Canada's trade commitments on government's regulatory autonomy. Whether trade commitments such NAFTA constrain ability to regulate health, safety and environment – and to what extent these commitments and their implications play into the decision making process.*

*Speak to you to understand how the regulatory environment has changed and whether as regulator you have felt impact of trade commitments*

- What are the key regulatory responsibilities within your Branch/ Directorate?
- How have regulations changed in your area over the last fifteen years? What are some of the key milestone changes?
- Have regulations become more stringent or less stringent (in terms of the requirements placed on industry to comply- such as requiring a greater depth of science to demonstrate acceptability of risk or a greater quantity or frequency of reporting)
- What evidence would you highlight to support your position? Are there independent reports which would echo that view (such as from OECD or other international body)?
- What are the key factors influencing your regulatory development process? (e.g.: the public need, view of key stakeholders, international trends, domestic trends, international commitments, other)
- How would you rank these influences?
- Do you consider Canada's international trade commitments and the potential constraints they impose, when developing regulation or regulatory policy? How?
- How does this influence your decision making? (perhaps in the wording of regulations, their content or the timing of changes) To what extent does it influence your decision making? (e.g.: a lot, somewhat, a little, not at all)
- Which trade commitments are most relevant to you in your regulatory capacity? (e.g.: WTO, FTAs, NAFTA, FIPAs) Why?

- Are you aware of Canada's international investment agreements such as FIPAs and NAFTA Chapter 11? Do they influence your decision making?
- Has your regulatory area ever faced a challenge under NAFTA Chapter 11 or the threat of a challenge? Describe.
- Are you aware of NAFTA Chapter 11 challenges to other areas of Canadian regulation? How?
- Does the threat of such a challenge or your awareness of such challenges affect your decision making with respect to regulatory policy? How?
- How often are regulatory proposals dropped following public consultation or Gazette 1? Have there been any specific instances that you are aware of when this has happened?
- What have been the main causes of this? (e.g.: change in policy direction, strong lobbying by stakeholders, incompatibility with international commitments)
- Has Canada led or followed international trends in this area of regulation?
- Given any complementary mandates in this area of regulation at the Federal and Provincial levels, how do you manage the trade implications of provincial actions?
- Who else should speak with in the Department, provinces, internationally
- I will be conducting a very short survey of all regulators within your Department/Agency in the coming months. Would you be able to assist by:
  - Participating as a respondent in the survey
  - Confirming which division on this list have regulatory responsibility.
  - Acting as or identifying a point of contact within your Directorate/Branch and helping me distribute these surveys by internal mail and receiving them back for me to collect? I would do all the actual email and phone chasing.
- Would such a survey be feasible during the months of July and August or would it be best to wait until September?

## APPENDIX 5: QUALITATIVE CODING – INTERVIEWS WITH CANADIAN REGULATORS

<b>Categories for 'Factors influencing the regulatory development process'</b>				
When asked what factors influence their regulatory development process, these are the factors identified by regulators during the in-depth interviews				
	<b>Initial Coding</b>		<b>Action Coding</b>	
<b>Invivo quotes/paraphrasing</b>	<b>Desriptive Code</b>	<b>Descriptive categories</b>	<b>process codes</b>	<b>process categories</b>
<i>We consider these (SPS and TBT commitments) in our decision making process'</i>	global initiatives	<b>international standards &amp; commitments (18)</b>	complying with global initiatives	<b>complying with international standards &amp; commitments</b>
<i>The agenda is set internatioanlly and through model regulations</i>	international approach	21%	aligning with international community	
	international scrutiny		adapting to international trends	
	international bodies		withstanding international scrutiny	
	international commitments		adhering to international commitments	
	international trends		adhering to TBT and SPS	
	international standards		resonding to international trends	
			adhering to international standards	
			tracking international standards	

<i>why are we not adopting a US or European solution'. We have some latitude to exercise our sovereignty but the question is always weather this is really needed. What are the key differences with other major trading partners that would necessitate such a unique approach</i>	harmonizing with trade partners	<b>harmonization initiatives (7)</b>	harmonizing internationally	<b>Harmonizing regulations with US/Internationally</b>
<i>The bedrock is US regulation</i>	harmonization with US	8%	adapting for Canadian context	(adapting for Canadian context)
	standard harmonization		cooperating internationally to reduce trade barriers	
	international harmonization		harmonizing with trade partners	
	trends among trading partners		harmonizing with the US	
	international cooperation-RCC		cooperating with the US	
	stakeholders	<b>stakeholder expectations (12)</b>	responding to stakeholders	<b>Responding to stakeholder expectations</b>
	provinces	14%	incorporating views of provinces	
	provincial trends (2)		aligning federal provincial interests	
	NGOs		responding to NGOs	
	public and NGO stakeholder views (2)		ensuring domestic consistency	
	consumer demands (4)		responding to consumer expectations	

	public push for strong regulations		considering stakeholder views	
	public expectations		responding to public expectations	
<i>Science is the main driver of regulatory change and development</i>	scientific data	<b>advances in science (9)</b>	responding to scientific data	<b>Responding to advances in science &amp; technology</b>
	Advances in science	11%	responding to science	
	Science		adjusting to scientific advance	
	research driven		responding to science and research	
	science and engineering		incorporating advances in science and engineering	
	technology and innovation		ensuring technology and innovation	
	emerging technologies (2)	(emerging technology)		
<i>It is dangerous we should ban it' in health departmet vs 'have not seen evidence of risk to people' in economic department.</i>	health impact	<b>health &amp; safety mandate and need (16)</b>	responding to health concern	<b>Responding to health &amp; safety needs</b>
<i>First and foremost is the determination of health issue</i>	health issues	19%	addressing health issues	
<i>what they need to do to protect human health and safety</i>	public health gap		filling public health gap	
	domestic need		identifying domestic need	
	workplace need		responding to workplace need	

	health driver		addressing safety concerns	
	safety issue		ensuring safety	
	hazardous nature of substance		ensuring effective controls	
	potency level		reducing dependance and abuse	
	potential substance abuse			
	potential for addiction			
	protect human health and safety		protecting human health and safety	
	health & safety		responding to health safety and environemntal concerns	
	mandate of health safety & environment		protecting health and environment	
	radiation protection			
	risk levels of product protect health & environment		assessing risk levels	
	public safety risk assessment (2)	(assessments of risk)	responding to public safety risk assessments	(Assessing risk levels)
	emerging risks		identifying emerging risk	
	risk informed approach		using risk informed approach	
<i>trade is not really a driver for us'</i>	trade through new trade negotiations	<b>international trade facilitation (11)</b>	negotiating new trade treaty	<b>Avoiding trade restrictions</b>

<i>They are under pressure on FTAs to move towards common standards</i>	common standards in FTAs (2)	(new negotiations)		(negotiating new trade treaties)
<i>Trade is not on the radar in terms of breaching agreements</i>	trade law input (2)	(legal considerations)	incorporating trade law input	(considering legal challenges)
<i>need to balance the issue of health and safety with the issue of competitiveness</i>	legal considerations		considering potential legal challenges	
<i>Not thinking about trade commitments in this process</i>	market access (2)	(market access/ reducing barriers)	ensuring market access	
<i>They are being asked to consider what may or may not encourage greater trade while at the same time wanting to protect workers</i>	avoid barriers to trade	13%	avoiding restrictions to market access	
<i>facilitating trade globally and not disadvantaging Canadian companies</i>	reducing trade barriers		avoiding barriers which hinder competitiveness	
	reduce innovative technology barriers		reducing trade barriers	
	trade facilitation		reducing barriers to technology and innovation	
	trade and competitiveness		facilitating trade	
	impact on export opportunities		considering trade and commerce impacts	
	health, safety and competitiveness balance		balancing competitiveness with health & safety	
	economic impact		focussing on impact regulations on market opportunities	

	competitiveness		ensuring competitiveness	
	encouraging trade		balancing market access and competitiveness	
	trade with respect nuclear licencing		encouraging trade	
	RIAs (lead to trade focus)		considering trade through RIAs	
	domestic streamlining initiatives	<b>domestic streamlining &amp; modernization (11)</b>	responding to domestic streamlining initiative	<b>Responding to domestic streamlining and modernization initiatives</b>
	modernization	13%		
	domestic efficiency objective		responding to domestic efficiency initiatives	
<i>There is a desire not to impose onerous costs</i>	cost/benefit justification (2)	(cost benefit)	increasing flexibility for regulatory change	
	objective based		justifying cost/benefit	justifying cost/ benefits
	outcome focussed (2)	(outcome based)	focussing on objective vs prescriptive	(focussing on outcomes)
	fixing long term irritants		focussing on outcomes	
	outdated regulations		addressing irritatnts through regulation	
			addressing outdated regulations	

**Categories for 'How regulators consider trade commitments in the regulatory development process'**

Trade was one of many factors. Specifically how do regulators consider trade commitments in the regulatory development process			
	Initial Coding		Action C
<i>In vivo quotes/paraphrasing</i>	Process Code	Process categories	Descriptive Code
<i>biggest trade concern is notification. Needs to be scientifically robust basis for regulation</i>	Notifying to the WTO	ensuring international transparency/ disclosure (6)	trade notification
<i>real desire to be as open as can</i>	ensuring trade notification	11%	performing beyond TBT notification requirements
	sharing information beyond notification		WTO TBT committee
	notifying to SPS & TBT at WTO		notifications to WTO SPS
<i>Consider formal obligations - Is a measure justified under statute?</i>	Ensuring standards in new trade regulations	ensuring compatibility with new and existing trade commitments (8)	new trade negotiations
<i>Trade is an issue with new agreements as want to ensure that standardards are not lowered</i>	negotiating FTAs	14%	WTO commitments
	justifying regulations under trade commitments		regulations consistent under trade commitments
	adhering to SPS & TBT		
<i>trade factor in terms market access</i>	RIAs forcing trade considerations	Avoiding barriers to trade (11)	RIAs force trade consideration
<i>tension between maitaining integrity of the food system and trade interests'</i>	convincing treasury board no trade issue	20%	MLR's as barriers to trade
<i>industry challenges are a concern</i>	following EA process		convergence MLR standards

<i>Consideration of trade impact of the EA is entirely peripheral. 90% of their energy is on the legal parts of the act which doesn't mention trade issues</i>	preventing barriers to trade (MRLs)		market access
<i>The number one consideration is how effective will the regulations be. How can they make them as effective as possible without burden for industry. Trade means all types - WTO, TRIPs</i>	minimising industry burden		minimise burden on industry
<i>consider health and environmental concerns and the value of trade and commerce</i>	ensuring competitiveness balance		competitiveness focus
<i>Trade concerns seen as 'What will be the impact on producers and consumers'. Is our market big enough to justify our own regulations - made in Canada</i>	balancing liability & trade promotion		Industry concerns
<i>Market access is a key driver for regulatory development. If the US sets new standards, Canada needs to adhere.</i>	understanding industry concerns		tobacco industry threat
<i>RIAs key driver for trade considerations</i>	tobacco litigating industry		
<i>Treasury Board gave them hard time over potential trade issue</i>			
<i>trade difficulty arises when there is political interest in project</i>	careful when political interest driving decision	managing political interests (2)	political influence
<i>delays are down to political will rather than trade concerns</i>	politics driving decisions can lead to trade challenge	4%	non science based political decisions
<i>We always think about trade' - focus is competitiveness</i>			

<i>previous cases don't have a lot of influence</i>	avoiding disputes while focussed on core mandate	avoiding disputes (8)	Legal advice
	Avoiding trade challenges		rigorous objective EA process
<i>The EA process is onerous on the proponent. Foreign investors are particularly concerned with ensuring that they are not going through more effort than a Canadian investor</i>	managing foreign investor expectation/perception	14%	investor nationality irrelevant
<i>I don't want to step into a major trade issue. At the same time, it is not our primary mandate which is the protection of health and the environment'</i>	reacting to foreign investor		avoid dispute
<i>they are aware of the cash drain of such a case</i>	considering possible legal challenge		potential legal challenge
	Receiving legal advice on trade impact		
	asking for legal advice		
<i>FTAs matter most</i>	avoiding US regulatory impediments	harmonizing with trade partners (18)	harmonization
<i>question whether Canada will feel pressure to respond to international regulatory changes</i>	already harmonizing with US	32%	harmonization through RCC
<i>NAFTA working group harmonize to highest common denominator</i>	US driving GHG regulation		international standard alignment
<i>The willingness to regulate, both the forum and actual regulations is driven by what the US is doing</i>	harmonizing to high standards		international cooperation
<i>Now they need more than a good reason to do something different in regulation</i>	facilitating trade through harmonization		standard harmonization
<i>The Canadian government is currently very focussed on manufacturers and US harmonization</i>	harmonizing for market access		harmonization balance

<i>high degree of attention on making things compliant with the US</i>	harmonizing through RCC		strong push US harmonization in transport
	aligning international standards		consistent with trade partners
	Cooperating internationally		trade facilitation in export mandate
<i>trade commitments are 'not front of mind'</i>	focussing on health	Not considering trade (3)	little trade impact
<i>Trade 'not a priority'</i>	Reducing red tape	5%	trade not driver
<i>Trade doesn't change what we measure. 'The results are the results'</i>	focussing on science		
<i>trade is not a big factor</i>	relaxing of trade angst		
<i>health and safety first</i>	trade not impacting regulation		
<i>Science is main driver</i>	lack understanding of trade obligations		
<i>never seen NAFTA have an influence'</i>			
<i>NAFTA Chapter 11 is not on our radar'</i>			
<i>accpetance that it is ok if environmental issues affect trade</i>			
<i>concerened with ensuring risk based, objective, solid science basis to justify adding a regulation in the area of health and the environment</i>			
<i>safety is the key driver</i>			
<i>there are no issues in trade</i>			
<i>NAFTA disputes not top of mind on the operational side</i>			
<i>The mandate of the agency is health and safety and there is no economic mandate</i>			

**APPENDIX 6 – LIST OF INTERVIEWS WITH TOBACCO CONTROL REGULATORS**

**Framework Convention on Tobacco Control  
Fifth Conference of the Parties – Seoul Korea November 12-16**

**Meetings and Interviews**

<b>Country</b>	<b>Name</b>	<b>Meeting Date</b>
New Zealand	Paul Badco National Programme Manager, Tobacco Control, Sector Capability and Implementation	Thursday November 15
Singapore	Mr. Litt Chan, Manager Adult Health Division, Health Promotion Board	Tuesday November 13
Sweden	Andreas Johansson Head of Section, Public Health Division, Ministry of Health and Social Affairs	Thursday November 15
Finland	Kari Passo Director Ministry of Social Affairs and Health	Wednesday November 14
Norway	Karl-Olaf Wathne Special Adviser, Norwegian Ministry of Health and Care Services	Thursday November 15
UK	Andre Black Tobacco Programme Manager, Department of Health	Monday November 12 – Set up time to discuss further in London in December
Panama	Dr. Reina Roa Rodriguez Direcotra de Provision, Servicio de Salud, Punto Focal para el control del Tobaco, Minsterio de Salud	Tuesday November 13
Malta	John Attard Kingswell Director, Superintendence of public Health, Environmental Health Directorate	Wednesday November 14
Ghana	Edith Wellington Research and Development Division Ghana Health Services	Tuesday November 13
Yemen	Mohamed Al Khawlani Director of Tobacco Control Program, Ministry of Public Health and Population	Wednesday November 14
Ecuador	Dr. Hugo Noboa	Has agreed to meet. Does not speak English so will need to bring colleagues for interpretation

NGO	Elizabeth Furgurson, Chief Operating Officer Framework Convention Alliance	Thursday November 15 – agreed to communicate further via email
Tobacco Industry	Barbara Martellini, Assistant VP Corporate Affairs, Ultoco Services S. A.	Thursday November 15 – agreed to communicate further via email
Academic	Dr. Ben McGrady Project Director, Initiative on Trade, Investment and Health O'Neill Institute for National and Global Health Law	Monday November 12
Academic	Raphael Lencucha Assistant Professor, University of Lethbridge Faculty of Health Sciences	Monday November 12

**APPENDIX 7– IN-DEPTH INTERVIEW QUESTIONS WITH TOBACCO CONTROL REGULATORS**

**Framework Convention on Tobacco Control FTCC Conference**

**Seoul, Korea – November 12-16**

**Interviews with tobacco control regulators**

**Delegation Country** \_\_\_\_\_

**What role do you play in the development of tobacco control regulation?**

**What are the key factors driving your regulatory development policy?** (eg: health goals of the government, domestic pressures, international commitments such as FCTC, industry lobbying or litigation, etc.)

**What are you doing to meet your commitments to Article 11 and 13 of the FCTC? What types of policies are you putting in place or planning to put in place?**

**Have you required health warnings comprising 50% or more of the product area? If not, what is preventing you from doing this? (Do the legal challenges faced by Uruguay on this issue play a role?)**

**FCTC guidelines for Article 11 and 13 recommend parties consider adopting plain packaging requirements as means of restricting packaging, labelling and advertising. Is this something you are considering?**

**What factors are influencing your decision to pursue this policy? (To what extent does the litigation faced by Australia play a role in your decision making? Are you awaiting the results of that battle?)**

**In general, how influential is the response from the tobacco industry to your policy making? Has your government faced a threat of legal action by the tobacco industry for your tobacco policy initiatives? What kind of threat?**

**Do you consider your country's international trade commitments when developing regulatory policy? Which ones? Do you ever consider IIAs? Do you know what these are?**

**Survey participation? Who?**

## List of descriptive codes for Tobacco Control

### 1. Key drivers in regulatory development

#### A) FCTC obligations and guidelines (U,D)

- FCTC guidelines (U, D)
- FCTC Convention and guideline (U, D)
- FCTC tools (D)
- FCTC obligations (D)

#### B) Regional obligations (U,D)

- Regional initiatives (U)
- EU legislation (framework convention) (U, D)
- EU constraints and obligations (D2)
- EU tobacco directive (D)

#### C) Actions other countries (U,D)

- What other countries are doing (U, D2)

#### D) Domestic constraints (D)

- Domestic constitutional constraints (D)

#### E) Industry influence (U)

- Industry influence (U)

#### F) Impact of regulations (U,D)

- Economic impact (D)
- Unintended consequences (D)

#### G) Scientific research (U,D)

- Research (U)
- Academic research (U)
- Scientific evidence (D)

#### H) Health gap (D)

- Health (D)
- Public health gaps (D2)
- Domestic concerns (D)
- Domestic need (D)

#### I) Public opinion (U,D)

- Media and public (U)
- Public consensus (U)
- Public opinion (D2)
- NGO community (D)

#### J) Political will (U,D)

Political will (U, D)  
Political influence (D)

**K) Trade (D)**

Trade distant (D)  
Impact of illicit trade (D)

**2. Considering Plain packaging**

***Not considering, because***

Long way away (U)  
First focussed on health warnings (U)  
Lack political commitment (U)  
Existing laws not enforced (U)  
Watching and waiting Australia results (D)  
Not clear on effectiveness policy (D)  
Have not considered it (D)

***Considering, however***

Departmental differences an issue (U)  
IP concerns (U)  
Lack understanding on impact of policy (U)  
Sees it as EU jurisdiction issue D)  
Awaiting Australia (D)  
Ability to get it through political system an issue (D)  
Highlighting risk of policy (D)  
Examining the idea (D)  
Interested in understanding the impact (D)

**3. Factors influencing plain packaging decision**

**A) Not ready (U)**

**B) Focus on basics first (U)**

**C) Industry influence (U)**

**D) Experience of other countries (U)**

**E) Trade implications (D)**

Awaiting Australian results (D2)  
IP rights impact (D2)  
Possible trade repercussions (D)  
WTO battle (D)  
Risks of litigation (D)

**F) New EU Directive (D)**

**G) Domestic constitutional constraints/ legislation (D2)**

**H) Political will (D)**

**4. Legal action facing and influence of industry**

**A) Small influence (U,D)**

- Not threatening in general (U)
- Have not faced litigation (U)
- No legal action due to weak court system (U)
- Don't consider industry lobbying in developing policy (D)
- Industry has small influence (D)
- Not big influence on direction of policy (D)
- Industry not influential (D)

**B) Active industry, little influence (D)**

- Litigation from industry on three occasions – procedural not content – passed legislation (D)
- Industry challenge through EFTA on point of sale – won case (D)

**C) Strong influence and action (U,D)**

- Two legal challenges in domestic court - Industry intervention succeeded in blocking government support for policies (U)
- Very influential and tied to political presidency (U)
- Industry lobbied openly against plain packaging (D)
- Threat of litigation on plain packaging (D)
- Judicial action has cross border impact – wait and see Australia (D)
- Tobacco companies looking for angle – treaty shopping (D)

**5. Do consider international trade commitments**

**A) Not an issue/influence (U)**

- Trade is not an issue (U)
- Not thinking of trade (U)
- Not aware of trade challenges at home – does not affect (U)
- Aware of challenges elsewhere but not influenced by this (U)
- IAs means nothing – not on radar screen (D)

**B) Other country's trade challenges of concern (D)**

**C) Other domestic departments consider trade (U)**

**D) Alternative focus to trade (U,D)**

- FCTC guidelines are the focus (U)
- Key focus is health policy not trade (D)
- EU commitments more important than trade (D)
- EU is key focus (D)

**E) New trade negotiations (D)**

- Trade key when new treaty negotiated to retain regulatory space (D)

**F) Recent consideration (D)**

Trade is recent phenomena and considered in development of regulations (D)

Trade considered along with other public concerns (D)

WTO and TRIPS most important (D)

**6. My observations**

General references made to trade

Litigation is usually WTO or domestic court litigation

Few direct references to IIA challenges in Australia. Australia usually means domestic constitutional challenge or within the WTO.

## APPENDIX 9 – SURVEY QUESTIONNAIRE FOR CANADIAN FEDERAL REGULATORS

### Canadian Federal Regulator Survey

Q0 CANADIAN FEDERAL REGULATOR SURVEY THIS SURVEY WILL TAKE LESS THAN 5 MINUTES TO COMPLETE! This survey forms part of a doctoral research project at the London School of Economics and Political Science (LSE) on the Canadian Regulatory Process. Over the last six months, meetings have been held with senior officials in your organization regarding this doctoral research project. Officials are aware that this next stage of the research project will involve a short confidential survey of government officials with responsibility within the regulatory process. You have been identified as a valuable source of information and are encouraged to respond. Thank you! INSTRUCTIONS This survey is confidential. It will take less than 5 minutes to complete. Please answer all questions (there are only 15 in total). The Government wide results will be available to all participants at the completion of the research project. Please do not hesitate to contact Christine Cote at [c.cote@lse.ac.uk](mailto:c.cote@lse.ac.uk) if you have any questions regarding this survey Thank you for your time!

Q1 1. Which title most approximates your position within your Department or Agency?

- Director General (1)
- Director (2)
- Head of Section (3)
- Manager (4)
- Other (5) \_\_\_\_\_

Q2 2. Where in the regulatory process do you spend your time? You can identify more than one.

- Regulatory policy development and planning (1)
- Developing regulatory changes or new regulations (2)
- Regulatory authorization (e.g.: licensing) (3)
- Monitoring regulatory compliance (4)
- Evaluating regulatory effectiveness (5)
- Other (6) \_\_\_\_\_

Q3 3. To the best of your knowledge, would you say that regulation within your area of expertise has become more or less comprehensive in its coverage over the last decade (where comprehensive refers to the number of emerging areas being regulated)?

- More comprehensive (1)
- Less comprehensive (2)
- Other (3) \_\_\_\_\_

Q4 4. To the best of your knowledge, would you say that regulation in your area of expertise has become more or less stringent over the last decade (where stringent refers to the requirements for a greater depth of science to demonstrate acceptability of risk)?

- More stringent (1)
- Less stringent (2)
- Other (3) \_\_\_\_\_

Q5 5. In a couple of lines, what examples would you offer to justify your answers to Q3 and Q4

Q6 6. When developing new regulations, changes to existing regulations, providing regulatory authorization or making decisions on evaluation and monitoring, there are a number of key drivers in your decision making process. Please rank the influences below, where 1 indicates the most influential and 8 the least.

- \_\_\_\_\_ The public environmental, health or safety need (1)
- \_\_\_\_\_ Science or technological advances in the field (2)
- \_\_\_\_\_ Canada's international trade and investment commitments (3)
- \_\_\_\_\_ The views of key industry stakeholders or proponents (4)
- \_\_\_\_\_ The views of other stakeholders such as Non-Governmental Organizations (NGOs) or the public (5)
- \_\_\_\_\_ Global trends such as the work of international bodies (6)
- \_\_\_\_\_ Domestic initiatives such as efforts at regulatory streamlining or red tape reduction (7)
- \_\_\_\_\_ Other (8)

Q7 7. To what extent do you consider Canada's trade and investment commitments as relevant to the regulatory process?

- Very much (1)
- Some (2)
- not very much (3)
- not at all (4)

Q8 8. When are Canada's trade and investment commitments of most concern to you? Which of the following describe how trade plays a role in your decision making? You can identify as many as are relevant.

- When a trade agreement is being negotiated by Canada (to ensure any new commitments are compatible with existing regulations) (1)
- In balancing the economic cost-benefits of a regulatory decision, in order to avoid a barrier to trade or to the free commercial flow of goods and investment (2)
- To ensure that any new regulation would not lead to a trade dispute or litigation from international investors (3)
- As part of the Regulatory Impact Analysis Statement (RIAS) which necessitates consideration of trade and investment implications of any new regulation (4)
- In identifying regulatory alternatives for addressing a public need (5)
- They are rarely of concern (6)
- Other (7) \_\_\_\_\_

Q9 9. Where trade is a factor, which types of trade commitments are relevant for you to consider when making a regulatory decision? You can identify as many as are relevant.

- World Trade Organization (WTO) commitments (1)
- North American Free Trade Agreement (NAFTA) commitments (2)
- Bilateral Free Trade Agreement (FTA) commitments (3)
- Foreign Investment Protection Agreement (FIPA) commitments (4)
- Other (5) \_\_\_\_\_

Q10 10. For greater clarity, please indicate which WTO agreements have the most impact on your regulatory decision making process?

	SPS (Sanitary & Phytosanitary Measures) (1)	TBT (Technical Barriers to Trade) (2)	TRIPS (Trade Related Intellectual Property Rights) (3)	TRIMS (Trade Related Investment Measures) (4)
Has a big impact (1)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Has a small impact (2)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Has no impact (3)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Q11 11. For greater clarity please indicate which NAFTA chapters have the most impact on your regulatory decision making process?

	SPS Chapter 7 (Sanitary & Phytosanitary Measures) (1)	TBT Chapter 3 (Technical Barriers to Trade) (2)	Investment Chapter 11 (3)	Services Chapter 12 (4)
Has a big impact (1)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Has a small impact (2)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Has no impact (3)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Q12 12. Have there been any trade challenges launched against your area of regulatory policy that you are aware of?

- I am aware of a trade challenge against my area of regulation (please describe below) (1)

\_\_\_\_\_

- I am not aware of any trade challenge against my area of regulation (2)

Q13 13. Have there been any NAFTA Chapter 11 Investor State Dispute cases launched against your area of regulatory policy that you are aware of?

- I am aware of a NAFTA Chapter 11 Investor State Dispute against my area of regulation (please describe below) (1) \_\_\_\_\_
- I am not aware of any NAFTA Chapter 11 Investor State Dispute against my area of regulation (2)

Q14 14. Have there been any threats of a trade and investment challenge against your area of regulatory policy that you are aware of

- I am aware of a threat of a trade or investment challenge made against my area of regulation (please describe below) (1) \_\_\_\_\_
- I am not aware of any threat of a trade or investment challenge made against my area of regulation (2)

Q15 15. If you have answered yes to any of the last three questions, to what degree does this influence your decision making within the regulatory development/ management process?

- Very much (1)
- Some (2)
- Not very much (3)
- Not at all (4)

## APPENDIX 10 – QUALITATIVE CODING ANALYSIS OF SURVEY DATA

APPENDIX 10: QUALITATIVE CODING ANALYSIS OF SURVEY DATA		
List of key descriptive codes	Categories	Frequency
<b>The Direction of Regulatory Change</b>		
more stringent regulations	more stringent	6
static regulations	static regulations	2
regulating differently	regulating differently	4
complete regulatory overhaul	substantial regulatory change	2
new act		
aggressive targets for 2025	future targets (sub)	1
<b>The drivers for changes or increases in regulatory stringency</b>		
enhancing science requirements	Deeper science & technology	3
increased depth analysis		
more science based regulations		
more complex due to evolving technology	complexity (sub)	3
broader regulations	New areas being regulated	7
more comprehensive regulations		
looking to regulate new areas		
international standards driver	international influence	5
responding to international crisis		
globalization regulations on GHG emissions	harmonization	6
RCC		
alignment with US EPA		
harmonization initiatives		
losing capacity to tailor regulations (Canada)	loss of sovereignty (sub)	1
improving investment climate	Regulatory efficiency & modernization	10
more streamlined and modernized		
RCC streamlining of transport regulations		
red tape reduction		
streamlining to reduce administrative burden		
alternative control mechanisms	other control instruments (sub)	8
cost/benefit justification	cost/benefit focus (sub)	7
big project focus (EA)	smarter focussed regulation (sub)	2
tighter more precise regulations		
smarter but not less regulation		
outcome based	outcome based (sub)	4
greater flexibility		
greater scrutiny	public scrutiny	1
improved investment climate	investment climate (sub)	1
		43
<b>Examples of changing nature or regulations</b>		
Government of Canada initiatives-history of reform	overview of major initiatives	
RCC - Regulatory Cooperation Council	Chemical Management Plan	
Red Tape Reduction Initiative and the government's response (including the one-for-one)	New Environmental Assessment Act	
Cabinet Directive on Smart Regulations 2003/4	Tobacco Control Act and Regs	
	US EPA alignment on GHG emissions	

## Global Tobacco Control Regulation Survey 2013

Q0 GLOBAL TOBACCO CONTROL SURVEY THIS SURVEY WILL TAKE LESS THAN 5 MINUTES TO COMPLETE! This survey forms part of a doctoral research project at the London School of Economics and Political Science (LSE) on Global Tobacco Control Regulations. It will supplement a series of interviews which were conducted with tobacco control regulators from around the world during the WHO Framework Convention on Tobacco Control (FCTC) Fifth Conference of the Parties (COP5) in Seoul Korea in November 2012. Your input will be very valuable. Thank you for your participation. INSTRUCTIONS This survey is confidential. It will take less than 5 minutes to complete. Please answer all questions (there are only 10 in total). The global results will be available to all participants at the completion of the research project. Please do not hesitate to contact Christine Cote at [c.cote@lse.ac.uk](mailto:c.cote@lse.ac.uk) if you have any questions regarding this survey Thank you for your time!

Q1 1. What title most approximates your role?

- Director (1)
- Head of Section (2)
- Special Adviser (3)
- Tobacco Control Focal Point (4)
- Other (5) \_\_\_\_\_

Q2 2. In the area of tobacco control, where in the regulatory process do you spend your time? You can identify more than one.

- Regulatory policy development and planning (1)
- Developing regulatory changes or new regulations (2)
- Monitoring regulatory compliance (3)
- Evaluating regulatory effectiveness (4)
- Other (5) \_\_\_\_\_

Q3 3. What factors influence your development of tobacco control regulations. Please rank the influences below, where 1 indicates the most influential and 6 the least.

- \_\_\_\_\_ Domestic public health concerns (1)
- \_\_\_\_\_ The FCTC protocol and guidelines (2)
- \_\_\_\_\_ The activities of neighboring countries (3)
- \_\_\_\_\_ Your country's international trade and investment commitments (4)
- \_\_\_\_\_ The views of key tobacco industry stakeholders (5)
- \_\_\_\_\_ The views of other stakeholders such as Non-Governmental Organizations (NGOs) or the public (6)

Q4 4. What current level of pictorial warnings do you have in place on tobacco packaging?

- We do not yet have pictorial warnings (1)
- Warning covering an average of 30% of package front and back (2)
- Warning covering an average of 50% of package front and back (3)
- Warning covering an average of 70% of package front and back (4)
- Warning covering an average of 80% of package front and back (5)

Q5 5. What factors are important to you when considering either the introduction of pictorial warnings or increases to the size of pictorial warnings on tobacco products? Please select as many of these as are relevant.

- Domestic public health concerns (1)
- Framework Convention on Tobacco Control commitments and guidelines (2)
- The tobacco control policies of neighboring countries (3)
- The tobacco control policies of world leaders in this area (eg: Australia, Canada, EU countries) (4)
- The threat of litigation from the tobacco industry (5)
- The threat of an international trade or investment challenge (6)

Q6 6. What is your country's position on the policy of plain packaging?

- Plain packaging is not a priority for my country (3)
- We have begun the formal process of considering plain packaging (4)
- We will consider this policy sometime in the future (5)

Q7 7. Which factors will be influential in your decision to pursue plain packaging (either now or in the future)? Please select as many of these as are relevant.

- Domestic political support for this policy (1)
- The compatibility of plain packaging regulations with our domestic or regional laws and policies (e.g: EU law and directives) (2)
- The FCTC Guidelines for Articles 11 & 13 (3)
- The outcome of the WTO challenge to Australia's plain packaging law (4)
- The outcome of the Philip Morris investor-state challenge to Australia's plain packaging law (5)
- Other (6) \_\_\_\_\_

Q8 8. To what extent do you consider your country's trade and investment commitments as relevant to the regulatory process on tobacco control?

- Very much (1)
- Some (2)
- not very much (3)
- not at all (4)

Q9 9. Where trade is a factor, which types of trade commitments are relevant for you to consider when making a regulatory decision on tobacco control? You can identify as many as are relevant.

- World Trade Organization (WTO) commitments (such as TBT, SPS, TRIPS) (1)
- Regional trade commitments (e.g.: EU, ASEAN, NAFTA) (2)
- Bilateral Free Trade Agreement (FTA) commitments (3)
- Bilateral Investment Treaty (BIT) commitments (4)
- Other (5) \_\_\_\_\_

Q10 10. Have there been any trade or investment challenges to tobacco control regulations in your country?

I am aware of a trade or investment challenge against tobacco control in my country (1)

\_\_\_\_\_

I am not aware of any trade or investment challenge against tobacco control in my country (2)