

# International Investment Agreements Since NAFTA: Substantive Provisions<sup>†</sup>

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<sup>†</sup> Editor's note: The following is a reproduction of presentation slides that accompanied the author's talk. A narrative or prose style text of the presentation was not available for publication. The information contained in the present format is naturally somewhat limited, but it still provides a great deal of valuable information and useful context for the subject.

<sup>\*</sup> The author has extensive experience in the practice of international trade law. He participated as a legal advisor in Canada's Trade Negotiation Office respecting the automotive provisions of the *Canada-U.S. Free Trade Agreement* ("CUFTA") and advised Canada's Office of the Trilateral Trade Negotiations during the negotiation of the *North American Free Trade Agreement* ("NAFTA"). Jon has advised industry associations and other clients, both in the public and private sectors, on matters involving international trade arising under NAFTA and the *Agreement Establishing the World Trade Organization* ("WTO Agreement"). He also advised the Federal Government in respect of actions brought by U.S. investors under the NAFTA investment chapter including claims brought by Ethyl Corporation, Pope & Talbot and UPS. He has advised industry stakeholders in respect of WTO challenges brought against Canada regarding automotive duty remission programs and pharmaceutical patent issues, and in respect of WTO challenges brought by Canada against the United States in respect of the softwood lumber dispute. Has advised clients respecting antidumping and countervailing duty actions brought under the *Canadian Special Import Measures Act* as well as respecting customs matters, import and export controls and other border measures. Recipient of the Award of Excellence in International Law from the International Section of the Ontario Bar Association, October 20, 2009. His publications include *The North American Free Trade Agreement: A Comprehensive Guide*. Jon retired as a partner at Goodmans LLP and is currently a sole practitioner.

## What are investment agreements?

- Treaties between countries
- Usually bilateral, occasionally trilateral
- No multilateral investment agreements
- Protect investors by imposing treatment standards
- Bypass domestic legal systems through binding investor/state arbitration
- About 3,000 in existence

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## Substantive Provisions

- Non-Discrimination
  - National Treatment
  - Most-favoured nation (MFN) treatment
- Fair and equitable treatment
- Expropriation
- Performance Requirements
- Repatriation and Other Provisions

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## National Treatment

- Treatment no less favourable than accorded in like circumstances to domestic investors and their investments
- Government position – requires discrimination based on nationality
- Aggressive investor position – requires best in jurisdiction treatment, policy reason for different treatment doesn't matter

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## MFN Treatment

- Treatment no less favourable than accorded in like circumstances of investors of any other country and their investments
- Investor argument – investor entitled to the best treatment under any of the host country investment agreements
- Never successful under NAFTA but sometimes successful elsewhere

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## Fair and Equitable Treatment

- Requires fair and equitable treatment and full protection and security
- Unlike national treatment and MFN treatment which are comparative, fair and equitable treatment establishes a minimum standard
- Most concern to NAFTA governments because seemingly open-ended

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## Fair and Equitable Treatment (continued)

- NAFTA Governments –minimum international law standard – treatment must be egregious to breach
- Investors – any perceived “unfair” treatment is caught
- NAFTA Governments settled through Agreed Interpretation
- Open-ended in other investment agreements

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## Expropriation

- Prohibits nationalization or expropriation unless
  - - for a public purpose
  - - on a non-discriminatory basis
  - - in accordance with due process
  - - upon payment of full compensation based on fair market value

## Expropriation (continued)

- Originally provision of greatest concern
- Frequently advanced as basis for claim but rarely successful
- NAFTA tribunals require substantial and permanent deprivation
- Confers higher right to foreign investors in countries like Canada that don't constitutionally protect property rights

## Performance Requirements

- Achieving given levels of exports or levels of domestic content
- Preferring domestic inputs
- Balancing imports or domestic sales with export performance or foreign exchange earnings
- Technology transfer
- Exclusive supplier to specified regions

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## Performance Requirements Prohibited

- Prohibit performance requirements a condition for being permitted to establish or as a condition for receiving advantages such as subsidies.
- Precludes certain investment strategies

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## Other Provisions

- Repatriation of dividends, interest, capital and capital gains
- Minimum Equity Requirements
- Local Presence

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## Grandfathering, Exceptions and Reservations

- Grandfathering
  - NAFTA federal governments
  - Provincial and municipal
- Exceptions
  - Most taxation measures
- Reservations
  - Sectors such as transportation and communications

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## Positives and Negatives

- Positives
  - Some protection to foreign investors
  - International jurisprudence on investment norms
- Negatives
  - Patchwork approach
  - Possible chilling effect on legitimate domestic policies

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## Investor/State Dispute Resolution

- Positive or Negative?

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