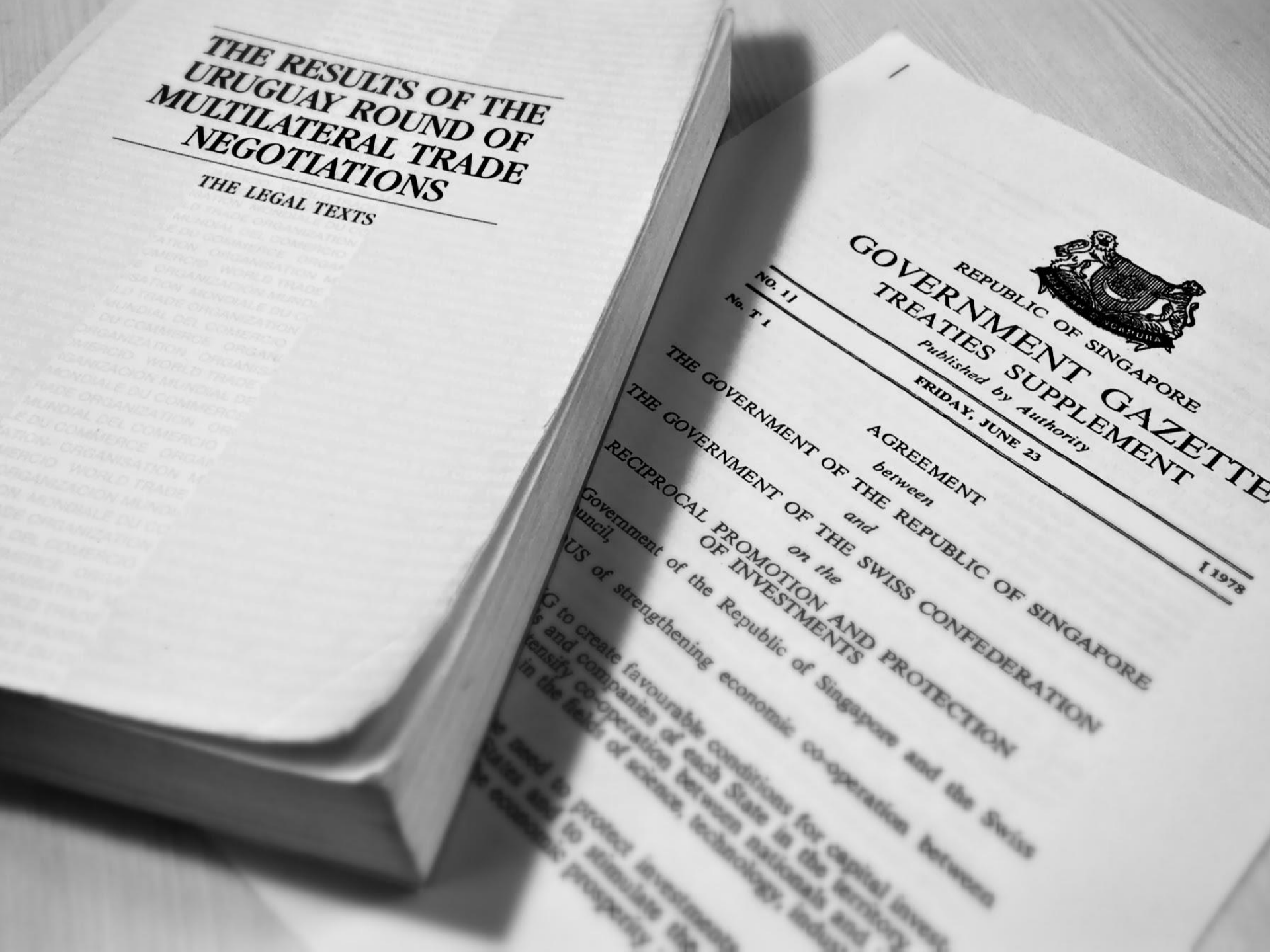
Modern Investment Treaty-making Practice: Restatement, Elaboration and Transparency

CIL
Centre for International Law
National University of Singapore

J C Thomas, QC
National University of Singapore
Centre for International Law

Themes

- Movement away from short, generally worded treaties
- Trend towards longer, more detailed treaties that give direction to arbitrators
- Many more defined terms, detailed substantive obligations, more procedural direction
- Increased transparency
- Convergence in treaty-making is on the horizon



THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS

THE LEGAL TEXTS

REPUBLIC OF SINGAPORE

GOVERNMENT GAZETTE

TREATIES SUPPLEMENT

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AGREEMENT

between

THE GOVERNMENT OF THE REPUBLIC OF SINGAPORE

and

THE GOVERNMENT OF THE SWISS CONFEDERATION

on the

RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

Unexpected interpretations

- The ‘fair and equitable treatment’ provision was susceptible to potentially idiosyncratic application
- The ‘indirect expropriation’ and ‘measures tantamount to expropriation’ phrasing was interpreted broadly in one case

Pope & Talbot v. Canada

Considered NAFTA Article 1105(1) which provides:

> "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, **including** fair and equitable treatment and full protection and security."

Pope & Talbot v. Canada

110. Another possible interpretation of the presence of the fairness elements in Article 1105 is that they are *additive* to the requirements of international law. **That is, investors under NAFTA are entitled to the international law minimum *plus* the fairness elements**. It is true that the language of Article 1105 suggests otherwise, since it states that the fairness elements are included within international law. But that interpretation is clouded by the fact, as all parties agree, that the language of Article 1105 grew out of the provisions of bilateral commercial treaties negotiated by the United States and other industrialized countries…

Supreme Court of British Columbia's View of *Pope & Talbot*

[65] **With respect, I am unable to agree with the reasoning of the *Pope & Talbot* tribunal. It has interpreted the word "including" in Article 1105 to mean "plus", which has a virtually opposite meaning…**

United Mexican States v. Metalclad Corporation, Reasons for Judgment of the Honourable Mr Justice Tysoe

S.D. Myers Inc. v. Canada Partial Award

The majority finds that the breach of NAFTA's national treatment obligation also constitute a breach of the 'Minimum Standard of Treatment':

> "266. Although ... the Tribunal does not rule out the possibility that there could be circumstances in which a denial of the national treatment provisions of the NAFTA would not necessarily offend the minimum standard provisions, a majority of the Tribunal determines that on the facts of this particular case **the breach of Article 1102 essentially establishes a breach of Article 1105 as well**."

S.D. Myers Inc. v. Canada

Arbitrator Chiasson (dissenting):

> "267. Mr. Chiasson considers that a finding of a violation of Article 1105 must be based on a demonstrated failure to meet the fair and equitable requirements of international law. Breach of another provision of the NAFTA is not a foundation for such a conclusion…"

Metalclad Corporation v. Mexico

"103. Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."

Mexico v. Metalclad (Judicial review)

"[99] … This definition is sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority. However, the definition of expropriation is a question of law with which this Court is not entitled to interfere under the *International CAA*."

This underscored the importance of clear treaty drafting

- Judicial deference to the perceived expertise of international arbitrators
- Reluctance to intervene
- No review for error of law
- Only 'one kick at the can'

July 2001 Free Trade Commission Note of Interpretation

A. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

Other issues

As claimants began to bring claims against the three NAFTA Parties, questions began to arise:

- Who was appointed to tribunals?
- What ethical and other obligations applied to tribunal members?
- What was a tribunal empowered to do?
- Why were documents pertaining to the claims are not readily available to the public?
- Why were hearings held *in camera*?

"NAFTA's powerful little secret"

"THEIR meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under the North American Free Trade Agreement."

New York Times, 11 March 2001

This led to the other part of the July 2001 Note of Interpretation

A Access to documents

1. **Nothing in the NAFTA imposes a general duty of confidentiality** on the disputing parties to a Chapter Eleven arbitration, and, **subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.**

2001 Note of Interpretation (cont.)

2. In the application of the foregoing:

   a. In accordance with Article 1120(2), the NAFTA Parties agree that **nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.**

2001 Note of Interpretation (cont.)

b. **Each Party agrees to make available to the public** in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:

   i. confidential business information;

   ii. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and

   iii. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

Demands for Participation

- Tribunals began to receive petitions for rights of intervention from unions, NGOs, First Nations
- They responded favourably to such petitions, but did not grant the same rights as those of disputing parties

UPS v. Canada Decision on *Amicus Curiae*

"70. The Tribunal returns to the emphasis which the Petitioners, with considerable cogency, have placed both on the important public character of the matters in issue in this arbitration and on their own real interest in these matters. It recalls as well the emphasis placed on the value of greater transparency for proceedings such as these. **Such proceedings are not now, if they ever were, to be equated to the standard run of international commercial arbitration between private parties.** The Petitioners have made out a case for their being permitted to make written submissions on appropriate matters as determined, on application, by the Tribunal…"

Back to the drawing board…

- 2004 Canadian Model Foreign Investment Protection Agreement
- 2004 United States Model Bilateral Investment Treaty

The emergence of longer treaties

- Both model treaties included more definitions
- Both incorporated the 2001 Note of Interpretation's provisions on fair and equitable treatment
- Both contained annexes elaborating on how to distinguish between regulation and indirect expropriation
- Both established greater transparency rules

Singapore-US FTA, Chapter 15

- Influenced by the US Model BIT
- Employed exchanges of letters between ministers to confirm shared understandings of key concepts

Chapter 15 (cont.)

- Affirmed the Joint Commission's power
- Not only was an interpretation by the Joint Commission binding, "an award must be consistent" with it

Chapter 15 (cont.)

- Proceedings would be open
- Pleadings, orders, decisions and awards would be published
- *Amicus curiae* interventions regulated
- In this way, the treaty varied the otherwise applicable arbitration rules
- The ICSID rule that attendance at hearings was controlled by consent of the parties was modified by the treaty

This occurred in many treaties

- The post-NAFTA model propagated through adoption to varying degrees by third States
- Traces of the North American approach are easily seen in the ASEAN Comprehensive Investment Agreement
- The Canada-China FIPA departed significantly from prior Chinese practice; certain provisions were taken word-for-word from post-NAFTA treaties

The EU has embraced the change

- EU Member States preferred short, generally worded BITs
- With the transfer of investment treaty-making power from the Member States to Brussels, the approach to investment protection changed
- Influenced by European Parliament, the NAFTA experience, claims against EU Member States, NGOs and public criticism

Draft EU-Singapore FTA goes further

- Deals with issues that have raised concerns (*e.g.* claims to standing by shell companies having no real connection to a Party)
- Further elaboration on the meaning of fair and equitable treatment (closed list, subject to expansion only by agreement of the Parties)
- Inclusion of text on distinguishing between regulation and indirect expropriation
- Open hearings, transparency, non-disputing party participation

Draft EU-Singapore FTA

- Further recognition of role of *bona fide* regulation, environmental and other considerations
- Introduction of a GATT Article XX-type exceptions clause (included in other Asian treaties but not in prior European practice)
- Introduction of mediation mechanism
- Code of conduct for arbitrators and mediators
- Reserve possibility of an appellate mechanism

Potential convergence of treaty models

- ***If*** the EU approves and ratifies the FTAs, this will mark a major shift in European practice
- Singapore's 12 BITs with EU Member States will be terminated and replaced with the FTA
- The EU will have signed on to, and further elaborated upon, the post-NAFTA model

Convergence

- ***If*** the TPP negotiations succeed, another plurilateral agreement will apply as between the 12 TPP States
- The world will move from 3200+ BITs toward a plurilateral world of similar and converging treaty models between significant groupings of States

Thank You

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