International investment arbitration and public health policy: growing demands for new competencies

Ashley Schram

PhD(c), Population Health, University of Ottawa

Ronald Labonte

Canada Research Chair, Globalization and Health Equity, University of Ottawa

Anthony VanDuzer

Professor, Faculty of Law, University of Ottawa

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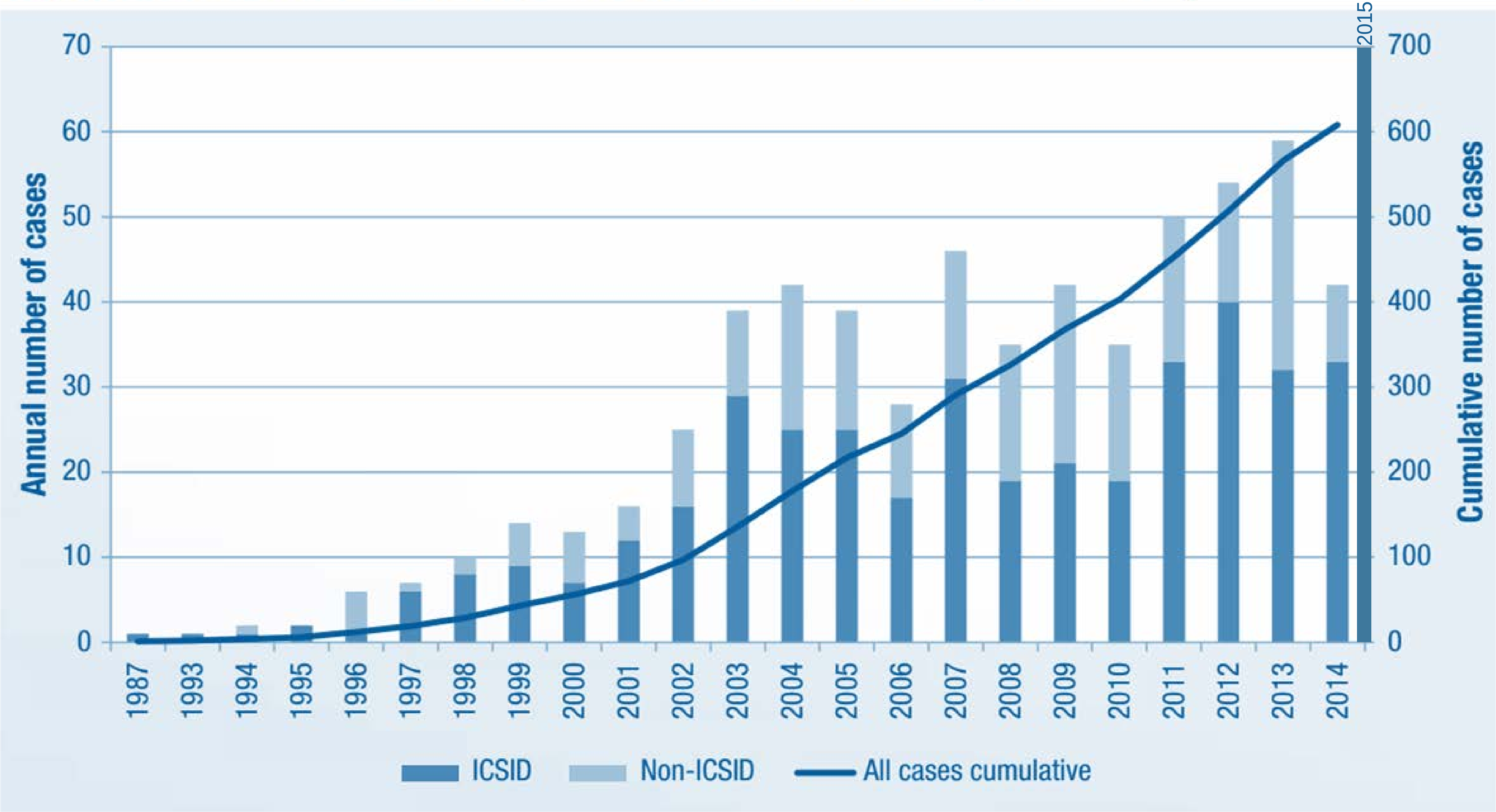
Investor-State Dispute Settlement

- international investment agreements
  - expansive investor rights + investor-state dispute settlement mechanisms
  - *e.g.* North American Free Trade Agreement (NAFTA), bilateral investment treaties (BITs)

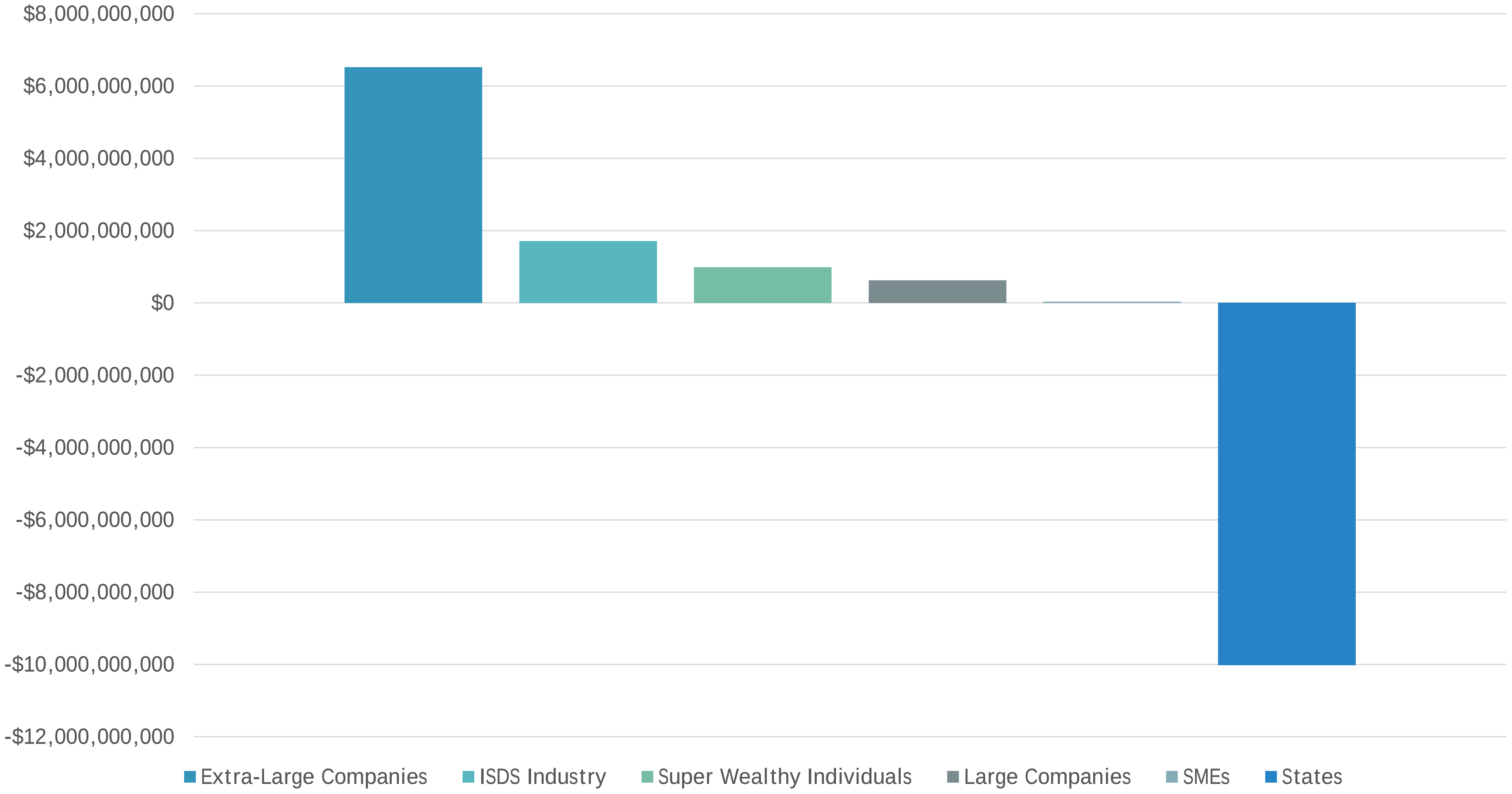
- allow foreign investors to directly sue states over policy measures
  - if they are a 'national' of one party to the treaty
  - if they have made an 'investment' in another state party to the treaty
  - if they feel that one of their guaranteed rights have been violated
    - fair and equitable treatment
    - expropriation of investment

- system is heavily criticised (lack of transparency, conflicts of interest, etc.)

Figure 2. Known ISDS cases, annual and cumulative (1987–2014)



Profits and Losses in ISDS System

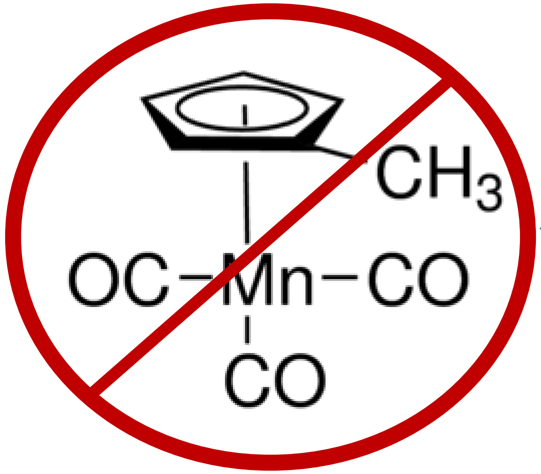


Van Harten & Malysheuski (2016) Who has benefited financially from investment treaty arbitration? An evaluation of the size and wealth of claimants

1. Direct Challenge to Health Policies

Ethyl
CORPORATION

NAFTA = US$350 million



methylcyclopentadienyl manganese tricarbonyl (MMT) = neurotoxin

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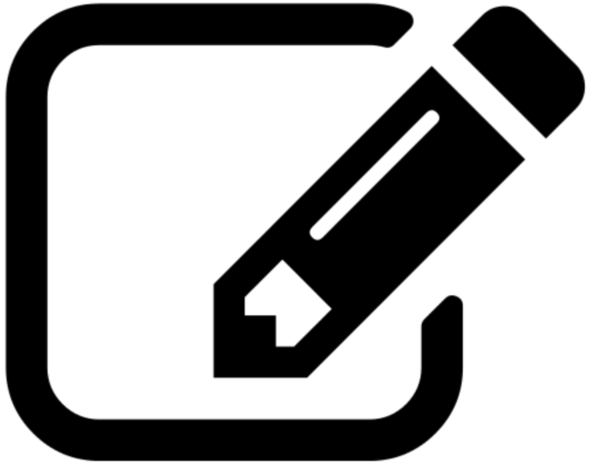
US$19.5 million

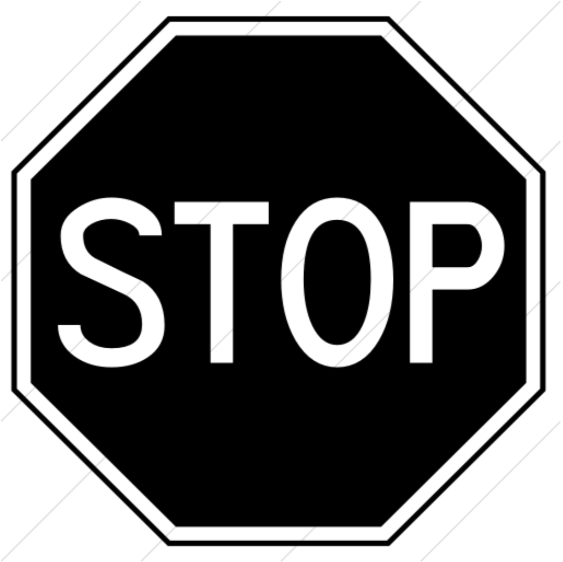
“MMT is neither an environmental nor a health risk”

2. Regulatory Chill



Thailand
Traffic Light Labelling Packaged Food

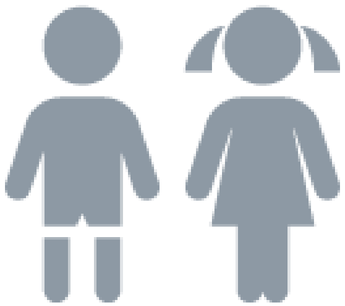
New Zealand
Tobacco Plain Packaging

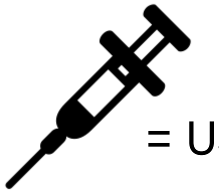


Canada
MMT Ban

3. Opportunity Costs for Health

Sub-Saharan Africa & South Asia





= US$275 per death averted

US$ 10 billion+

= over 36 million deaths averted

Method

- examined 41 investor-state dispute settlement awards on merits from past 5 years
  - analysis premised on the principles of common law analysis
  - recorded essential case details
  - investigated common investor claims
    - fair and equitable treatment, expropriation, full protection and security, national treatment, most-favoured nation, unreasonable measures, ‘umbrella clause’.
      - definition of the provision
      - methods for testing the provision
      - application of the provision to the facts of the case.
  - lessons applicable for health policy
    - how to anticipate investment claims in future health policy
    - how to advocate for language in future treaties

Expropriation

- No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
  - for a public purpose;
  - on a non-discriminatory basis;
  - in accordance with due process of law; and
  - on payment of compensation

- <u>Direct expropriation</u>: the seizure of or transfer of title on physical property
- <u>Indirect expropriation</u>: a measure that permanently destroys the value of the investment or the ability of the investor to manage, use, or control it in a meaningful way
  - What distinguishes between a compensable indirect expropriation and a non-compensable regulatory measure?

Expropriation

- ‘sole effects doctrine’
  - exclusively based on the economic impacts of the measure
    - permanently decrease value, significant loss of control over the investment
    - economic impacts = expropriation = compensation

- ‘proportionality’
  - weighs three criteria and looks for proportional measures to outcomes
    - the economic impact of the measure
    - the extent that the measure interferes with legitimate expectations
    - the purpose of the measure

- police powers ‘carve-out’
  - protects specific classes of regulatory measures
    - Measures “to protect legitimate public welfare objectives including the protection of health, safety and environment”
    - if policy = above + legally implemented = non-expropriatory

Expropriation

Sole-Effects Doctrine

"[t]he Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree" *Metalclad v Mexico*

"[w]hile there can be no question concerning the right of the government of Costa Rica to expropriate property for a bona fide public purpose…the expropriatory measure must be accompanied by compensation…" *Unglaube v Costa Rica*

Proportionality

"…no serious social situation, nor any urgency related to such situations…Mexican courts have not identified any crisis…actions undertaken by the authorities to face these socio-political difficulties…may not be considered…sufficient justification to deprive the foreign investor of its investment with no compensation…" *Techmed v Mexico*

Police Powers

"[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare" *Saluka v Czech Republic*

Fair and Equitable Treatment (FET)

- 1967 Draft OECD Convention
  - "[e]ach Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties"

- FET most successful claim for investors
  - Often found for the investor when all other claims fail

- FET claim successful in 45 of 84 (53%) claims
  - FET claims in NAFTA proceedings 4 of 18 (22%)
  - FET claims in BITs 41 of 66 (62%)

Fair and Equitable Treatment (FET)

- protection against egregious, outrageous, arbitrary behaviour
- protection against discrimination, denial of justice and due process

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- legitimate expectations (definitions?)
- transparency
- good faith
- stable and predictable legal framework (right to regulate?)

Fair and Equitable Treatment (FET)

(1) the minimum standard of treatment (MST) of aliens under customary international law

- *Neer* standard
  - behaviour universally considered ‘egregious’ or ‘outrageous’
  - consistent state practice + clear sense of legal obligation

NAFTA
TPP

(2) all sources of international law

- general principles of international law, modern treaties, and other conventional obligations

(3) as an autonomous and self-contained treaty standard

- not linked to any objective body of law
- individual arbitrator’s notions of what is ‘fair’ and ‘equitable’

CETA

Key Messages for a Dialogue

- Investor-State Dispute Settlement (ISDS) is relevant for health policy
  - Allows direct challenges to health policies
  - Can create ‘regulatory chill’ → modifying/delaying/abandoning policies
  - Has opportunity costs → money directed to private profits over public policies

- The set of investor right themselves are important
  - Some still provide plenty of health policy space
    - Indirect expropriation unlikely to challenge health measures
  - Some very concerning and should be focused on → FET
  - Health can advocate for treaty language
    - “police power carve outs” and high thresholds for breaching standards
    - advocate against ISDS system

Thank You

@ashleylschram

ashleygrau@gmail.com