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## **Investments: International Case Law**

International Economic Law  
Prof. Christine Kaufmann

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### **Goals**

- Know and discuss key problems in investment case law
- Understand different legal approaches of investment protection

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**Case Metalclad v Mexico (2000)** (1/3)


➤ Facts (paras. 28-69):

- Metalclad, a US company, had applied for the construction of a hazardous waste landfill in Mexico (through the acquisition of a Mexican company).
- The application was denied by local authorities.
- The governor of the province where the landfill was located declared the area (including the landfill) a “Natural Area” to protect rare cactus plants.

*Questions:*

- Under which treaty did the dispute arise?
- As a legal advisor to Metalclad, what do you suggest your company should do?

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**Case Metalclad v Mexico (2000)** (2/3)

➤ Findings of arbitration panel (paras. 72-112)

- Violation of Art. 1105 of the NAFTA (fair and equitable treatment standard):
  - Transparency
  - Predictability
  - Due Process

*Question:*  
Why do you think has the standard of fair and equitable treatment been breached in this case?

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**Case Metalclad v Mexico (2000)** (3/3)

- Violation of Art. 1110 of the NAFTA (Expropriation and Compensation):  
"No Party may directly or indirectly nationalize or expropriate an investment of an investor of another party or take measures tantamount to nationalization or expropriation of such an investment..."

*Question:*  
Does the denial of a construction permit amount to an expropriation under Art. 1110 NAFTA in this case?

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**Pope & Talbot Inc. v Canada (2000-2002)** (1/2)


➤ Facts:

- Pope & Talbot is a US company operating in Canada through subsidiaries in the lumber sector.
- During the implementation of a relevant trade agreement between the US and Canada, Canada limited wood export from Canada to the US. This limitation was implemented by the collection of a tax on wood exports to the US.

*Questions:*

- Under which dispute settlement procedure has the case been settled?
- Which international organisation is providing these procedural rules?

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## Pope & Talbot Inc. v Canada (2000-2002) (2/2)

➤ Findings of arbitration panel:

- Among other claims made by Pope & Talbot, the panel addressed the claim of expropriation under Art. 1110 of the NAFTA as following:
  - Measures implemented by Canada are not of nationalizing or confiscatory character.
  - Investor remains in control of the investment and day-to-day business.
  - Canada does not prevent the investor from paying dividends to its shareholders and does not interfere with the full ownership of the investor.
    - **No expropriation under Art. 1110 of the NAFTA**

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## SD Myers v Canada (2000) (1/3)

➤ Facts

- SD Myers was a company with a core activity in highly toxic waste disposal (mainly PCB). Its business entailed the export of PCB from Canada to the US for its disposal.
- In 1989, Canada signed the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. As a consequence, Canada issued an order banning all PCB exports from Canada to the US.

*Question:*  
Which provision of the NAFTA could be breached by an export ban for PCB waste?

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## SD Myers v Canada (2000)

(2/3)

➤ Findings of arbitration panel:

- On claims of breaches of Art. 1102 (National Treatment) and Art. 1105 (Minimum Standard) of the NAFTA:
  - Art. 1102: The panel found that the order banning the export of PCB enacted by Canada was not driven by environmental concerns but by the intention to support Canadian competitors of SD Myers. It was therefore considered a breach of Art. 1102 of the NAFTA (para. 255).
  - Art. 1105: The panel found that the breach of Art. 1102 amounted also to a breach of Art. 1105, as the treatment of SD Myers was unjust and unacceptable (para. 263).

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## SD Myers v Canada (2000)

(3/3)

➤ Findings of arbitration panel:


- On claim of a breach of Art. 1110 of the NAFTA (expropriation):  
The panel denied the existence of an indirect expropriation, mostly for the same reasons as in the Pope & Talbot Case.

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**Philip Morris Asia Ltd. v. Australia** (1/2)



Source: Commonwealth of Australia

- In 2011, Australia enacted the Plain Packaging Act (PPA).
- In 2012, the Australian High Court rejected a constitutional complaint by PMA Ltd. It held that the PPA did not violate intellectual property rights.
- In parallel PMA Ltd. made a notice of arbitration under the Australia – Hong Kong BIT.
  - UNCITRAL rules of procedure applicable.
  - Arbitrators: Karl-Heinz Bockstiegel (Chair), Gabrielle Kaufmann-Kohler and Donald McRae (members)
  - 14 April 2014: decision to divide the case into two phases: jurisdiction and core questions (merits).

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**Philip Morris Asia Ltd. v. Australia** (2/2)

*Questions:*

- What is the main difference between the “Uruguay and Australia cases”?
- As a legal advisor to Philip Morris Asia Ltd. and as a legal advisor to Australia, how would you advise your employer with regard to the dispute in question and to future bilateral investment treaties?

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### WTO: Australia – Tobacco Plain Packaging (1/2)

- Cuba, Dominican Republic, Honduras, Indonesia and Ukraine bring complaints against Australia before the WTO: [DS434](#), [DS435](#), [DS441](#), [DS458](#) and [DS467](#))
- Identical complaints for violation of
  - Articles 2.1, 3.1, 15.4, 16.1, 20, 22.2(b) and 24.3 of the TRIPS Agreement;
  - Article 2.1 and 2.2 of the TBT Agreement
  - Article III:4 of the GATT 1994
- Panel established on 5 May 2014
  - Procedural agreement between the Parties, 28 April 2014 (WT/DS434/12, WT/DS435/17, WT/DS441/16, WT/DS458/15, WT/DS467/16)
  - Alexander Erwin (chair), François Dessemontet, Ms Billie Miller (members)

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### WTO: Australia – Tobacco Plain Packaging (2/2)

*Questions:*

- What are the differences between BIT and WTO proceedings?
- Argentina, Brazil, Canada, Chile, China, Cuba, Dominican Republic, EU, India; Indonesia; Japan; Korea, Republic of; New Zealand, Nicaragua, Nigeria, Norway, Oman, Panama, Philippines, South Africa, Chinese Taipei, Thailand, Ukraine, US, Uruguay, Zimbabwe, Guatemala, Singapore, Guatemala, Malawi, Malaysia, Mexico, Singapore, Turkey, Zambia, Peru joined the proceedings as third parties. Can you imagine why?

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