

INVESTMENT ARBITRATION AND CORPORATE SOCIAL RESPONSIBILITY IN THE TRANS-PACIFIC PARTNERSHIP

N I C H O L A S W A L L *

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I. INTRODUCTION

The *Trans-Pacific Partnership*¹ (*TPP*) free trade agreement was signed February 4th, 2016. Its twelve parties, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam, represent approximately 40% of global GDP.² The *TPP* seeks to facilitate trade through the elimination of tariffs and other barriers.³ While recent events call into question whether the *TPP* will be ratified, an agreement of this magnitude would have undoubtedly impacted the ways in which states, civil societies and businesses operate and interact with one another. Yet there has been underwhelming discussion with regards to the manner in which the *TPP* would impact a key nexus of these three groups: corporate social responsibility (CSR).

At the same time, the *TPP*'s Investment Chapter⁴ attracted significant criticism, which is mirrored by the criticism that the Investor-State Dispute Settlement (ISDS) model has faced generally over the last decade.⁵ One particular focus of ISDS criticism has centered on its erosion—whether perceived or actual—of a state's regulatory space, and the concern that ISDS ultimately leads to less protection and regulation in the areas of human, environmental and labour rights. Granted, the suspicion directed at foreign investors regarding potential for rights abuses is not without reason. The forum of international investment arbitration, as a manifestation of

¹ *Trans-Pacific Partnership*, 4 February 2016, online: <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/index.aspx?lang=eng> [*TPP*].

² Office of the United States Trade Representative, "Overview of the TPP" online: <<https://ustr.gov/tpp/overview-of-the-TPP>>.

³ *TPP*, *supra* note 1.

⁴ *TPP*, *supra* note 1, Chapter 9: Investment.

⁵ See Susan D Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73:4 *Fordham L Rev* 1521.

international law, is not traditionally conducive to imposing obligations on individual persons.⁶ This frustrates attempts to impose or enforce CSR standards on international businesses. This paper seeks to side step the “right to regulate” debate, and instead advocates for an additional focus: the potential for investors to bring claims against states for failing to observe their international legal obligations with respect to human, environmental and labour rights.

Socially responsible businesses can use ISDS’s traditional strengths to promote state observance of international environmental, labour and human rights obligations while simultaneously protecting their foreign investments. The claim in *Peter Allard (Canada) v. Barbados*⁷ serves as a blueprint for future claims with this objective, the viability of which will be hypothetically analyzed within the context of the TPP’s Minimum Standard of Treatment provision.⁸ As the following discussion will illustrate, investment protection and ISDS provisions, as they exist in countless international investment agreements (IIAs), are viable tools for companies looking to enforce, rather than dispute, host state measures aimed at environmental, labour and human rights obligations, while at the same time protecting their own business interests.

This paper discusses the CSR implications stemming from the Investment Chapter of the TPP, beginning with an examination of the agreement’s object and purpose. Particular focus is then devoted to Article 9.17, which explicitly addresses CSR in the Investment Chapter. Next, the *Allard* claim and its viability under the TPP will be evaluated. Additional implications are subsequently discussed in order to fully canvass the potential for CSR advancement under the TPP’s Investment Chapter. This paper ends by noting the consequences for businesses under the TPP’s ISDS regime, and ultimately concludes that the TPP’s ISDS regime provides ample opportunity for CSR advancement, as well as for enterprises to benefit from the adoption of CSR principles despite the Chapter’s essentially unenforceable CSR provision. In addition, claims similar in

⁶ Yousuf Aftab, “The Intersection of Law and Corporate Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies” in Proceedings of the 60th Annual Rocky Mountain Mineral Law Institute (Rocky Mountain Mineral Law Foundation, 2014), online: <enodorigths.com/wp-content/uploads/2015/09/1-Human-Rights-Strategy-and-Litigation-Readiness.pdf> at 19.

⁷ PCA Case No 2012-06 online: <www.pccases.com/web/view/112>.

⁸ TPP, *supra* note 1 art 9.6.

structure to that of *Allard* have significant potential for the promotion of environmental, human and labour rights in many other IIAs.

II. OBJECT AND PURPOSE OF THE TPP

Investment provisions are to be interpreted on the basis of general treaty interpretation principles.⁹ Accordingly, ordinary meaning, context, object and purpose, as well as subsequent state practice, are all relevant factors in interpretation.¹⁰

A treaty's object and purpose is a particularly important aspect of treaty interpretation.¹¹ While deriving the object and purpose of an agreement as comprehensive as the *TPP* is notably difficult, as per the (albeit perhaps, overly simplistic) discussion below, it appears that the goal of the *TPP* is to create a balance between the traditional goals of free trade agreements (FTAs)—liberalized trade and economic growth—with the need for sustainable development. Whether the *TPP* strikes an *appropriate* balance between these goals is a question beyond the scope of this paper. That said, it appears that the *TPP* strives to achieve this balance more so than many preceding FTAs. For the *TPP*, the Preamble is a significant aid in arriving at this answer.¹² This is particularly the case given that the *TPP* does not contain an “objectives” chapter, unlike many other FTAs or IIAs. In the past, tribunals have dealt with this by inferring a treaty's object and purpose with reference to its preamble.¹³ It also appears that the closest statement of an objective is found in the Preamble:

⁹ *Asian Agricultural Products LTD v Republic of Sri Lanka* (1990), 32 ILM 580 ICSID Case No. ARB/87/3 (Final Award) at para 39 (ICSID).

¹⁰ Marc Jacob, “International Investment Agreements and Human Rights” (2010) INEF Research Paper Series: Human Rights, Corporate Responsibility and Sustainable Development No 03/2010 at 28.

¹¹ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 art 31(1) (entered into force 27 January 1980) [VCLT].

¹² *Ibid*, art 31(2); J Anthony VanDuzer, Penelope Simons & Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat, 2012) at 46–48, <https://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf>.

¹³ Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2nd ed (Oxford: Oxford University Press, 2012) at 29–30. Recent examples cited include *Hrvatska Elektroprivreda v Slovenia* (2009), ICSID Case No ARB/05/24, Decision on Treaty Interpretation Issue at paras 177–79 (ICSID); *Austrian Airlines v Slovakia* (2009),

ESTABLISH a comprehensive regional agreement that promotes economic integration to liberalise trade and investment, bring economic growth and social benefits, create new opportunities for workers and businesses, contribute to raising living standards, benefit consumers, reduce poverty and promote sustainable growth...¹⁴

Yet this provision is on the same interpretive footing as other preambular clauses, such as the recognition of Parties' "inherent right to regulate," the intention to promote "high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development," the protection and enforcement of labour rights, and the promotion of "transparency, good governance and rule of law, and eliminate bribery and corruption in trade and investment."¹⁵ While a preamble does not create substantive provisions,¹⁶ and is "not to be regarded as overriding and superseding"¹⁷, it nevertheless provides a key interpretive tool in the face of a text's ambiguity or vagueness, and a lens through which the following provisions may be interpreted.

III. CHAPTER 9'S EXPLICIT CSR PROVISION

There are several different potential means of incorporating CSR guidelines and their substantive obligations. This can include providing for—or requiring a state to create—incentives for companies to adopt CSR guidelines, encouraging or requiring changes to domestic law, requiring an ISDS tribunal to consider an investor's behaviour, and compliance with CSR standards and domestic law.¹⁸ The International Institute for

Final Award paras 101–04 (UNCITRAL); *Alps Finance and Trade AG v The Slovak Republic* (2011), Award at paras 236–37 (UNCITRAL).

¹⁴ TPP, *supra* note 1, Preamble.

¹⁵ *Ibid.*

¹⁶ Patrick Dumberry & Gabrielle Dumas-Aubin, "How to impose human rights obligations on corporations under investment treaties? Pragmatic guidelines for the amendment of BITs" in Karl P Sauvart & Andrea K Bjorklund, eds, *Yearbook on International Investment Law & Policy 2011-2012*, (New York: Oxford University Press 2013) 569 at 579.

¹⁷ *ADF Group Inc v United States* (2003), ICSID Case No ARB(AF)/00/1 at para 147 (ICSID).

¹⁸ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2015: Reforming International Investment Governance*,

Sustainable Development's (IISD) Model Investment Agreement goes further, imposing direct obligations on investors and investments.¹⁹ There is no "one size fits all" approach, and the ideal CSR provision(s) depend on specific circumstances, including the various capacities of the parties to the agreement.²⁰ The measure of a given provision's effectiveness, however, is the degree to which the provision actually creates more socially responsible behaviour.

While CSR is explicitly touched upon in three chapters in the *TPP*,²¹ its inclusion in the Investment Chapter is of primary importance to present purposes. Article 9.17, entitled "Corporate Social Responsibility" provides the following:

The Parties *reaffirm the importance* of each Party *encouraging* enterprises operating within its territory or subject to its jurisdiction *to voluntarily incorporate* into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.²²

In practice, this provision alone is highly unlikely to create a substantive obligation for a party. Technically, a party would have to be found responsible for failing to attribute some requisite degree of importance to the encouragement of voluntary adoption of CSR practices. This leads one to question why it was included at all. While Article 9.17 may merely be fluff, an investigation into other possibilities or implications for CSR under the *TPP* is warranted when included in an agreement of this magnitude.

CSR provisions are still a relatively new phenomenon. Prislán and Zandvliet discuss these provisions in a comparison to labour provisions:

UNCTAD/WIR/2015 at 158–160, online: <unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245> [WIR]. For a statistical survey and analysis of IIA provisions aimed at sustainable development and responsible business conduct, see Kathryn Gordon, Joachim Pohl & Marie Bouchard, "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey" (2014) OECD Working Papers on International Investment No 2014/01, online: <dx.doi.org/10.1787/5jz0xvngx1zlt-en>.

¹⁹ Howard Mann et al, "IISD Model International Agreement on Investment for Sustainable Development" (2005), arts 11–18, online: <https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> [IISD Model Investment Agreement].

²⁰ WIR, *supra* note 18.

²¹ *TPP*, *supra* note 1, arts 9.17, 19.7, 20.10.

²² *Ibid*, art 9.17 [emphasis added].

The commitments that these CSR provisions impose are much less demanding when compared to the obligations under other types of labor provisions, as they are usually phrased in a “double-soft law” manner: States are required to *remind* or *encourage* investors to adopt *voluntary* standards. This is not to say, however, that the “soft” language necessarily makes them redundant, as they could certainly influence the interpretation of other investment protection standards found in IIAs.²³

The provision applies to the party’s behaviour towards enterprises within its territory *and* its jurisdiction.²⁴ This suggests that both home and host states can take measures to provide such encouragement. The implications and applicability of both perspectives are discussed below.

A. Home State Perspective

The home state perspective is based on an acknowledgment that adherence to CSR guidelines ensures the viability of the home state’s foreign investment projects in host states that have less robust regulation. Therefore, it is no surprise that similar provisions have been included in several bilateral treaties between Canada and other states with less robust regulatory regimes, and where Canada would primarily act as a capital exporter. This includes the Canada-Benin Bilateral Investment Treaty²⁵ (BIT) and Canadian FTAs with Peru²⁶, Colombia²⁷ and Panama.²⁸ Jarrod Hepburn and Vuyelwa Kuuya studied CSR provisions in IIAs, and observed the following in relation to the development of the Canada-Colombia FTA:

Canada’s House of Commons Trade Committee discussed the role of CSR in foreign investment in its June 2008 report on the negotiations over the Canada-Colombia FTA. The Committee acknowledged the danger of permitting

²³ Vid Prislán & Ruben Zandvliet “Labor Provisions in International Investment Agreements” in Andrea K Bjorklund, ed, *Yearbook on International Investment Law & Policy 2012-2013* (NY: Oxford University Press, 2014) at 387 [emphasis in original].

²⁴ *Ibid.*

²⁵ *Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments*, 9 January 2013, Can TS 2014 No 13, art 16 (entered into force 12 May 2014).

²⁶ *Free Trade Agreement between Canada and the Republic of Peru*, 29 May 2008, Can TS 2009 No 15, art 810 (entered into force 1 August 2009).

²⁷ *Free Trade Agreement between Canada and the Republic of Colombia*, 21 November 2008, Can TS 2011 No 11, art 816 (entered into force 15 August 2011).

²⁸ *Free Trade Agreement between Canada and the Republic of Panama*, 14 May 2010, Can TS 2013 No 9, art 9.17 (entered into force 1 April 2013).

investment by Canadian companies in isolated areas of Colombia with little governmental presence, where the potential for socially irresponsible action was high. It noted broad support from the business community for the inclusion of CSR policies in the Canada-Colombia FTA, based on the recognition that investment projects undertaken without local community involvement were 'doomed to failure'. The Committee cited the views of business leaders that Canada had a role to play in exporting its standards of CSR, as this would ultimately create a more favourable investment climate in the target country. The report thus recommended ensuring that CSR (and other human rights) mechanisms be in place before any FTA is signed with Colombia.²⁹

This supports the suggestion that the primary purpose of a CSR provision is to facilitate home state encouragement of their investors operating in host states where the potential for socially irresponsible behaviour is high. It has also been posited that this approach "essentially implements the option, discussed by [the United Nations Conference on Trade and Development] in 2001, of including voluntary CSR mechanisms as a non-binding annex to international investment agreements."³⁰

CSR encouragement is also specifically provided for in the *TPP* in the areas of labour and the environment, indicating CSR standards in these areas may be a particular concern or focus of the parties. For labour, the *TPP* requires that, "[e]ach Party *shall endeavour* to encourage enterprises to voluntarily adopt corporate social responsibility initiatives on labour issues that have been endorsed or are supported by that Party."³¹ This wording contrasts with the slightly more lenient, parallel provision regarding CSR and the environment, which says that each party "should encourage" the adoption of CSR policies and practices related to the environment.³² However, the subsequent article provides that, "in accordance with its laws, regulations or policies and to the extent it considers appropriate, each Party *shall encourage*: (a) the use of flexible and voluntary mechanisms to protect natural resources and the environment in its *territory*."³³ The use of

²⁹ Jarrod Hepburn & Vuyelwa Kuuya, "Chapter 24: Corporate Social Responsibility and Investment Treaties" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law*, (The Netherlands: Kluwer Law International, 2011) 589 at 602 [footnotes omitted].

³⁰ *Ibid* [footnotes omitted].

³¹ *TPP*, *supra* note 1, art 19.7 [emphasis added].

³² *Ibid*, art 20.10.

³³ *Ibid*, art 20.11.2 [emphasis added].

particular language is telling—“territory” indicates that at least some CSR measures are to be restricted to the home state perspective.

B. Host State Perspective

Alternatively, from the host state perspective, Article 9.17 could be used as a shield against investor claims of discrimination. The provision immediately preceding Article 9.17 seeks to preserve Parties’ right to regulate by stating:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent* with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.³⁴

Thus, encouragement of adoption of CSR standards may arguably be considered an “other regulatory objective”. This is supported by the language devoted to subsidies in the Investment Chapter, which provides that decisions regarding the non-issuance or modification of subsidies do not alone constitute expropriation or the violation of several other investor protections.³⁵ Consequently, there is an opportunity for home or host states to subsidize enterprises for socially responsible behaviour. This also constitutes an example of how the voluntary adoption of CSR may be encouraged.

One caveat to this line of thinking is illustrated by Howard Mann’s comments on the phrase “otherwise consistent” found in similar provisions outside of the TPP:

[T]he insertion of the phrase “consistent with this Chapter” renders the entire paragraph legally useless in terms of reinforcing the right to regulate. In practice, it states the opposite, that the right to regulate for a public purpose *must be* fully exercised in a manner consistent with the IIAs protections of the foreign investor. This qualifying language, which originated in 1992 in NAFTA’s Chapter 11 on Investment, is now found in dozens of IIAs.³⁶

According to Mann, the provision does not expand the regulatory rights of a party. However, in collaboration with the preambular recognition of a

³⁴ *Ibid*, art 9.16. [emphasis added].

³⁵ *Ibid*, *supra* note 1, arts 9.6.5, 9.7.3, 9.8.6, 9.12.6.

³⁶ Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities* (International Institute for Sustainable Development, 2008) at 19 [emphasis in original].

party's inherent right to regulate, such a provision may serve to protect regulatory space already in existence. Regardless, there are various ways in which the adoption of CSR standards and guidelines can be encouraged without violating investor protections. This furthers the potential for host state favouritism of socially responsible corporations.

Another angle to the host state dynamic is illustrated by the research conducted by Caroline Flammer on the U.S. manufacturing sector from 1992–2005.³⁷ According to her study, domestic companies respond to the reduction in tariffs from FTAs by increasing CSR investment and activity in order to “improve their competitiveness and differentiate themselves from their foreign rivals.”³⁸ It allows domestic enterprises to “leverage a comparative advantage”, namely, “their relationships with local stakeholders such as consumers, employees, and communities”.³⁹ At the same time, Flammer's research also demonstrates how this provision could potentially be used for indirect protectionist measures in developed states, stemming from the reality that large enterprises from more developed states are more likely to have the requisite resources for enacting CSR policies.⁴⁰

The potential for protectionism is tempered by two factors. First, the substantive foreign investor protections found within the *TPP* guard against any particularly egregious or blatant form of favouritism.⁴¹ Second, measures aimed at “encouragement” can only go so far before an enterprise is no longer adopting CSR guidelines “voluntarily”. On this, Hepburn and Kuuya have noted, “the relatively permissive wording used in the BITs ... does partially mitigate these concerns. It only requires encouragement of CSR adherence, falling short of imposing mandatory standards that could be difficult to meet or could be misused for protectionist effect.”⁴² While there is clearly some limit, it is less clear exactly where that limit may be.

³⁷ Caroline Flammer, “Does Product Market Competition Foster Corporate Social Responsibility? Evidence from Trade Liberalization” (2015) 36 *Strat Mgmt J*, 1469.

³⁸ *Ibid* at 1481.

³⁹ *Ibid*.

⁴⁰ See Hepburn & Kuuya, *supra* note 29 at 608, “there is a risk that CSR provisions will be used for protectionist effect, to prevent investment in the ‘First World’ by developing country corporations that cannot meet the required CSR standards.”

⁴¹ See *TPP*, *supra* note 1, arts 9.4 “National Treatment”, 9.5 “Most-Favoured-Nation Treatment”.

⁴² *Ibid*.

These limiting factors, in combination with the “double-soft law”⁴³ wording of the provision text and the evidence of its original intent from its development in Canadian Parliament, suggest that its primary use is in the home state context. Further, the provision inherently recognizes that some states exhibit less robust regulatory regimes with respect to the environment, labour and human rights. CSR frameworks can be used to supplement these regulatory and enforcement concerns by encouraging investors to abide by higher standards of conduct than those that exist in the host state.

While essentially unenforceable, the very inclusion of explicit CSR provisions in the *TPP* is significant in and of itself. Even non-binding CSR provisions can shape norms, future agreements, and ultimately, future state behaviour and practice, leading to the emergence of customary law or the adoption of stronger agreements.⁴⁴ Thus, “[t]he inclusion of CSR provisions in BITs and FTAs are an example of the “blurring” that can occur between ‘hard’ and ‘soft’ law. These provisions have, at the very least, moved CSR principles farther along the ‘continuum’ from soft to hard law.”⁴⁵ As discussed below, the *TPP* offers an additional, more concrete mechanism for the enforcement and promotion of international human, labour and environment rights obligations.

IV. FOREIGN INVESTORS ENFORCING INTERNATIONAL RIGHTS OBLIGATIONS

ISDS typically involves an investor claiming against a host state for violation of certain protections, resulting in decreased value of the given investment. Over the past few decades, efforts to mitigate the potential negative impact of IIAs on human, labour and environmental rights has been limited by a perspective that focuses on circumstances wherein an investor poses some risk to these rights, and a host state must raise as a defence the prevention of rights violations. That is, the prevalent focus of legal literature has been on the socially irresponsible corporation and the

⁴³ Prislán & Zandvliet, *supra* note 23.

⁴⁴ Madison Condon, “The Integration of Environmental Law into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments” (2015) 33 *Va Env'tl LJ* 102 at 127-128, citing Kenneth W Abbott et al, “The Concept of Legalization” (2000) 54 *Intl Org* 401 at 412.

⁴⁵ Condon, *supra* note 44 at 128.

responsible host state. Many legal disputes have spawned from opposition in a developing state to an extractive project based on environmental, human rights, public health or land rights and displacement concerns.⁴⁶ A recent, high profile example is the \$15 billion Chapter 11 NAFTA claim filed by TransCanada Corporation, the proponent of the Keystone XL Pipeline, against the United States following the government's rejection of the pipeline in 2016.⁴⁷ These circumstances typically take precedence in the minds of scholars and practitioners of both CSR and ISDS.⁴⁸

This focus is mirrored by the traditional approach to CSR promotion in the context of IIAs. For instance, the "clean hands doctrine" purports to deny foreign investors protection of their corresponding IIA where the investment, at the time it was made, failed to respect human rights or was otherwise contrary to host state law.⁴⁹ This approach has been expanded in some circumstances to apply after the time the investment was made. Overall, the clean hands doctrine has seen limited success.⁵⁰

The inherent limitation of the traditional approach to CSR in ISDS is that "it ignores the conceptual difficulty in applying human rights obligations directly to businesses."⁵¹ This limitation stems from the development of international law in the sense that legal persons have traditionally been almost entirely and exclusively within the ambit of domestic law.⁵² The traditional approach looks at what states can do,

⁴⁶ Tamara L Slater, "Investor-State Arbitration and Domestic Environmental Protection" (2015) 14 Wash U Global St L Rev 131 at 141, citing as e.g. *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No ARB/09/12 (2014). See also the ongoing litigation in *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414.

⁴⁷ *TransCanada Corporation and TransCanada PipeLines Limited v The United States of America*, Request for Arbitration, 24 June 2016, online: <www.keystone-xl.com/wp-content/uploads/2016/06/TransCanada-Request-for-Arbitratio-2n.pdf>.

⁴⁸ See, e.g. Aftab, *supra* note 6. See also Gare A Smith, "An Introduction to Corporate Social Responsibility in the Extractive Industries" (2008) 11 Yale Human Rts & Dev LJ 1; and Gavin Hilson, "Corporate Social Responsibility in the Extractive Industries: Experiences from Developing Countries" (2012) 37:2 Resources Policy 131.

⁴⁹ Aftab, *supra* note 48 at 16–21.

⁵⁰ Clara Reiner & Christoph Schreuer, "Human Rights and International Investment Arbitration," in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni, eds, *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) at 89.

⁵¹ Aftab, *supra* note 6 at 20.

⁵² Reiner & Schreuer, *supra* note 50 at 86.

consequently ignoring the potential for positive action on the part of the investors. Reversing this perspective—looking instead at how ISDS could be used by responsible corporate actors to hold states to their international obligations—reveals another mechanism for the protection of environmental, labour and human rights, in addition to that which can be exercised by virtue of the enterprise’s investment. In the following section, a relatively recent case will illustrate how this may work. It is the basis of a hypothetical analysis of such an approach’s applicability in the context of the TPP.

A. *Peter Allard (Canada) v. Barbados*

The claim in *Peter Allard (Canada) v. Barbados* was commenced in 2010 with a Notice of Dispute (the Notice) pursuant to the Canada-Barbados BIT⁵³ and the award was rendered in 2016.⁵⁴ The Notice indicates that Allard invested approximately US \$35 million into an eco-tourism resort (named and henceforth referred to as Sanctuary) situated in wetlands area of Barbados—an area of particular environmental significance.⁵⁵ The Notice further outlines ways in which Allard’s investment contributed to the sustainable development of Barbados.⁵⁶

Barbados created for itself both international and domestic environmental legal obligations, according to the Notice. On April 12, 2006, Barbados ratified the *Convention on Wetlands of International Importance*⁵⁷ (*Ramsar Convention*). The wetland in which Sanctuary is located was placed on the List of Wetlands of International Importance under the *Ramsar Convention*. Relying on Article 3 of the *Ramsar Convention*, the Notice asserts that Barbados was obligated to “formulate its planning so as to

⁵³ *Peter A Allard (Canada) v The Government of Barbados*, PCA Case No 2012-06, Notice of Claim, online: <graemehall.com/legal/papers/BIT-Complaint.pdf> [Notice].

⁵⁴ *Peter A Allard (Canada) v The Government of Barbados* (2016), PCA Case No 2012-06, Award. While the claimant was ultimately unsuccessful, it was the facts, not the law, which prevented this success. This paper focuses on the claim and its legal structure rather than the case’s specific circumstances.

⁵⁵ *Ibid* at para 2.

⁵⁶ *Ibid* at para 6.

⁵⁷ *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975) [*Ramsar Convention*].

promote the conservation of the ... wetlands.”⁵⁸ On December 10, 1993, Barbados also ratified the *Convention on Biological Diversity*.⁵⁹ The Notice claims that, based on the importance of the wetlands’ biodiversity—and Barbados’ acknowledgment of such—Barbados is required to “integrate, as far as possible, the conservation of the ... wetlands into its relevant plans, programmes and policies.”⁶⁰ While Canada has ratified both of these treaties, the relevance of the treaties to *Allard* is their imposition of obligations on Barbados in its capacity as a state containing areas subject to these treaties. Furthermore, Barbados’ own domestic marine pollution legislation recognizes pollution as an offence and establishes an office to investigate and prevent polluters and pollutants.⁶¹

The Notice asserts that certain actions and omissions of Barbados “have caused or permitted environmental damage to the Sanctuary, thereby destroying the value of Mr. Allard’s investments in Barbados.”⁶² These actions and omissions, including failure to enforce environmental laws and failure to investigate or prosecute poachers and polluters, are contrary to Barbados’ own laws and international legal obligations.⁶³ Allard claims that, as a result, the ecosystem on which Sanctuary relied to attract its visitors sustained significant environmental damage. According to the Notice, Barbados’ failure to regulate amounts to a failure to provide, (a) fair and equitable treatment; and (b), full protection and security to Allard and his investment.⁶⁴

Of primary importance is the structure of the claim itself. It is based on the premise that a host state can be held responsible for damage to an investment when said damage was caused by the host state’s failure to adequately enforce or implement its international environmental rights commitments through domestic law and other state measures. The viability of an “*Allard*-structured” or “failure to enforce” claim as a claim under

⁵⁸ Notice, *supra* note 53 at para 10.

⁵⁹ *United Nations Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) [*Biodiversity Convention*].

⁶⁰ Notice, *supra* note 53 at para 11.

⁶¹ *Ibid* at para 13, citing *Marine Pollution Control Act*, LRO 1998, CAP.392A.

⁶² Notice, *supra* note 53 at para 9.

⁶³ *Ibid* at paras 10-11.

⁶⁴ The Notice also includes a claim of indirect expropriation, but this is not a necessary component of the claim to be analyzed, and is thus not discussed in this paper.

Article 9.6 of the *TPP* (Minimum Standard of Treatment) shall be evaluated, with particular attention to its additional application to international human and labour rights obligations. It will be determined if such a claim, designed to hold a state accountable for its international obligations, can arguably succeed under the *TPP*. If this is possible, it has a significant implication for CSR under the *TPP* investment regime as well as for other IIAs with ISDS and similar substantive protections to those contained in Article 9.6.

B. Applicable Law in TPP Investment Arbitration

A *TPP* Tribunal is required to “decide the issues in dispute in accordance with this Agreement and applicable rules of international law”.⁶⁵ Alternatively, if the issue stems from an investment contract, the Tribunal is required to apply:

- (a) the rules of law applicable to the pertinent investment authorisation or specified in the pertinent investment authorisation or investment [contract], or as the disputing parties may agree otherwise; or
- (b) if, in the pertinent investment agreement the rules of law have not been specified or otherwise agreed:
 - (i) the law of the respondent, including its rules on the conflict of laws; and
 - (ii) such rules of international law as may be applicable.⁶⁶

Outside of a dispute stemming from an investment contract, “applicable rules of international law” means that the governing law is international law exclusively, including the IIA itself.⁶⁷ It also means that rules of international law, such as human rights, may be considered.⁶⁸ Domestic law is considered, but only as a matter of fact.⁶⁹

Any finding of host state responsibility requires that the dispute arises directly from the investment.⁷⁰ Therefore any state measure, regardless of

⁶⁵ *TPP*, *supra* note 1, art 9.250.

⁶⁶ *Ibid* art 9.25(2).

⁶⁷ Dolzer & Schreuer, *supra* note 13 at 289, citing *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994), Chapter 11, Section B, art 1131.

⁶⁸ Reiner & Schreuer, *supra* note 50 at 83.

⁶⁹ *TPP*, *supra* note 1, art 9.25.1.

⁷⁰ Dolzer & Schreuer, *supra* note 13 at 246–47; citing *Fedax NV v Venezuela*, 37 ILM 1378 (1998) at para 24. See also *Siemens v Argentina* (2004), ICSID Case No ARB/02/8

whether it was aimed specifically at the investment in question, can constitute a violation of the state's obligations.⁷¹ Consequently, Dolzer and Schreuer suggest that, "a host state cannot rely on the general policy nature of measures taken by it if these measures had a concrete effect on the investment and violated specific commitments and obligations. These commitments may arise from legislation, a contract, or a treaty."⁷²

However, the basis of a claim is subject to limitation. Article 9.19 only permits claims based on a breach of an obligation listed in Chapter 9, an investment contract or authorisation. This prevents a party from bringing a claim based directly on the breach of an obligation arising from some other treaty, or from a failure to enforce domestic law.⁷³ If disputes could be raised regarding "all disputes relating to an investment"—a phrase that has been used in other IIAs—there would be no such limitation.⁷⁴ That said, other international obligations or specific commitments certainly inform the substantive content of the protections found in Chapter 9. This is based in part on the principle that investment treaties are to be presumed to be in compliance with international law⁷⁵, and that "any relevant rules of international law applicable in the relations between the parties" shall to be taken into account in treaty interpretation.⁷⁶

C. Protections Provided by Article 9.6

Article 9.6 provides for the "Minimum Standard of Treatment" (MST) of foreign investors. The MST requires parties to treat investments "in accordance with ... customary international law minimum standard of

Decision on Jurisdiction at para 150 [*Siemens*].

⁷¹ *CMS v Argentina* (2003), 42 ILM 788 at para 33 (ICSID).

⁷² Dolzer & Schreuer, *supra* note 13 at 248.

⁷³ Zachary Douglas, "The enforcement of environmental norms in investment treaty arbitration" in Pierre-Marie Dupuy, Jorge E Viñuales, eds, *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge: Cambridge University Press, 2013) at 424.

⁷⁴ *Ibid.*

⁷⁵ *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment of 10 September 1929, PCIJ Series A No 23 at 20, online: <www.icj-cij.org/pcij/serie_A/A_23/74_Commission_internationale_de_l_Oder_Arret.pdf>; *Eletronica Sicula SpA (ELSI) (USA v Italy)*, Judgment of 20 July 1989, [1989] ICJ Rep 15, at para 50, online: <www.icj-cij.org/docket/files/76/6707.pdf> [ELSI].

⁷⁶ VCLT, *supra* note 11, art 31(3)(c).

treatment of aliens.”⁷⁷ This includes both the “fair and equitable treatment” (FET) and the “full protection and security” (FPS) standards.⁷⁸ It does not create any additional substantive rights beyond these standards.⁷⁹ Therefore, a measure that constitutes a breach of either the FET or the FPS standards would also be a breach of Article 9.6. Annex 9-A specifies that the “customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.”

Article 9.6.2(a) specifies that FET includes the obligation of due process. Article 9.6.2(b) specifies that the FPS standard “requires each Party to provide the level of police protection required under customary international law.”⁸⁰ The standard for a breach of the MST is set, in part, by Article 9.6.4, which states:

For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

Consequently, a breach of Article 9.6 must constitute a violation of the corresponding standard as it exists in customary international law. It must go beyond an action that is merely inconsistent with investor expectations, even if damage occurs as a result. Article 9.6 also includes the same protections provided for in NAFTA since the NAFTA Free Trade Commission’s statement on its MST provision, Article 1105.⁸¹ Thus, NAFTA decisions on the MST, FET and FPS standards are particularly helpful for inferring the substantive legal content of Article 9.6. The substantive content of these three standards is described below.

1. Minimum Standard of Treatment

The decision in *LFH Neer & Pauline Neer (USA) v United Mexican States*⁸² is widely seen as the provenance of the modern MST in customary international law. *Neer* stated that:

⁷⁷ TPP, *supra* note 1, art 9.6.

⁷⁸ *Ibid*, art 9.6(1)(2).

⁷⁹ *Ibid*.

⁸⁰ *Ibid*, art 9.6(2)(b).

⁸¹ NAFTA Free Trade Commission, Interpretive Note of 31 July 2001, cited in *Mondev v United States* (2002), ICSID Case No ARB(AF)/99/2 Award at para 101.

⁸² *LFH Neer & Pauline Neer (USA) v United Mexican States* (1926), IV RIAA 60,21 AJIL 555

[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.⁸³

However, customary international law is fluid, and NAFTA Tribunals' recognition of this standard's subsequent evolution has since lowered the threshold for state liability, albeit not in an entirely consistent fashion due to the decision in *Glamis Gold v. United States*,⁸⁴ which appears to have bucked this trend.⁸⁵ *ADF v. United States* held

[T]he customary international law referred to in Article 1105(1) is not 'frozen in time' and that the minimum standard of treatment does evolve. ... [W]hat customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.⁸⁶

The exact substantive content of the MST, and the extent to which it differs from the FET standard, remains nebulous and is still subject to debate.⁸⁷

Tribunal descriptions of the MST and its violations indicate that, while it has been lowered to a degree, it is by no means a low threshold.⁸⁸ The Tribunal in *Thunderbird v. Mexico* described breaches of the MST as acts that, "weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards."⁸⁹ Similarly, *Cargill, Inc. v. Mexico* described potential violations as measures that wer

grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to

[*Neer*].

⁸³ *Ibid* at 61 (RIAA).

⁸⁴ *Glamis Gold v United States* (2009), UNCITRAL Award at paras 598–627 (NAFTA).

⁸⁵ Dolzer & Schreuer, *supra* note 13 at 140–41.

⁸⁶ *ADF*, *supra* note 17 at para 179. See also Dolzer & Schreuer, *supra* note 13 at 140.

⁸⁷ Hussein Haeri, "A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law" (2011) 27:1 Arb Intl 27.

⁸⁸ *Ibid* at 39.

⁸⁹ *International Thunderbird Gaming Corporation v Mexico* (2006), UNCITRAL Award at para 194.

constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety...[A]lthough bad faith or willful neglect of duty is not required, the presence of such circumstances will certainly suffice.⁹⁰

As will be apparent, the MST and FET protections are likely more different in concept than in practice.

Whether the TPP MST goes further than this conventional MST in customary international law is unclear. Annex 9-A of the TPP specifies that the “customary international law minimum standard of treatment of aliens refers to *all* customary international law principles that protect the investments of aliens.”⁹¹ This raises the following question: does the TPP's MST include other customary international law principles applicable to other areas of law—for instance, environmental law—owing to the fact that they serve to protect an investment? The precautionary principle and its potentially customary status⁹² come to mind.⁹³ Ultimately, this will be determined by whether the Tribunal adopts a purpose-based approach, where only principles developed for the purpose of protecting investments are assimilated into the MST, or a more liberal, effect-based approach, where the focus is instead on the effect of the principle.

2. *Fair and Equitable Treatment*

The TPP describes the MST such that it includes the protections provided for by the FET and FPS standards. Similarly, recent academic commentary by Patrick Dumberry has stated, “[u]nder [NAFTA Article 1105], the FET standard must be considered as one of the elements included in the umbrella concept of the minimum standard of treatment.”⁹⁴ The FET standard itself contains protections against arbitrary or

⁹⁰ *Cargill, Inc v Mexico* (2009), ICSID Case No ARB(AF)/05/2 at para 296 [*Cargill*]. Note however that the Tribunal here lays out measures that would constitute a breach of the MST because it breaches the FET standard, which is a part of the MST.

⁹¹ TPP, *supra* note 1 [emphasis added].

⁹² Agne Sirinskiene, “The Status of Precautionary Principle: Moving Towards the Rule of Customary Law” (2009) 4:118 *Jurisprudence* 349.

⁹³ However, a distinction exists based on to whom the obligation is owed. Many customary principles have been developed in relation to obligations owed by one state to another.

⁹⁴ Patrick Dumberry, “The Protection of Investors’ Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105” (2014) 31:1 *J Intl Arb* 47 at 50, citing *Cargill, Inc v Mexico* (2009) (see *Cargill, supra* note 90).

discriminatory conduct, in addition to guarantees of due process and access to justice.⁹⁵ A recent NAFTA Tribunal decision summarized the FET as follows:

[T]he fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.⁹⁶

This is complimented by the recognition that the core of the FET standard is good faith⁹⁷, which itself is recognized as a principle of customary international law.⁹⁸ An often-cited definition of the FET standard includes the expectation that a state “use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments”.⁹⁹ Other definitions have described violations of the FET standard as “acts showing a willful neglect of duty, an insufficiency of action falling far below international standards”¹⁰⁰ or those that are “manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions).”¹⁰¹ While Article 9.6 does not explicitly prohibit arbitrary host state conduct, both the MST and the FET standard at customary international law are seen as doing so.¹⁰²

⁹⁵ Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Wolters Kluwer, 2013).

⁹⁶ *Mobil Investments Canada Inc and Murphy Oil Corp v Canada* (2012), ICSID Case No ARB(AF)/07/4 Decision on Liability and on Principles of Quantum at para 152 (NAFTA).

⁹⁷ *Siag and Vecchi v Egypt* (2009), ICSID Case No ARB/05/15 Award at para 450 [*Siag*]; *Siemens*, *supra* note 70 at para 308; *Tecmed SA v United Mexican States* (2003), ICSID Case No ARB(AF)/00/2 Award (ICSID) at para 154 [*Tecmed*]; *Azurix Corp v the Argentine Republic* (2006), ICSID Case No ARB/01/12 Award (ICSID) at para 307. See also Dolzer & Schreuer, *supra* note 13 at 142-143.

⁹⁸ *Siag*, *supra* note 97.

⁹⁹ *Tecmed*, *supra* note 97 at para 154.

¹⁰⁰ *Genin v The Republic of Estonia* (2001), ICSID Case No ARB/99/2 Award at para 367. See also Dolzer & Schreuer, *supra* note 13 at 142.

¹⁰¹ *Saluka Investments BV v Czech Republic* (2006), UNCITRAL Partial Award at para 309 (UNCITRAL).

¹⁰² Dolzer & Schreuer, *supra* note 13 at 195.

Central to the idea of arbitrary state conduct is that it is at odds with the rule of law. The International Court of Justice decision in the *ELSI* case laid out the following widely adopted definition of arbitrariness:

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law ... It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.¹⁰³

This is reflected in tribunals' attempts to describe arbitrary conduct. The Tribunal in *AES v. Hungary* said that, to be considered reasonable and otherwise non-arbitrary conduct, "there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented."¹⁰⁴ Similarly, measures "not based on legal standards but on discretion, prejudice, or personal preference" have also been described as arbitrary.¹⁰⁵

Arbitrary conduct opposed to the rule of law has been attributed to host states where government behaviour is inconsistent with its legal obligations. The tribunal in *Siag v. Egypt* found government inaction constituted a violation of the FET and FPS standards.¹⁰⁶ A central consideration in finding a violation of the FET standard was that the Egyptian government failed to respect numerous court rulings of its own courts, which the Tribunal characterized as an "extraordinary violation of the rule of law".¹⁰⁷ While this violation was found under the "due process/denial of justice" head of the FET standard, it could also be described as "arbitrary", based on the meaning assigned to this term in decisions discussed above.

Host state transparency is another obligation that has been imposed on the basis of the FET standard. The Tribunal in *MTD v. Chile* ruled that a state "has an obligation to act coherently and apply its policies consistently,

¹⁰³ *ELSI*, *supra* note 75 at 76 [emphasis added].

¹⁰⁴ *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary* (2010), ICSID Case No ARB/07/22 Award at paras 10.3.7-10.3.9. See also Dolzer & Schreuer, *supra* note 13 at 193.

¹⁰⁵ *EDF(Services) Limited v Romania* (2009), ICSID Case No ARB/05/13 Award at para 303; *Lemire v Ukraine* (2010), ICSID Case No ARB06/18 Decision on Jurisdiction and Liability at para 262. See also Dolzer & Schreuer, *supra* note 13 at 193.

¹⁰⁶ *Siag*, *supra* note 97 at paras 448-55.

¹⁰⁷ *Ibid* at para 453, quoting from Claimants' post-hearing submissions at 28.

independent of how diligent an investor is.”¹⁰⁸ The Tribunal in this decision “emphasizes ... the inconsistency of action between two arms of the same Government *vis-à-vis* the same investor even when the legal framework of the country provides for a mechanism to coordinate.”¹⁰⁹ It further stated, “Chile is not a passive party and the coherent action of the various officials through which Chile acts is the responsibility of Chile, not of the investor.”¹¹⁰ The *TPP* features an entire chapter on the topic of regulatory coherence¹¹¹, which may lend weight to its importance.

Some tribunals have also acknowledged the relevance of international environmental or social norms to the FET standard, although this has been limited to the support of the state in a given dispute, not the investor.¹¹²

3. Full Protection and Security

The FPS standard is meant to provide for the physical security of an investment, including against physical violence and harrassment.¹¹³ To avoid infringement of this standard, “it is generally accepted that the host state will have to exercise ‘due diligence’ and will have to take such measures to protect the foreign investment as are reasonable under the circumstances.”¹¹⁴ However, if state organs *themselves* act to violate the FPS standard, issues of due diligence or attribution are no longer relevant—the host state will be held directly responsible.¹¹⁵

Due diligence is not observed in the case of a host state’s failure “to take reasonable, precautionary and preventive action” to protect an

¹⁰⁸ *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (2004), ICSID Case No ARB/01/7 Award at para 165 (ICSID) [*MTD*]. See also Dolzer & Schreuer, *supra* note 13 at 151-52.

¹⁰⁹ *MTD*, *supra* note 108 at para 163.

¹¹⁰ *Ibid* at para 164.

¹¹¹ See *TPP*, *supra* note 1 at Chapter 26.

¹¹² Roland Kläger, “Chapter 11: ‘Fair and Equitable Treatment’ and Sustainable Development” in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (The Netherlands: Kluwer Law International, 2011) 241 at 254-256 [referring to *Maffezini* at para 67 and *Parkerings-Compagniet* at 392].

¹¹³ Dolzer & Schreuer, *supra* note 13 at 161-63.

¹¹⁴ *Ibid* at 161.

¹¹⁵ *Ibid* at 162-163.

investment.¹¹⁶ While the standard is not one of strict liability, tribunals have gone as far as to say that full protection implies “a State’s guarantee to stability in a secure environment, both physical, commercial and legal.”¹¹⁷ However, it is still debated whether legal and other protections ought to also be considered.¹¹⁸

4. Additional Provisions that May Inform Article 9.6 Protections

TPP provisions outside of Chapter 9 could bolster *Allard*-structured claims, particularly through the lens of the Agreement’s object and purpose. For example, consider the provisions found within the Environment Chapter. Article 20.3.4 provides that, “[n]o Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement for that Party.”¹¹⁹ Article 20.3.6 further provides that “a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties.”¹²⁰ This Chapter also provides for the implementation of other multilateral environmental agreements that the parties are subject to, but that may lack binding enforcement regimes.¹²¹ The Environment Chapter does, however, contain the following discretionary provision:

5. The Parties recognise that each Party retains the right to exercise discretion and to make decisions regarding: (a) investigatory, prosecutorial, regulatory and compliance matters; and (b) the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws a Party is in compliance with paragraph 4 if a course of action or inaction *reflects a reasonable exercise of that discretion*, or results from a *bona fide decision regarding the allocation of those resources in accordance with priorities for enforcement of its environmental laws*.¹²²

¹¹⁶ *Bewater Gauff v Tanzania* (2008), ICSID Case No ARB/05/22 Award at para 725.

¹¹⁷ *Ibid* at para 729.

¹¹⁸ Dolzer & Schreuer, *supra* note 13 at 163-165.

¹¹⁹ TPP, *supra* note 1, art 20.3(4).

¹²⁰ *Ibid*, art 20.3(6).

¹²¹ TPP, *supra* note 1, art 20.4.

¹²² *Ibid*, art 20.3(5) [emphasis added].

This provision may serve as a cover for states in instances of lax enforcement. The question of whether particular behaviour should be considered “reasonable” or the result of a “bona fide decision” is vulnerable to many possible interpretations.

The language of the Labour Chapter is stricter. Among other measures aimed at labour protections, Article 19.3 requires parties to adopt the fundamental protections provided for in the *ILO Declaration*.¹²³ This includes: freedom of association and the right to collective bargaining; elimination of forced and child labour; and the elimination of discrimination in employment. Chapter 19 contains a similar “Non-Derogation” clause to that of Chapter 20, but Article 19.5 leaves much less discretionary space for parties:

1. No Party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement.
2. If a Party fails to comply with an obligation under this Chapter, a decision made by that Party on the provision of enforcement resources shall not excuse that failure. Each Party retains the right to exercise reasonable enforcement discretion and to make bona fide decisions with regard to the allocation of enforcement resources between labour enforcement activities among the fundamental labour rights and acceptable conditions of work enumerated in Article 19.3.1 (Labour Rights) and Article 19.3.2 (Labour Rights), provided that the exercise of that discretion, and those decisions, are not inconsistent with its obligations under this Chapter.

Therefore, a failure to meaningfully enforce central labour provisions would be met with less leniency.

Provisions that promote transparency, accountability and good governance can be found throughout the *TPP*. One such provision, found in the Development Chapter, says the parties “affirm their commitment to promote and strengthen an open trade and investment environment that seeks to improve welfare, reduce poverty, raise living standards and create new employment opportunities in support of development.”¹²⁴ More importantly, particularly for a “failure to enforce” argument, the subsequent Article provides that “[t]he Parties further recognise that transparency, good governance and accountability contribute to the effectiveness of

¹²³ *TPP*, *supra* note 1, art 19.3(1); International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work*, 86th Sess, Geneva, (June 18, 1998).

¹²⁴ *TPP*, *supra* note 1, art 23.1(1).

development policies.”¹²⁵ The TPP offers further support for these goals again in Chapter 26, wherein parties are required to promptly publish, and make available, its proposed and in-force laws, regulations, and decisions.¹²⁶ It also requires parties to adopt accountability and anti-corruption regimes.¹²⁷ These provisions support a favourable interpretation of the MST, FET and FPS standards for *Allard*-structured claims as they refer to specific favourable values of the Agreement, as well as obligations related to required party behaviour. In doing so, these provisions shape the content the MST, FET and FPS protections.

D. Viability of an *Allard*-Structured Claim under Article 9.6

Based on the standards of protection outlined above, a host state could theoretically be found responsible under Article 9.6 for a failure to enforce domestic laws or fulfill international legal obligations aimed at environmental, labour and human rights protection, where said failure leads to damage to an investment. Conceptually, there does not appear to be any barrier that prevents responsibility from attaching, so long as the international rights obligation in question can be assimilated into a protection provided for in the TPP. While outside the immediate scope of this paper, this is likely the case for other IIAs with substantively similar investor protections.

As the threshold for a breach of the MST is higher than that of either the FSP or the FET, a particularly egregious measure would have to occur to constitute a violation of the MST. A host state's failure to enforce domestic laws or fulfill an international legal obligation would have to constitute manifest arbitrariness, falling below acceptable international standards, or an unexpected and shocking repudiation of a policy's very purpose and goals, or an otherwise gross subversion of a domestic law or policy for an ulterior motive. This threshold is not impossible to meet. A state's blatant disregard of environmental protection in some form or area could constitute a violation of such a standard. Some human and labour rights, such as those against slavery and racial discrimination have achieved *jus cogens* status,¹²⁸ and thus may be more easily recognized by a tribunal. A

¹²⁵ *Ibid*, art 23.2.

¹²⁶ *Ibid*, art 26.2.

¹²⁷ *Ibid*, art 26.7. See also Chapter 26 generally.

¹²⁸ *Barcelona Traction, Light, and Power Company, Limited (Belgium v Spain) (Second Phase)*,

central aspect is their correlation to a willful neglect of duty. However, it remains to be seen whether it is possible to import other principles of customary international law into this standard.

The threshold is lower for the FET standard and, therefore, it is easier to establish a breach. Failure to enforce environmental standards that the host state had itself set out would clearly constitute arbitrary conduct. This certainty stems from the core nature of arbitrariness—a conflict with the rule of law. To enact a law with a valid and rational purpose, and to then disregard its enforcement (absent a reasonable motive), conflicts with the principle of the rule of law. It is surely arbitrary. Arbitrariness is thus a key principle for the purposes of subjecting domestic laws and their enforcement to scrutiny by the international legal system.

In addition to arbitrariness, a state's failure to enforce its own laws violates the expectation that the state "use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments".¹²⁹ Such a discrepancy violates states' obligations "to act coherently and apply its policies consistently",¹³⁰ thus contradicting the standard's provision of transparency. As with the MST, any violation of the protections found in Chapters 19 and 20 would bolster this claim.

The existence of responsibility under the FPS standard is less clear. Based on its traditional use as a means of protecting against physical interference or harassment, a conceptual shift may be required from a means-focused definition of protection to an ends-focused one. A means-focused definition would consider only the threats the standard was historically intended to protect against, such as harassment, looting, the seizing of property or civil unrest.¹³¹ In contrast, an ends-focused definition would recognize and give effect to the ultimate objective of the standard—the preservation of the physical integrity of the investment. The due diligence threshold of liability would not be difficult to meet where the claim is based on a state's regulatory regime, since the regulatory mechanisms employed by a state establish its responsibilities. In this way, they define what constitutes due diligence. From this perspective, a state's

[1970] ICJ Rep 3 at para 34.

¹²⁹ *Tecmed*, *supra* note 97 at para 154.

¹³⁰ *MTD*, *supra* note 108 at para 165.

¹³¹ Dolzer & Schreuer, *supra* note 13 at 162–63.

failure to enforce environmental standards may well constitute a breach of the FPS standard. Several of the provisions discussed, as well as the object and purpose of the TPP, lend support to the recognition of an environmental claim. Circumstances that feature a host state's failure to prevent pollution of the investment's environment would have a comparatively good chance of bridging this gap. The only instance wherein human or labour rights may be more straightforward in establishing host state responsibility is if a violation was committed against an investor or one of its employees, but this may lead to issues with damages, as discussed below.

Beyond those stated within Article 9.6, other claims may also be raised under the TPP so long as they correspond to a substantive protection in Chapter 9. For example, the lack of proper regulation of or adherence to international obligations may also raise issues of discrimination contrary to the National Treatment or Most-Favoured-Nation (MFN) Treatment standards where enforcement is inconsistent. In *White Industries Australia Ltd. v. The Republic of India*, a MFN clause was used to find India liable for failure to adopt and implement an effective judicial system.¹³²

V. CAVEATS AND OTHER FACTORS TO TAKE INTO ACCOUNT

There are several obstacles to the enforcement of an *Allard*-structured claim. Perhaps the most obvious it that it is a novel claim and tribunals may be reluctant for one reason or another to recognize it. In the award rendered by the Tribunal in *Allard*, the claimant was ultimately unsuccessful on the facts, but the claim as discussed here was not inherently denied on the law.

Just as the claim is novel, so too are the damages sought. Awards ordered by a TPP Tribunal are only allowable in the form of payment or restitution, and cannot include penal damages.¹³³ Absent a claim of expropriation, many of the breaches anticipated by an *Allard*-structured claim could be difficult to quantify. Environmental damage may be the easiest to quantify, as experts can make a determination regarding the cost

¹³² *White Industries Australia Ltd v The Republic of India* (2011), UNCITRAL Award at 110-18. Here, the MFN clause operated to afford the claimant a higher standard of judicial due process protection, imported from another BIT to which India was a Party, see 105-06.

¹³³ TPP, *supra* note 1, arts 9.29(1)-(6).

of cleanup or remediation, for example. Failure to enforce labour or human rights may be more difficult. Disputing parties may have to rely on forensic economists and other experts to assess damages not typically considered, such as those to reputation, stock value, or increased legal costs for risk management.

For example, a host state may fail to adequately enforce labour standards in a community in which the claimant operates, allowing for the use of child and compulsory labour by its competitors. This failure leads to a) a competitive disadvantage for the claimant, as they are paying more for labour; b) civil unrest in the community; and c) the tarnished reputation of the claimant simply by operating in this community. Studies such as Rachel Davis and Daniel Franks' *Costs of Conflict*¹³⁴ illustrate the ways in which civil unrest can impact business operations' bottom line. However, establishing and quantifying the damage suffered will nevertheless prove to be a significant obstacle. Further studies and impact assessments on rights deprivation and its damage to the bottom line would considerably help in this regard. The issue of establishing that the host state was the "proximate cause"¹³⁵ of the damages suffered should also be apparent in the example above. Undoubtedly, this level of causation may be difficult to prove in some circumstances.

There are other factors that may impact an *Allard*-structured claim's chances for success, such as how well protected or recognized a specific obligation is, or the extent of the breach. Was the breach a result of mere negligence? Or, did it amount to bad faith, or a willful neglect of duty? For example, the discretionary enforcement clause in Article 20.5 may present a considerable hurdle for environmental claims in this regard.

The content of the investment contract or authorization may also have a significant impact. For example, a host state's contractual promise to enforce domestic environmental, labour, and human rights laws effectively and in good faith would improve a claim.¹³⁶

¹³⁴ Rachel Davis & Daniel Franks, "Costs of Company-Community Conflict in the Extractive Sector" *Corporate Social Responsibility Initiative Report No 66* (Cambridge, MA: Harvard Kennedy School, 2014), online: <www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf>.

¹³⁵ *TPP*, *supra* note 1, art 9.29(4).

¹³⁶ Dolzer & Schreuer, *supra* note 13 at 152–54 lay out several instances in which a contractual breach supported a claim that a breach of the FET had occurred. However, this is neither necessary nor sufficient for a successful claim.

There are three additional points pertinent to the host state's perspective. First, defences such as necessity fall outside the scope of this paper. Second, many treaties employ language that seeks to accommodate the different capacities developing states have when fulfilling their international legal obligations. For example, the language, "as far as possible and as appropriate or in accordance with its capabilities", effectively qualifies many of the primary obligations imposed by the *Biodiversity Convention* featured in the *Allard* claim. This *Convention* also requires monetary support by developed states for the purposes of capacity building.¹³⁷ Accordingly, if such support is insufficient in aiding Barbados to fulfill its obligations under the *Convention*, this could have implications for the interpretation of IIA obligations and the presumption of compliance with international law. Perhaps Barbados may not be held as strictly to its obligations under these circumstances. Third, there are substantial ethical questions regarding the resources of the host state and the investor. Is it socially responsible to bring claims against a state that already struggles to deliver basic services to its residents? Is it possible the host state is already doing all that it can to fulfill its rights obligations? Is the claim a proportionate response to the breach? Is the cost of advancing the claim too prohibitive? If other members of a community are harmed, can they be compensated? These are questions that ought to be addressed by the potential claimant and perhaps even the Tribunal.

Despite these concerns, *Allard*-structured claims are generally in line with widely recognized CSR guidelines, and particularly with the *UN Guiding Principles on Business and Human Rights*'¹³⁸ Principle 11. The *Guiding Principles*' commentary on this principle states:

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

¹³⁷ *Biodiversity Convention*, *supra* note 55, art 20(2).

¹³⁸ John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 17th Sess, Annex, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011), online: <business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation.

Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights.¹³⁹

Another principle suggests that, regardless of context, businesses should “[c]omply with all applicable laws and respect internationally recognized human rights” and “[s]eek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements”.¹⁴⁰ In fact, these claims would also encourage states’ “Duty to Protect Human Rights”, the primary principle here being:

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.¹⁴¹

Allard claims provide a mechanism to ensure that human rights are respected in the community in which they operate. Further, it helps to even the playing field, ensuring that enterprises do not have to pay a competitive price for playing by the rules.

VI. THE *TPP*'S PROCEDURAL IMPLICATIONS FOR CSR

While significant, *Allard*-structured claims are only one aspect of the *TPP*'s Investment Chapter's CSR implications. The degree of transparency and possibility for *amicus curiae* participation in the ISDS procedure, as laid out in Chapter 9, has significant implications for CSR.

A. Transparency

Article 9.24 governs the transparency of ISDS proceedings under the *TPP*. It requires:

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:
 - (a) the notice of intent;
 - (b) the notice of arbitration;

¹³⁹ *Ibid* at 13.

¹⁴⁰ *Ibid* at 21.

¹⁴¹ *Ibid* at 6.

- (c) pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 9.23.2 (Conduct of the Arbitration) and Article 9.23.3 and Article 9.28 (Consolidation);
- (d) minutes or transcripts of hearings of the tribunal, if available; and
- (e) orders, awards and decisions of the tribunal.¹⁴²

Further, the Tribunal is required to conduct hearings open to the public, excluding the discussion of information designated as protected. In those instances, “[t]he tribunal shall make appropriate arrangements to protect such information from disclosure which may include closing the hearing *for the duration of the discussion of that information*.”¹⁴³ Seemingly, the provision endeavours to keep as much of the proceedings open as possible.

The substantial transparency created produces further incentive for investors to maintain “clean hands.” The public availability of these materials increases the accountability of both investor and state behavior, including both the subject matter of the claim and arguments raised by the disputing parties.¹⁴⁴

B. *Amicus Curiae* Participation

With the TPP ISDS procedure, third parties are permitted to make submissions, albeit under certain conditions:

After consultation with the disputing parties, the tribunal may accept and consider written *amicus curiae* submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings ... The tribunal shall ensure that the submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.¹⁴⁵

Amicus curiae submissions may aid tribunals in understanding areas of law outside their expertise, such as environmental or human rights law, and provide an additional avenue for international rights advocacy. This, along

¹⁴² TPP, *supra* note 1, art 9.24.1.

¹⁴³ *Ibid*, art 9.24.2 [emphasis added].

¹⁴⁴ See, for example, the issues raised in John Ruggie, “Kiobel and Corporate Social Responsibility: An Issues Brief” (2012) Harvard Kennedy School, online: <www.hks.harvard.edu/m-rcbg/csri/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY.pdf>.

¹⁴⁵ TPP, *supra* note 1, art 9.23.3.

with transparency measures, has been suggested by commentators before, and is included in the IISD Model Investment Agreement.¹⁴⁶

VII. CONCLUSION & IMPLICATIONS FOR BUSINESS

The *TPP*'s object and purpose, and many of its provisions, emphasize the importance of environmental protection, labour rights and sustainable development more than many past agreements, thus establishing a more favourable environment in which socially responsible enterprises can operate. Yet, the *TPP* is not perfect, and the scope of this paper excludes discussion on the broader implications on sustainability and human rights—topics that have already drawn a significant amount of attention and criticism.

Business enterprises that have implemented a robust CSR framework would stand to benefit significantly under the *TPP* regime. The express inclusion of provisions in the Environment, Labour and Investment chapters facilitating the encouragement of CSR adoption indicates that at least some of the parties to the *TPP* expect it to occur. The specific means of encouragement under the *TPP* and future agreements, and how they may differ from existing means, warrant further discussion. It is more than likely that these means would include incentives for businesses to adopt and maintain CSR strategies. One likely benefit is the opportunity for public-private partnerships and closer government relations. Others may include subsidies, operational support, resources for CSR strategies, or an advantage in government treatment and, perhaps, even in procurement bids. Ideally, states' obligations to develop a coherent policy framework will encourage CSR. It is also worthwhile to note that the CSR encouragement language is stronger with respect to labour than it is with the environment. This may reflect parties' own priorities.

Some incentives for the adoption of CSR exist outside explicit state measures. Recall Flammer's research, which indicated that businesses operating in their domestic market move towards CSR as a means of staying competitive when trade barriers are liberalized. Such an advantage could be critical in an agreement where there is significant variation in the cost of labour between states. For foreign investors, a CSR framework can help

¹⁴⁶ IISD Model Investment Agreement, *supra* note 19, Annex A, art 8.

reduce conflict and therefore a negative impact to their bottom line.¹⁴⁷ The ISDS regime in the *TPP* incentivizes the adoption of CSR standards through traditional means such as the “clean hands” doctrine, as well as through its transparency and *amicus curiae* provisions.

The possibility for *Allard*-structured claims also reduces disincentives for CSR adoption and provides an avenue to protect both their investment and the rights of others. These claims are likely applicable to many other IIAs, although this is highly dependent on the investor protections the treaties themselves. The Tribunal in *ADF Group Inc. v. United States* observed the following logical corollary to an independent MST that exists at customary international law: “Where the treatment accorded by a State under its domestic law to its own nationals falls below the minimum standard of treatment required under customary international law, non-nationals become entitled to better treatment than that which the State accords under its domestic law.”¹⁴⁸ The privilege that this affords foreign investors should not be taken lightly. Socially responsible enterprises can use this standard and other investor protections to not only safeguard their own interests, but also those of the community in which they operate.

¹⁴⁷ Davis & Franks, *supra* note 134.

¹⁴⁸ *ADF*, *supra* note 17 at para 178.