



## INVESTOR-STATE ARBITRATION SERIES

PAPER NO. 9 — AUGUST 2016

# INVESTOR-STATE DISPUTE SETTLEMENT IN US LAW, POLITICS AND PRACTICE: THE DEBATE CONTINUES

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## ABOUT THE INVESTOR-STATE ARBITRATION PROJECT

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA between developed democracies — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where civil society groups and academic critics have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government, equivalent to those provided by contemporary investment protection agreements.

CIGI Senior Fellow Armand de Mestral is the lead researcher on the ISA project. Contributors to the project are Marc Bungenberg, Charles-Emmanuel Côté, David Gantz, Shotaro Hamamoto, Younsik Kim, Céline Lévesque, Csongor István Nagy, Luke Nottage, Ucheora Onwuamaegbu, Carmen Otero, Hugo Perezcano, August Reinisch and David Schneiderman. A conference was held in Ottawa on September 25, 2015. The papers presented at that conference are in the process of being issued as CIGI Papers and will ultimately appear as a collective book.

## ABOUT THE AUTHOR



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David was a law clerk to the US Court of Appeals for the Ninth Circuit, an attorney-adviser and assistant legal adviser with the US Department of State, and has been a partner at various law firms in Washington, DC. David is a member of the American Society of International Law and its international economic law interest group. He has held several public service roles, including as an arbitrator for Chapter 11, Chapter 19 and Chapter 20 of the North American Free Trade Agreement; consultant to the World Bank, the United States Agency for International Development and the United Nations Development Programme; and US judge to the Administrative Tribunal of the Organization of American States.

David received the Arthur Andrews Distinguished Teaching/Mentoring Award in 2006 and the US Department of State Superior Honor Award in 1974. He holds a J.S.M. and a J.D. from Stanford Law School and an A.B. from Harvard College.

**ACRONYMS AND ABBREVIATIONS**

BITs	bilateral investment treaties
BTD	Bipartisan Trade Deal
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
FTAs	free trade agreements
FTAA	Free Trade Agreement of the Americas
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
ISDS	investor-state dispute settlement
IISD	International Institute for Sustainable Development
KORUS	United States-Korea Free Trade Agreement
MTBE	methyl tert-butyl ether
NAFTA	North American Free Trade Agreement
NGOs	non-governmental organizations
TAA	Trade Adjustment Assistance
TPA	Trade Promotion Authority
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
USTR	United States Trade Representative





## EXECUTIVE SUMMARY

The United States, despite its late entry into the world of investor-state dispute settlement (ISDS) in 1982, has concluded more than 45 bilateral investment treaties (BITs) with ISDS, and included ISDS provisions applicable to nearly 20 countries under various free trade agreements (FTAs). Prior to the Trans-Pacific Partnership (TPP), however, only two partners to these agreements, Canada and Singapore, have been developed countries. Yet, the debate over the advisability of including ISDS continues, even though the North American Free Trade Agreement (NAFTA) ushered in an era of transparency and greater efficiency in BITs and investment chapters. It is also considerably more difficult for foreign investors (American or otherwise) to successfully challenge as regulatory takings non-discriminatory government actions designed to further environmental goals or protect public welfare. In the United States, the opponents of ISDS — organized labour, environmental groups and other non-governmental organizations (NGOs), and some (mostly Democratic Party) members of Congress — have offered many of the same objections for decades. They attack ISDS as, *inter alia*, providing foreign investors with greater rights than US nationals in US courts; allowing public policy decisions to be made by unelected arbitrators; permitting secret proceedings; encouraging US enterprises to move production and jobs abroad, thereby causing US job losses and favouring enterprises over people; and “chilling” normal government regulation, by the US states in particular. (Many of them are opposed to trade agreements — any trade agreements — in general.)

Because of the substantial risk that if ISDS were to be abandoned governments would again be subject to strong political pressures to formally or informally espouse investor claims and make such claims the key factor in their foreign relations with the host countries, and to further US objectives to secure broad recognition of host states’ obligations to treat foreign investment in accordance with US views of customary international law, presidents Ronald Reagan, George H. W. Bush, Bill Clinton, George W. Bush and Barack Obama have all supported ISDS. Negotiating objectives in the United States’ June 2015 Trade Promotion Authority (TPA) and the content of the TPP investment chapter reflect the latest stages in this post-NAFTA evolution, including the provision of a higher level of host government regulatory flexibility. Various related factors, including dozens of NAFTA investment claims against the three NAFTA parties, have supported this result. The creation of an ISDS mechanism as a means of relieving the US government from undertaking directly the settlement of investment disputes involving its citizens, and the evolution of US investment protection provisions into a process that is significantly more friendly to host governments and to regulation, are the principal themes of this paper.

## INTRODUCTION

The United States was a latecomer to the negotiation and conclusion of BITs. While Germany, the Netherlands, the United Kingdom and other European nations began concluding BITs 20 years earlier,<sup>1</sup> the United States did not sign its first BIT, with Panama, until 1982,<sup>2</sup> with several others signed in 1983 following the conclusion of the first US model BIT.<sup>3</sup> However, unlike some of the early European BITs, which did not include ISDS,<sup>4</sup> from the outset, the US BITs incorporated (albeit in considerably different form from more modern treaties) mandatory third-party arbitration mechanisms to resolve disputes between foreign investors and host countries.<sup>5</sup> Most US BITs (47) were concluded between 1983 and 2000 by the Reagan, George H. W. Bush and Clinton administrations.<sup>6</sup> Only two, with Uruguay and

1 For example, the first German BIT was concluded with Greece in 1961, with other early BITs concluded in 1962 (Guinea), 1963 (Ceylon), 1964 (Ethiopia) and 1965 (Ecuador). UNCTAD Investment Hub, Bilateral Investment Treaties: Germany, online: <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/78#iialInnerMenu>>. The Netherlands concluded agreements with Cameroon and the Ivory Coast in 1965. UNCTAD Investment Hub: Netherlands, online: <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/148#iialInnerMenu>>.

2 US Dept. of State, United States Bilateral Investment Treaties, online: <[www.state.gov/e/eb/ifa/bit/117402.htm](http://www.state.gov/e/eb/ifa/bit/117402.htm)> [US BITs].

3 See K Scott Gudgeon, “United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards” (1986), 4 BJIL 105 at 106 (discussing the development of the model BIT) [Gudgeon].

4 See e.g. *Treaty between the Federal Republic of Germany and Ceylon for the Promotion and Reciprocal Protection of Investments*, 8 November 1962 (entered into force 7 December 1966) (since terminated), online: <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1419>> (providing the usual provisions for state-to-state arbitration of disputes over the interpretation and application of the treaty, in article 10, but no provision for ISDS).

5 See e.g. *Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment*, 27 October 1982, art VII(2) (entered into force 30 May 1991), online: <[www.state.gov/documents/organization/43582.pdf](http://www.state.gov/documents/organization/43582.pdf)> (providing for arbitration under the previously agreed arbitral procedures, before the Inter-American Arbitration Commission or other international arbitration mechanisms).

6 See US BITs, *supra* note 2.

Rwanda, have been concluded since 2000.<sup>7</sup> The Obama administration has concluded no BITs to date, but is pursuing one with China.<sup>8</sup>

It was not an accident that all US BITs contained ISDS provisions. In addition to the US Government's desire to afford greater protection for US investors in developing countries, a significant driving force behind the United States' decision to abandon the formal or informal espousal process that had been followed in recent years (such as in Latin America in the 1970s), was the objective of making available a third-party process that would allow the United States to avoid espousal in most circumstances and thus remove investment disputes from the forefront of bilateral and regional relations (and significant inter-agency disputes<sup>9</sup>), as with Peru and other members of the Organization of American States during the 1968–1976 period.<sup>10</sup> The movement toward investment agreements also benefitted foreign investors, who might have lost their investment if diplomatic intervention had been unsuccessful and, at least indirectly, the host countries who concluded investment agreements in the hope that it would stimulate investment.

US Government support of ISDS in FTAs (or in BITs with some FTA parties) has been consistent, despite extensive public and Congressional opposition since the negotiation and conclusion of NAFTA<sup>11</sup> by the George H. W. Bush administration,<sup>12</sup> and despite the fact that there is little hard evidence that BITs, as distinct from other factors creating a favourable investment climate, encourage foreign investment. The Clinton administration negotiated only one FTA, with Jordan, and it contained no investment provisions because of a recent separate BIT between the United States and Jordan.<sup>13</sup> (The 1985 FTA with Israel, negotiated by the Reagan administration, contains no investment provisions, and no BIT exists between the United States and Israel.) However, the George W. Bush administration proceeded to negotiate more than a dozen FTAs, covering 17 countries. With only one exception (Australia<sup>14</sup>), these FTAs contain investment protections with ISDS, except for those FTAs with countries (such as Bahrain) with pre-existing BITs.<sup>15</sup> The Obama administration's one and only FTA, the TPP, includes ISDS provisions applicable to all parties including Australia, albeit with some exceptions.<sup>16</sup> A major feature of the negotiations of the TPP (and the Transatlantic Trade and Investment Partnership [TTIP] as well) is the fact that many of the other negotiating parties are developed rather than developing nations — a major departure from prior US practice — with the dual exceptions of the inclusion of Canada in NAFTA and the bilateral FTA with Singapore. This belies, to a considerable extent, the argument that ISDS is necessary only with nations that lack independent court systems and/or adherence to the rule of law.

US BITs have not been, for the most part, particularly controversial. This is presumably due in large part to the following: all US BITs have been with developing nations, mostly small ones, or the nations of Eastern Europe, which at the time were developing or emerging market nations; the obligations,

7 *Ibid.*

8 Peterson Institute, "Toward a US-China Investment Treaty", February 2015, online: <[www.iie.com/publications/briefings/piieb15-1.pdf](http://www.iie.com/publications/briefings/piieb15-1.pdf)> [Peterson, China BIT]; David A Gantz, "Challenges for the United States in Negotiating a BIT with China: Reconciling Reciprocal Investment Protection with Policy Concerns" (2014), 31 *Ariz J Intl & Comp L* 203 [Gantz, "China BIT"].

9 See Kenneth A Rodman, *Sanctity vs. Sovereignty: The United States and the Nationalization of Natural Resource Investments* (New York: Columbia University Press, 1988) at 45–51 (relating the strong disagreements between the State Department and Treasury Department as to how best to deal with Latin American expropriations) [Rodman].

10 See the second section of this paper, entitled "Pre-BIT/ISDS Era: Diplomatic Protection and its Discontents."

11 The earlier *United States-Israel Free Trade Agreement*, 22 August 1985 (entered into force 1 September 1985), online: <[http://tcc.export.gov/trade\\_agreements/all\\_trade\\_agreements/exp\\_005439.asp](http://tcc.export.gov/trade_agreements/all_trade_agreements/exp_005439.asp)> and the now-superseded *United States-Canada Free Trade Agreement*, 2 January 1988 (entered into force 1 January 1989), online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf)>, contain no ISDS provisions. See e.g. article 16 of the CFTA, which provides investor protection obligations, but not ISDS.

12 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, 32 I.L.M. 289 (1993) (entered into force 1 January 1994), online: <[www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement](http://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement)> [NAFTA].

13 Signed 2 July 1967. US BITs, *supra* note 2. See *Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area*, 24 October 2000 (entered into force 17 December 2001), online: <<https://ustr.gov/sites/default/files/Jordan%20FTA.pdf>>.

14 *United States-Australia Free Trade Agreement*, 18 May 2004 (entered into force 1 January 2005) online: <[https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset\\_upload\\_file428\\_5167.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file428_5167.pdf)>. Chapter 11 of the FTA provides the usual investor protections but ISDS is absent other than with regard to a right of either party to request consultations on ISDS (article 11.16). No public information suggests that such consultations have occurred, although the TPP could presumably supersede the investment provisions of the bilateral FTA in the event that Australia consents. See also USTR, *Free Trade Agreements*, online: <<https://ustr.gov/trade-agreements/free-trade-agreements>>.

15 US BITs, *supra* note 2; see *United States-Bahrain Free Trade Agreement*, 14 September 2004 (entered into force 1 August 2006), online: <<https://ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text>>.

16 Chapter 9, *Trans-Pacific Partnership*, 4 February 2016 (not in force), online: <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>> [TPP].

including ISDS, are reciprocal but the likelihood is minimal that, for example, a Uruguayan enterprise would demand arbitration of a claim against the US Government; and BITs are concluded as treaties, with the advice and consent of two-thirds of the senators present and voting.<sup>17</sup> As the provisions of US BITs are considered either self-executing or enforceable through existing legislation,<sup>18</sup> the House of Representatives typically has no direct role in their approval. Controversy arose primarily during the negotiation (or revision) of model BITs in 2004 and 2012, where the dialogue between business interests on one side and organized labour and environmentalists on the other was predictable, and well after the first of the NAFTA Chapter 11 actions against the United States had made headlines and empowered opponents of ISDS who feared, *inter alia*, interference with regulatory actions.

Still, the most significant debates have been in the context of the TPA legislation enacted in 2002 and re-enacted only in 2015. The possible conclusion of BIT negotiations between the United States and China, under way for more than five years but with the negotiations progressing only recently,<sup>19</sup> will likely raise the ISDS controversy to a previously unknown level if and when a BIT text is concluded and made public, as discussed in the section on the TPP. Significantly, the defenders of ISDS, principally the US Government and the US business community, have focused more extensively on the many modifications to the NAFTA model incorporated in all US FTAs and BITs concluded since 2003, while most of the opponents (including libertarian groups such as the Cato Institute) largely ignore the changes, directing their opposition instead toward the perceived undesirability of ISDS (and protection of US investments abroad) more generally.

The next part of this paper (“Pre-BIT/ISDS Era: Diplomatic Protection and its Discontents”) continues with a brief discussion of the period 1965–1980 in particular, which was dominated by a formal or informal “espousal” process (in which the US Government negotiated individual claims settlements<sup>20</sup> with various governments, in particular Peru, Ecuador and Venezuela in South America), and by controversies over US policies, including economic sanctions, designed to protect US investors abroad from expropriation (or, from another point of view, to coerce foreign governments into paying compensation for expropriated properties). The third part (“The United States Embraces BITs (with ISDS): 1983–2000”) discusses the late and somewhat cautious US embrace of BITs, and conclusion of more than 40 such agreements, the vast majority during the 1980s and 1990s. The fourth part (“ISDS in US FTAs: NAFTA, Chapter 11”) focuses on NAFTA Chapter 11, including the provisions that have created controversy; the apparently unexpected experience of the United States as a respondent in ISDS; and the ensuing re-evaluation by both the US Government and opposition groups concerned with the adverse implications of the potential challenges by foreign investors, such as the threat to “legitimate” government regulatory actions.

The penultimate section of this paper (“ISDS in FTAs: From the 2002 TPA to the 2015 TPA”) views the post-NAFTA modifications to the investment chapter model, beginning with the 2002 TPA legislation and the US-Singapore and US-Chile FTAs. This section also discusses the factors that led to changes in the investment provisions of these FTAs, principally as reflected in the 2002 TPA legislation — with its negotiating objectives applicable to, among other things, investment provisions — and in subsequent policy documents, such as the May 2007 Bipartisan Trade Deal (BTD). This part of the paper also discusses the debates over the 2015 TPA legislation and the actual text of the negotiating objectives adopted by Congress and signed by the president in June 2015.

The final section (“The Latest Act: The TPP”) addresses the recently concluded TPP negotiations, which were directly or indirectly dependent on the enactment of the TPA legislation at the end of June 2015.

17 See US Const art II, § 2 (“He [the president] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur...”).

18 The investor obligations are considered self-executing, while obligations such as the obligation of the United States Government to pay an award against the government would be enforceable under “the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (TIAS 6697) and related provisions of the Federal Arbitration Act (9 USC. Sec. 201 et seq.), as well as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (TIAS 6090) and related provisions of the Convention on the Settlement of Investment Disputes Act of 1966 (22 USC Sec. 1650a).” US, Senate Executive Report 111-8, 111th Cong, 2d sess., *Investment Treaty with Rwanda* (Treaty Doc. 110-23), 22 December 2010 (entered into force 5 January 2012), online: <[www.gpo.gov/fdsys/pkg/CRPT-111erpt8/html/CRPT-111erpt8.htm](http://www.gpo.gov/fdsys/pkg/CRPT-111erpt8/html/CRPT-111erpt8.htm)> [Rwanda BIT].

19 See Gantz, “China BIT”, *supra* note 8.

20 These informal settlements can be distinguished in most respects from more traditional lump sum settlement agreements, which typically have resulted in the US Government receiving a sum of money from a foreign government that is then distributed pro rata to a long list of claimants. See e.g. Richard B Lillich & Burns H Weston, “Note: Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims” (1988), 82 AJIL 69.

## PRE-BIT/ISDS ERA: DIPLOMATIC PROTECTION AND ITS DISCONTENTS

For the United States, a principal function of BITs was a means of supporting customary international law, creating “an instrument of US legal policy which was responsive to the unique issues facing private foreign investment in developing countries” so as to reinforce “congenial and stable legal standards for the protection of US investment in the developing world.”<sup>21</sup> Protection of US foreign investment abroad, primarily in developing nations, has been a hallmark of US international economic policy at least since the early 1960s, with various efforts to establish the international law principle of “prompt, adequate and effective compensation” following on the Cuban and Brazilian expropriations.<sup>22</sup> There was no practice until much later — in NAFTA — of including other capital-exporting nations (Canada) within the protections offered by ISDS.

As noted earlier, the United States was hardly in the forefront in seeking to protect increasing US investment in developing countries. European practice was well known to State Department officials (and presumably to private US enterprises as well) as a “proven success story” by the 1970s,<sup>23</sup> even if the earlier European BIT versions did not necessarily provide for ISDS. This, and the fact that the dozens of earlier US “friendship, commerce and negotiation” treaties (most with limited or no investment protection obligations) were, for various reasons, a poor model for concluding treaties with developing nations, led the State Department to begin a process that would lead to a model BIT and multiple negotiations. Other driving forces toward BITs may have included business community frustration with Carter administration neutrality on foreign investment issues, and concerns that many developing countries were increasing restrictions on inward investment<sup>24</sup> in the aftermath of the Charter of Economic Rights and Duties of States. This charter, among other provisions that were generally opposed by capital-exporting nations, provided for permanent sovereignty over natural resources and for compensating owners of expropriated property in domestic courts solely in accordance with domestic law (effectively excluding any minimum standards of international law).<sup>25</sup>

In addition to these considerations, further benefits of independent third-party arbitration also existed. In the late 1960s and 1970s, when expropriation disputes were legion among US investors and various Latin American governments (Peru, Ecuador and Venezuela, in particular), investors who lacked recourse to international arbitration and (often with good reason) distrusted national courts regularly sought assistance from the State and Treasury Departments in negotiating settlement arrangements for payment of compensation.<sup>26</sup> In the author’s experience, this inevitably put the disputes, whether formally or informally espoused, at the forefront of US bilateral relations with the host country. Such a result was virtually assured by the existence of US legislation that suspended bilateral foreign assistance, US support for loans from the World Bank and Inter-American Development Bank, and tariff preferences under the Generalized System of Preferences for uncompensated expropriations.<sup>27</sup> Whether to take a hard line with expropriating governments or a more diplomatic approach, and whether to depart from the concept of “prompt, adequate and effective compensation” through a US government-negotiated settlement at something closer to book value, was also a subject of intense discussion and often bitter inter-agency and executive branch–Congress disputes led by the Treasury Department and State Department.<sup>28</sup>

21 Gudgeon, *supra* note 3 at 110.

22 See Kenneth Vandeveld, *United States Investment Treaties* (Oxford: Oxford University Press, 1992) at 22–25; Rodman, *supra* note 9 at 27–51 (discussing “United States Support of an International Property Regime”).

23 Gudgeon, *supra* note 3 at 109.

24 “Administration Announces Official Stance on International Investment”, 8:23 *US Import Weekly (BNA)* (14 September 1983) at 879, quoted in Valerie H Ruttenberg, “The United States Bilateral Investment Treaty Program: Variations on the Model” (1987) 9 *U Pa J Intl L* 121, 122.

25 UNGA Res 3281 (XXIX), UNGA, A/RES/29/3281 1974, online: <[www.un-documents.net/a29r3281.htm](http://www.un-documents.net/a29r3281.htm)>, arts 2(1), 2(2)(c).

26 For an account of some such negotiations, see, e.g. David A Gantz, “The United States-Peruvian Claims Agreement of February 19, 1974” (1976) 10 *Intl Lawyer* 390 (resulting in a settlement — the “Greene” settlement — of a dozen US enterprise claims against the Government of Peru, including the highly politicized taking of the properties of Esso Standard (Inter-America, Inc.)); David A Gantz, “The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property” (1977) 71 *AJIL* 474 at 491 (settling a claim by the Marcona Mining Company against Peru) [Gantz, “Marcona”]; Rodman, *supra* note 9 at 288–94 (also discussing the Greene and Marcona settlements as examples of the “pragmatic approach” to resolving such disputes through US government action).

27 Hickenlooper Amendment: 620(e)(1) of the *Foreign Assistance Act of 1961*, as amended (22 USC 2370(e)(1) [barring foreign assistance]; Gonzalez Amendment, § 21 of the *IADB Act*, as amended, 86 Stat 59 (1972) [requiring USG to oppose loans in World Bank and IADB]; § 502(b)(4) of the *Trade Act of 1974*, as amended (88 Stat 2067) [suspension of GSP].

28 See Rodman, *supra* note 9 at 45–51 (chronicling the inter-agency and congressional disagreements).



As one young State Department lawyer (the author) involved in a series of expropriation disputes with Peru from 1973 to 1976 noted, “These laws mean not only that US bilateral relations may be severely damaged by an expropriation, but that, in the case of a country which enjoys a world or Third World leadership role [e.g., Peru], the spill-over effect will impinge upon our multilateral relations as, for example, in the Organization of American States. There the members other than the United States, from the largest to the smallest, object to linking eligibility for assistance to treatment of foreign investment.”<sup>29</sup>

For all these reasons, the United States Government initiated a process in 1982 that resulted in the negotiation and conclusion of multiple BITs.

## THE UNITED STATES EMBRACES BITS (WITH ISDS): 1983–2000

Although several US BITs (those with Egypt and Panama) were initially negotiated earlier, almost all the rest have been based on a series of model BITs, those completed in 1984, 2004 and 2012 in particular, that parallel the evolutionary changes in the investment provisions of US FTAs. It is beyond the scope of this article to discuss BIT provisions generally in any detail. Rather, the analysis is focused on the inclusion of ISDS and related BIT and investment chapter provisions in such areas as fair and equitable treatment, expropriation and transparency as part of the arrangements that permitted individual foreign investors to bring actions against foreign governments that were party to the agreements, without any requirement of approval or participation by the investor’s home government.

Among the innovations of the 1984 US model BIT (first announced in 1982 but later modified), and the many agreements negotiated using the model as the basis for negotiations, was the inclusion of ISDS, which had already been included in many of the BITs concluded by European nations. As one commentator noted, “The treaties are genuinely new in this regard. While the assumption of continuing amicable relations between the protected investor and the host State is implicit in the BITs, the treaties guarantee investors access to a neutral arbitral forum in which to present any claims. To this end, the signatories consent to international arbitral jurisdiction in the BITs, and the treaties establish mechanisms to ensure that arbitration may proceed even if the host State refused to cooperate.”<sup>30</sup>

That being said, the ISDS provisions in the early US treaties, and in the 1984 model BIT, were less explicit than the modern standards, although perhaps equally effective in requiring binding arbitration at the demand of the foreign investor. In particular, where consultation and negotiation between the investor and the host government failed, arbitration was mandatory when “the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures.”<sup>31</sup> Still, such “previously agreed” procedures are to a great extent incorporated in the 1984 model BIT language, which provides that each (government) party consents to submission of such disputes to binding arbitration at the International Centre for Settlement of Investment Disputes (ICSID) or, where the centre is not available because the host government is not a party to ICSID, to the ICSID Additional Facility.<sup>32</sup>

Later sections of this paper discuss the arguments of proponents and opponents of ISDS in trade agreements. It is notable that there appears to have been little or no meaningful debate as part of the 1982–1984 model BIT drafting process. Rather, a former State Department official directly involved in the process notes that, “The model treaty [...] that ultimately developed under the BIT program was the product of years of extensive bureaucratic analysis, refinement *by members of the business and legal communities*, and modifications during negotiations of the initial treaties.”<sup>33</sup> There is no mention in this or other contemporary literature of input from labour unions, NGOs or anyone other than those mentioned above, perhaps in part because Reagan administration officials felt no obligation to cater to such normally Democratic constituencies. The entire BIT negotiating process was characterized by a high degree of secrecy.<sup>34</sup>

29 Gantz, “Marcona”, *supra* note 26 at 491. The author also served as a member of the US delegation to the OAS from 1971 to 1976, and frequently heard first-hand assertions that by threatening to suspend foreign assistance the United States was using “economic coercion” in contravention of article 19 of the OAS Charter (30 April 1948, 2 UST 2394, TIAS No. 2361, 119 UNTS 3, amended Feb. 27, 1967, 21 UST 607, TIAS no. 6947).

30 Wayne Sachs, “The New US Bilateral Investment Treaties” (1984) 2 BJIL 192 at 219.

31 “Text of the US Model Treaty concerning the Reciprocal Encouragement and Protection of Investment of February 24, 1984” (1986) 4 BJIL 136 at art VI(2).

32 *Ibid*, art VI(3).

33 Gudgeon, *supra* note 3 at 105–106 (footnotes omitted; emphasis added).

34 One professor, Andrea Bjorklund, who at the time was an associate in a Washington, DC, law firm, reports that even the completed US BITs were not easily available to the public. She had to visit the Department of State’s library to locate copies.

With the strong support of the Reagan administration, nine BITs were completed during that period, and another dozen were concluded during the George H. W. Bush administration.<sup>35</sup> The golden age of US BITs was the period 1993–2000, when the Clinton administration concluded 24 such agreements, including several with what are now EU member nations, although, in fairness to the first Bush administration, negotiations for many of those were begun before 1993.<sup>36</sup> None of these were concluded with what at the time were considered developed countries, and relatively few were controversial, perhaps because by the early 1990s the focus of opposition to ISDS had shifted to NAFTA, in particular its Chapter 19 (for binational panel review of administrative determinations in unfair trade cases) and to broader dislike by many in the Democratic Party of *any* further FTAs, including but not limited to ISDS provisions. This situation is reflected by the fact that President Clinton’s “fast track” authority expired after a one-year extension in April 1994 (to permit the procedures to be used for approval by Congress of the Uruguay Round agreements) and was never renewed, partly for lack of advocacy by the Clinton administration during its second term and in part because of both Democratic and Republican Party opposition.<sup>37</sup> Accordingly, in the section that follows, the focus of the discussion shifts to FTA chapters from BITs.

## ISDS IN US FTAS: NAFTA, CHAPTER 11<sup>38</sup>

Including Chapter 11 in NAFTA was not a radical move for the United States. The sources were the United States–Canada FTA (for the obligations-to-investors language, but without ISDS), the various US BITs and the 1992 model BIT.<sup>39</sup> The inclusion in NAFTA of a compulsory third-party arbitration procedure to settle investment disputes, along with international law standards for the treatment of foreign investment, must have been seen as a major achievement for the Department of State, the Treasury Department and the Office of the United States Trade Representative (USTR), as well as for the business community, considering that it overcame many decades of Mexico’s adherence to the Calvo Clause<sup>40</sup> and a long and troubled history of investment disputes between Mexico and the United States, including the petroleum industry expropriation in 1938.<sup>41</sup> What *was* radical was the inclusion, for the first time, of ISDS in an agreement with another developed nation — that is, Canada.

FTA investment chapters, Chapter 11 of NAFTA in particular, have generated extensive controversy based on both the major substantive provisions (national treatment, fair and equitable treatment, and expropriation, among others) and the interpretation and application of such provisions in specific instances, as well as with regard to frequent ISDS. The reasons are obvious. Over 22 years, NAFTA has generated more than 50 ISDS claims. Of the 17 against the United States, only seven have reached the award stage, and the United States has yet to be required to pay an award to a foreign claimant.<sup>42</sup> The most relevant fact for this discussion is that the majority of the claims, some 35 (including notices of arbitration for cases that were never pursued), have been filed and, in many instances, litigated between two developed nations, investors of the United States against Canada, and vice versa.<sup>43</sup> (In contrast, as far as the author has been able to determine, only one case has been brought by a foreign investor under any BIT or any other FTA investment chapter against the United States, and in two and a

35 See listing of US BITs, *supra* note 2.

36 *Ibid.*

37 *Omnibus Trade and Competitiveness Act of 1988*, Pub L No 100–148; Pub L No 103–49 (enacted 2 July 1993, codified at 19 USC § 2902(e)).

38 Parts of this section draw on David A Gantz, “The United States and Dispute Settlement under the North American Free Trade Agreement: Ambivalence, Frustration and Occasional Defiance” in Cesare Romano, ed, *The Sword and the Scales: The United States and International Courts and Tribunals* (New York: Cambridge University Press, 2009) 356.

39 Daniel M Price & P Bryan Christy, III, “Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement” in Judith H Bello et al, eds, *The North American Free Trade Agreement: A New Frontier in International Trade and Investment in the Americas* (New York: American Bar Association, 1994) 165 at 167, especially note 6 [Price & Christy].

40 The Calvo Clause, named after the Argentine jurist Carlos Calvo who articulated it first, posits that investors in the nation must agree to resolve disputes in the local courts and to forego seeking diplomatic protection by the home state in the event of difficulties. The Mexican version, article 27 of the Constitution, reads: “Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership of lands, waters and their appurtenances, or to obtain concessions for the exploitation of mines, waters or mineral fuels, in the Mexican Republic. *The State may grant the same right to foreigners provided that they agree before the Ministry of [Foreign] Relations to consider themselves as nationals with respect to said properties and accordingly not to invoke the protection of their Governments in regard to them; under penalty, in case of breaches of the agreement, of losing to the benefit of the Nation the properties they may have acquired thereby*” (emphasis added).

41 Rodman, *supra* note 9 at 110–22.

42 Cases against Canada are available from the US Department of State, online: <[www.state.gov/s/l/c3740.htm](http://www.state.gov/s/l/c3740.htm)>; cases against the United States are available online: <[www.state.gov/s/l/c3741.htm](http://www.state.gov/s/l/c3741.htm)>.

43 *Ibid.*

half years the latter proceeding, under the Dominican Republic-Central America Free Trade Agreement [CAFTA-DR], has not progressed beyond the “notice of intent to arbitrate” stage.<sup>44</sup>)

The most vocal government and NGO (and some state government) concerns have centred on the preservation of government authority to regulate (to preserve the environment or to support public health and safety, in particular) without facing liability for such actions. They also relate to the allegations that foreign investors in the United States have greater rights to compensation than US citizens under the Fifth Amendment to the US Constitution.

Because literature elsewhere extensively analyzes the NAFTA and post-NAFTA changes in investment chapters,<sup>45</sup> this paper’s discussion of such changes is restricted to the highlights: changes in provisions relating to fair and equitable treatment, expropriation, transparency in the arbitral proceedings and various procedural issues designed to eliminate frivolous claims from the outset, except as noted below.

## The Substance

Judging from the cases litigated under NAFTA and the attacks on Chapter 11, the most significant and controversial investors’ protections in Chapter 11, section A, are the rights to national treatment, fair and equitable treatment and to fair compensation in the event of expropriation or nationalization, direct or indirect.<sup>46</sup> (Many cases have turned on national treatment and non-discrimination under article 1102, but the application of the requirement has been more straightforward, despite some issues of interpretation, and the language in subsequent agreements does not vary materially from NAFTA.<sup>47</sup>) Tribunals established under Chapter 11 “decide the issues in accordance with this Agreement and applicable rules of international law.”<sup>48</sup> Because these three articles are most relevant to the subsequent discussion, the pertinent language is set out below.

### Article 1102: National Treatment

1. Each Party shall accord to investments of investors of another Party treatment no less favorable than it accords, in like circumstances, to investment of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale of or other disposition of investments.

### Article 1105: Minimum Standard of Treatment

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

### Article 1110: Expropriation and Compensation

1. 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:
  - (a) for a public purpose;
  - (b) on a non-discriminatory basis;
  - (c) in accordance with due process of law and Article 1105(1); and

44 *Guatemalan, Costa Rican and Dominican Claimants (Stanford Ponzi Scheme) v United States*; see Notice of Intent, 31 December 2012, online: <[www.state.gov/s/l/c56919.htm](http://www.state.gov/s/l/c56919.htm)> (based on the alleged failure of US regulators to exercise the international standard of due diligence to stop the Stanford Ponzi scheme and thus protect the claimant investors against fraud). A total of eight ISDS claims have been filed by US nationals and/or corporations against Costa Rica (1), the Dominican Republic (3), Guatemala (2) and El Salvador (2), all online: <[www.state.gov/s/l/c33165.htm](http://www.state.gov/s/l/c33165.htm)>.

45 See e.g. Price & Christy, *supra* note 39; David A Gantz, “Settlement of Disputes under the Central America-Dominican Republic-United States Free Trade Agreement” (2007) 30 *Boston College Intl & Comp L Rev* 331.

46 NAFTA, *supra* note 12, arts 1102, 1105, 1110, respectively.

47 See e.g. Jan Paulsson and Nigel Rawding, *Guide to ICSID Arbitration*, 2nd ed (Amsterdam: Wolters Kluwer, 2010) at 85.

48 NAFTA, *supra* note 12, art 1131(1).

- (d) on payment of compensation in accordance with paragraphs 2 through 6 [fair market value].

These are the core protections for foreign investors and those most frequently invoked in ISDS, as reflected in the cases discussed in this paper.

As with other FTAs and BITs, NAFTA, Chapter 11, section B, provides a detailed mechanism designed to facilitate binding resolution of investment disputes through compulsory arbitration,<sup>49</sup> normally through the World Bank's ICSID Additional Facility<sup>50</sup> or under the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL). The ICSID Additional Facility is available if only one state in the dispute (the host state or the investor's home state) is a party to the convention.<sup>51</sup> These mechanisms are not mandatory for the foreign investor who may elect to submit disputes to the local courts.<sup>52</sup> NAFTA includes the essential elements of the ISDS process: the investor's choice of arbitration before ICSID, through the ICSID Additional Facility or under the UNCITRAL Arbitration Rules; the three-year statute of limitations; and the "choice in the road" between national court litigation and international arbitration. None have changed markedly in US FTAs since NAFTA.<sup>53</sup>

Among the possible constraints on arbitrators, the NAFTA parties reserved the right to issue interpretations of the provisions of the agreement, with the proviso that "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."<sup>54</sup> One limitation in NAFTA that was changed in 2003 is reflected in the fact that NAFTA's ISDS provisions make no specific mention of investment authorizations or investment agreements, contracts with the governments as, for example, for government procurement (excluded from coverage under article 1108), although ISDS jurisdiction exists over monopolies and state enterprises where "the monopoly has acted in a manner inconsistent with the Party's obligations under Section A [the investor protections] and that the investor has incurred loss or damage by reason, or rising out of, that breach."<sup>55</sup>

In addition to the key provisions of NAFTA Chapter 11, concerns surfaced over the lack of transparency in "secret" ISDS proceedings and concerns over the perception that foreign investors through NAFTA and subsequent agreements had acquired greater rights than US investors had under US courts, both as discussed below, as well as worries that an arbitral tribunal would join procedural issues with the substance of the claims, resulting in a prolongation of the process (and the associated costs), even where the claim is ultimately dismissed.

## Emerging Opposition to ISDS under NAFTA

Opposition to NAFTA generally was broad, well before the negotiations were concluded. Recall Ross Perot's "giant sucking sound" and the Perot-Gore vice-presidential debate, most of which focused on a potential loss of jobs rather than dispute settlement.<sup>56</sup> Even the environmental groups had not yet focused on ISDS.<sup>57</sup> But, as Paul Krugman suggested in its defence, NAFTA could not at the time be "understood in terms of the real content or likely consequences of the agreement." Rather, he said:

[T]he hard-core opposition to NAFTA is rooted in a modern populism that desperately wants to defend industrial America against the forces that are transforming us into a service economy. International trade in general, and trade with Mexico in particular, have very little to do with those forces; clinging to the four percent average tariff the United States currently levies on imports of manufactures from Mexico might save a

49 *Ibid.*, arts 1120, 1122.

50 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 17 UST 1270, TIAS 6090, 575 UNTS 159 (entered into force 4 October 1966); ICSID Additional Facility Rules, art 2(a).

51 Mexico is not a party to ICSID and Canada became a party only in 2013; ICSID proper was thus not available under Chapter 11 prior to 2013.

52 If the investor decides to bring a NAFTA claim for damages based on a NAFTA government's measure or measures, the investor must waive their right to initiate or continue a parallel action in a national administrative tribunal or court, except for certain injunctive relief. NAFTA, *supra* note 12, art 1121(1)(b).

53 *Ibid.*, arts 1120, 1116.2, and 1121, respectively.

54 *Ibid.*, art 1131.2.

55 *Ibid.*, art 1116.2.

56 See Jackie Lopez, "The Campaign Against NAFTA: An Irrational Attack on Free Trade, Spring 2009" (Spring 2009) at 5, online: Duke University <<https://econ.duke.edu/uploads/assets/dje/2009/Lopez.pdf>>.

57 *Ibid.* at 6–7.



few low-wage industrial jobs for a little while, but it would do almost nothing to stop or even slow the long-run trends that are the real concern of NAFTA's opponents.<sup>58</sup>

In a broad defence of NAFTA, the Heritage Foundation in April 1993 focused on many issues other than dispute settlement, noting that both liberal and conservative critics of NAFTA argued that the agreement infringes on national sovereignty and limits local power to control laws, enforce environmental standards, and uphold health and safety regulations.<sup>59</sup> The foundation suggested in response that the mechanisms would "give US citizens and businesses more direct participation in resolving commercial, environmental and investment disputes between the three countries, by allowing them their day in court." Yet, there was little mention of investment disputes; the Heritage Foundation focused on Chapter 19 (unfair trade disputes) and Chapter 20 (state-to-state disputes).<sup>60</sup>

More explicit opposition to Chapter 11 did not spread until after the first Chapter 11 case was filed by the Ethyl Corporation, in April 1997.<sup>61</sup> The process was publicly attacked by a prominent anti-trade NGO, Public Citizen: "Ethyl Corporation's \$251 million lawsuit against a new Canadian environmental law should set off alarm bells throughout the public interest world. The suit, brought under the terms of the North American Free Trade Agreement, demonstrates the serious danger that present and future international economic pacts could pose to environmental regulations and other laws that protect the public."<sup>62</sup>

While the Ethyl case was settled in the aftermath of a finding by a federal (Canadian) dispute-settlement arbitration panel,<sup>63</sup> the controversy generated and the concerns of opponents were ongoing, in particular with regard to the *Methanex* and *Loewen* cases against the United States (discussed below) and the *Pope and Talbot* and *SD Myers* cases against Canada.

## The Impact of Chapter 11 Litigation

The ensuing NAFTA-based litigation changed many views. As Mark Clodfelter (who was a senior US State Department official at the time of NAFTA's signing) commented seven years after the agreement entered into force, the United States Government, and for that matter Canada and Mexico,

...took a very big step into the unknown when they signed onto Chapter 11. The NAFTA Parties have waived sovereign immunity from claims to an extent far greater than they have consented to the jurisdiction, for example, of the International Court of Justice. They have agreed to be answerable to private claimants before arbitral tribunals that are subject to only very limited review. Even though the United States has been party to a fair number of BITs, which have arrangements resembling Chapter 11, we have never done so with states that have so much investment in our territory.<sup>64</sup>

This *was* radical, because the United States had never concluded a BIT in the past with another developed country, although that aspect of the coverage of Chapter 11 does not appear to have received much US government attention until well after the fact, when thoughtful officials such as Clodfelter commented on it.<sup>65</sup>

58 Paul Krugman, "The Uncomfortable Truth about NAFTA: It's Foreign Policy, Stupid", *Foreign Affairs* (November/December 1993), online: <[www.foreignaffairs.com/articles/mexico/1993-12-01/uncomfortable-truth-about-nafta-its-foreign-policy-stupid](http://www.foreignaffairs.com/articles/mexico/1993-12-01/uncomfortable-truth-about-nafta-its-foreign-policy-stupid)>.

59 Wesley R Smith, "The NAFTA Debate, Part I: A Primer on Labor, Environmental and Legal Issues", *The Heritage Foundation* (9 April 1993), online: <[www.heritage.org/research/reports/1993/04/bg936nbsp-the-nafta-debate-part-i](http://www.heritage.org/research/reports/1993/04/bg936nbsp-the-nafta-debate-part-i)>.

60 *Ibid.*

61 See Appleton & Associates, Press Release, "First Ever Lawsuit against Canadian Government using NAFTA Investor-State Process Brought" (9 October 1997).

62 Michelle Sforza, Public Citizen, and Mark Vallianatos, Friends of the Earth, "Ethyl Corporation vs. Government of Canada: Now Investors Can Use NAFTA to Challenge Environmental Safeguards" (1998), online: <[www.citizen.org/trade/article\\_redirect.cfm?ID=6221](http://www.citizen.org/trade/article_redirect.cfm?ID=6221)>.

63 See Foreign Affairs, Trade and Development Canada, NAFTA – Chapter 11 – Investment Cases Filed against the Government of Canada, *Ethyl Corporation v the Government of Canada* (24 June 1998), online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng)>.

64 Mark Clodfelter, "US State Department Participation in International Economic Dispute Resolution" (2001) 42 S Tex L Rev 1273 at 1283 [Clodfelter]. Clodfelter at the time was the assistant legal adviser, Office of International Claims and Investment Disputes.

65 The State Department's guidance on the US BIT program a few years ago listed as one of the "basic aims" to "Protect investment abroad in those countries where investors' rights are not already protected through existing agreements...." It says nothing about reciprocal actions by foreign investors against the United States.

The cases against the United States have inevitably involved not only the State Department and the USTR, but also domestic agencies such as the Department of Justice and the Environmental Protection Agency (the latter, in particular, for the Methanex claim that raised environmental issues arising out of California's banning of a gasoline additive for environmental — or perhaps political — reasons). This created a potential for conflict between, on the one hand, national agencies principally concerned with encouraging US investment abroad and foreign trade (State and USTR) and, on the other hand, those more concerned with defending federal government and state actions<sup>66</sup> allegedly inconsistent with Chapter 11, such as the Department of Justice, the Department of Transportation, the Department of the Interior or the Environmental Protection Agency.

Most of the controversies that have led to at least some re-evaluation of US Government support of investment disputes fall into one of several areas. First, there are disputes arising from conflicts between trade and “legitimate” government regulatory action, including but not limited to actions protecting the environment. Many of these disputes centered on the expropriation provision, article 1110 as set out above. Second, concerns exist, primarily among NGOs and some members of Congress, regarding the appropriateness of having NAFTA tribunals effectively review decisions of US state and federal courts. Third, there exists an articulated concern, albeit probably unjustified, by the same NGOs and their supporters in Congress, that foreign citizens may have achieved greater substantive rights regarding investment in US territory under NAFTA than American citizens have under the Takings Clause of the Fifth Amendment of the US Constitution.<sup>67</sup> Fourth, broad concerns are expressed over the lack of transparency of the arbitral process. Under the original NAFTA Chapter 11 — before modifications in 2001 and 2003 — the proceedings, including the pleadings and hearings, were conducted largely in secret.

The *Methanex* case<sup>68</sup> aptly illustrates the concerns by the NAFTA governments and civil society over “regulatory takings” that could require compensation. The Canadian firm Methanex challenged the action of the State of California in banning the gasoline additive methyl tert-butyl ether (MTBE) because of the perceived risk that it might pollute the underground water supply. These measures were characterized by the claimant, both directly and indirectly, as “tantamount to expropriation.” The arbitral tribunal did not ultimately reach the question of whether California's action constituted a compensable taking under article 1110. Rather, it determined that the connection between the California MTBE ban and Methanex's operations was not “legally significant”; that is, it did not satisfy the “relating to” language in article 1101. (Methanex manufactured methanol, the primary component of MTBE, not MTBE itself.) Ultimately, the tribunal dismissed all claims by Methanex against the United States on the merits, rejecting as well Methanex's claims of violations of both national treatment, and fair and equitable treatment.<sup>69</sup>

Anti-NAFTA groups in the United States had also seized on the *Loewen* case as “an all-out attack on democracy...[that] would undermine the jury system, which is fundamental to our system of justice.”<sup>70</sup> In *Loewen*, a Louisiana state court trial — conducted with obvious prejudice to the Canadian investor — rendered a state anti-trust verdict against Loewen (a Canadian operator of funeral homes in Louisiana). The jury found a few million dollars' worth of actual damages, plus approximately \$400 million in punitive damages.<sup>71</sup> Because the claimant apparently could not meet bonding requirements for an appeal, set at \$625 million under Louisiana law, Loewen settled the case for \$175 million “under conditions of extreme duress.” Eventually it brought a Chapter 11 claim against the United States.

Among Loewen's contentions was that actions of the Louisiana trial court, the excessive monetary judgment and the bonding requirements amounted to a denial of justice and of fair and equitable treatment by the Louisiana courts in violation of article 1105 and of customary international law. The arbitral proceedings were initially dismissed on procedural grounds, with the tribunal holding that

66 Under NAFTA, *supra* note 12, art 105, state and local governments are bound by NAFTA provisions, unless otherwise provided.

67 “[N]or shall private property be taken for public use, without just compensation.”

68 *Methanex v United States* (Partial Award on Jurisdiction) (UNCITRAL, 7 August 2002); *Methanex v United States* [Final Award on Jurisdiction and Merits] (UNCITRAL, 3 August 2005) both online: <[www.italaw.com/cases/683](http://www.italaw.com/cases/683)>.

69 See Howard Mann, “The Final Decision in *Methanex v United States*: Some New Wine in New Bottles” (August 2005), International Institute for Sustainable Development (IISD), online: <[www.iisd.org/pdf/2005/commentary\\_methanex.pdf](http://www.iisd.org/pdf/2005/commentary_methanex.pdf)>.

70 “NAFTA: Consumer Group Brands Funeral Firm's NAFTA Suit an Assault on US”, *Int'l Trade Daily* (BNA) (27 November 1998) at D7 (quoting Joan Claybrook, president of Public Citizen).

71 *Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No. ARB/(AF)/98/3, Award, 26 June 2003, Notice of Claim, 30 October 1998, paras 3, 4, 6. Among other things, Loewen alleged that the court “permitted repeated appeals to the jury's anti-Canadian, racial and class biases.”

availability of the Chapter 11 mechanism had been lost when Loewen, in bankruptcy, transferred its interests to a US firm. In extensive dicta, the tribunal analyzed the Louisiana state court proceedings at considerable length, characterizing them as a “disgrace.” However, the tribunal nevertheless concluded in further dicta that (in addition to the corporate claimant losing its Canadian nationality) the decision was not cognizable under NAFTA and international law because Loewen had not received a final court verdict within the US court system, and there had thus not been a denial of justice.

A subsequent ruling by the arbitral tribunal, after Raymond Loewen, one of the claimants, asserted his continuous Canadian citizenship, necessarily resulted in a decision on the merits, converting the earlier dictum into a holding that the action of the Mississippi court did not meet the international law threshold of a denial of justice for lack of national judicial remedies.

A few years later, evidence surfaced that one of the arbitrators in *Loewen*, former congressman and US appellate court judge Abner Mikva, had been improperly influenced by the US Department of Justice while serving on the tribunal. As Judge Mikva related the incident at a conference in 2004, a Justice Department official had said to him, “You know, Judge, if we lose this case, we could lose NAFTA.” Mikva recounted his answer as, “Well, if you want to put pressure on me, then that does it.”<sup>72</sup> This remarkable exchange confirms the extraordinary level of concern felt by US government officials when the United States was respondent in controversial ISDS proceedings (and may explain a puzzling, pro-US Government result in a case that many observers expected to be won by Loewen).

Of course, whether the regulatory actions such as those challenged in *Methanex* and attacks on state court decisions, as in *Loewen*, are “valid” is to be determined by the adjudicatory process. However, the mere possibility that they might do so was enough to lead the American private sector and US Government to the barricades. For example, environmental groups have been highly critical of the repeated use of investor protection provisions “to challenge the host country’s environmental laws and administrative decisions,” noting that “the provisions designed to ensure security and predictability for the investors have created uncertainty and unpredictability for environmental regulators.”<sup>73</sup> Similarly, one American official suggested that “[the] promise [of NAFTA as a model for the FTAA (Free Trade Agreement of the Americas) and other agreements]...will only be fulfilled if Chapter 11 tribunals are successful in distinguishing valid claims under NAFTA and international law from claims beyond the bounds of what the Parties believed they were agreeing to when they entered into the NAFTA.”<sup>74</sup>

Certain changes in ISDS procedures that arguably did not require amendment of NAFTA were made by the NAFTA parties in response to public criticism of the process. In July 2001, the NAFTA parties issued an “interpretation” as permitted under Chapter 11, declaring that NAFTA did not require the confidentiality of arbitral proceedings and pledging with a few exceptions to make all arbitral documents “available to the public in a timely manner.”<sup>75</sup> (Business confidential information and privileged governmental information was to remain confidential, in both pleadings and hearings.) Fully two years later, after the enactment of the TPA legislation in 2002 (discussed below), the United States (and Canada) stated that they would consent to opening hearings in Chapter 11 disputes.<sup>76</sup> Such transparency provisions have been included with minor variations in all subsequent BITs and FTA investment provisions negotiated by the United States. Procedures were also initiated to permit *amicus curiae* briefs, first accepted by a NAFTA tribunal in 2003.<sup>77</sup> Each of the NAFTA governments maintains a website where documents can be found.<sup>78</sup>

72 See Jan Paulsson, “Moral Hazard in International Dispute Resolution”, at 6, (Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law, 29 April 2010), online: <[www.arbitration-icca.org/media/0/12773749999020/paulsson\\_moral\\_hazard.pdf](http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf)>.

73 Howard Mann, “NAFTA’s Chapter 11 and the Environment” (1999), IISD, at 9, online: <[www.iisd.org/pdf/nafta.pdf](http://www.iisd.org/pdf/nafta.pdf)>.

74 Clodfelter, *supra* note 64 at 1283.

75 Free Trade Commission, “Notice of Interpretation of Certain Chapter 11 Provisions” (31 July 2001), para A(1-2), online: <[www.sice.oas.org/tpd/nafta/Commission/CH11understanding\\_e.asp](http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp)> [NAFTA Interpretation].

76 US Dept. of State, “Statement on Open Hearings in NAFTA Chapter Eleven Arbitration” (7 October 2003), online: <[https://ustr.gov/archive/assets/Trade\\_Agreements/Regional/NAFTA/asset\\_upload\\_file143\\_3602.pdf](https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf)>.

77 See Don McCrae, “Amicus Curiae Submissions to the NAFTA Chapter 11 Tribunal: *Methanex Corp. v United States of America*” (12 March 2004) IISD, online: <[www.iisd.org/publications/amicus-curiae-submissions-nafta-chapter-11-tribunal-methanex-corp-v-united-states](http://www.iisd.org/publications/amicus-curiae-submissions-nafta-chapter-11-tribunal-methanex-corp-v-united-states)> (discussing the IISD *amicus* submission).

78 See e.g. US Department of State website, <[www.state.gov/s/l/c3439.htm](http://www.state.gov/s/l/c3439.htm)>; Foreign Affairs, Trade and Development Canada, <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng)>.

The NAFTA parties also attempted, in the interpretation, to limit the scope of the minimum standard of treatment under article 1105 by emphasizing, *inter alia*, that, “The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”<sup>79</sup> (This clarification was designed to deal in part with the apparently inadvertent omission of “customary” before “international law” in article 1105.) This interpretation language has also been included in subsequent US FTAs and BITs, as discussed below.

## ISDS IN FTAS: FROM THE 2002 TPA TO THE 2015 TPA

The arguments advanced by investors as well as by those generally opposed to ISDS in the course of hearings on the 2004 and the 2012 model BIT drafting exercises did not differ in major respects from those relating to debates on the NAFTA and post-NAFTA investment chapters, including ISDS provisions; all were similar to those presented in the course of the 2002 TPA debate and, to a more limited extent, by the 2007 BTM between the Bush administration and the Democratic Congress.<sup>80</sup> Thus, the principal focus in this section is on the 2002 TPA and the 2015 TPA negotiating objectives.

### The 2002 TPA and the United States-Singapore FTA

This sub-section focuses on the controversy regarding investment provisions in the 2002 TPA, and compares the NAFTA provisions to the US FTA with Singapore, with investment provisions similar to those in the United States-Chile FTA (*sans* ISDS) and CAFTA-DR (with ISDS). The various pressures on the George W. Bush administration and Congress to introduce changes led to new negotiating instructions in the president’s TPA legislation for 2002, legislation that was effectively necessary for the president and USTR Robert Zoellick to undertake their ambitious plans for regional trade agreements. Without limiting Congress to up or down votes (preventing Congress from amending the texts after the fact to favour US interests), and without requiring specific time limits for congressional consideration, other countries simply have not been willing to give their last, best positions during the negotiations.<sup>81</sup> The statutory negotiating objectives in the TPA, one of the benefits for Congress in the TPA compromise, thus become critical since if they are *not* followed Congress may well refuse to approve the resulting agreement (although to date this has not occurred under the TPA). As the Congressional Research Service describes the situation with the TPA, “To take the fullest advantage of these benefits, Congress, drawing on its constitutional authority and historical precedent, defined the objectives that the President is to pursue in trade negotiations. Although the executive branch has some discretion over implementing these goals, they are definitive statements of US trade policy that the Administration is expected to honor, if it expects trade agreement implementing legislation to be considered under expedited rules. For this reason, *trade negotiating objectives stand at the center of the congressional debate on TPA.*”<sup>82</sup>

In the debate, the pro-investment protection contingent of business and government have generally prevailed on the basic principles needed to protect American investors abroad, although groups advocating the inclusion of strong labour rights and environmental provisions also succeeded to the extent of having them included in the TPA,<sup>83</sup> albeit without the right to bring labour and environmental actions directly against parties to the agreements. Still, beginning with the 2002 TPA, the investment protection pendulum swung to a very significant degree toward host governments and away from unfettered investor rights. With regard to investment, many major changes from the NAFTA approach were ultimately adopted. These included, *inter alia*, provisions related to minimum standard of treatment;

79 NAFTA Interpretation, *supra* note 75 at para 1.2.

80 USTR, Bipartisan Trade Deal, May 2007, online: <[https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf)> [Bipartisan Trade Deal]. The deal focused primarily on labour, environmental and intellectual property issues, not on investment.

81 See US Congress; Senate; Committee on Finance; *Trade Reform Act of 1974*, Report on H.R. 10710 (S. Rpt. Senate Report 93-1298), 26 November 1974 (stating that without an up-or-down vote on trade agreements “Our negotiators cannot be expected to accomplish the negotiating goals...if there are not reasonable assurances that the negotiated agreements would be voted up-or-down on the merits. Our trading partners have expressed an unwillingness to negotiate without some assurances that the Congress will consider the agreements within a definite time-frame.” See also Ian F Fergusson, “Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy”, Congressional Research Service (27 April 2015) at 4, online: <<https://fas.org/sgp/crs/misc/RL33743.pdf>> [Fergusson].

82 Fergusson, *supra* note 81 at 11 (emphasis added).

83 The 2002 TPA did not, however, mandate the inclusion of minimal enforceable labour standards, a deficiency that was remedied only with the BTM in 2007, as discussed below. See also *ibid* at 7.

expropriation, in particular indirect expropriation; transparency, including *amicus* briefs; procedures to deal with frivolous claims; and provision for an appellate mechanism to review arbitral decisions:

[T]he principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while *ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States*, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice, by:

(A) reducing or eliminating exceptions to the principle of national treatment;<sup>84</sup>

...

(D) seeking to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice;

(E) *seeking to establish standards for fair and equitable treatment consistent with United States legal principles and practice, including the principle of due process.*

...

(F) providing meaningful procedures for resolving investment disputes;

(G) seeking to improve mechanisms used to resolve disputes between an investor and a government through—

(i) mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims;

(ii) procedures to ensure the efficient selection of arbitrators and the expeditious disposition of claims;

(iii) procedures to enhance opportunities for public input into the formulation of government positions; and

(iv) *providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements; and*

(H) *ensuring the fullest measure of transparency in the dispute settlement mechanism, to the extent consistent with the need to protect information that is classified or business confidential, by—*

(i) ensuring that all requests for dispute settlement are promptly made public;

(ii) ensuring that—

(I) all proceedings, submissions, findings, and decisions are promptly made public; and

(II) all hearings are open to the public; and

(iii) establishing a mechanism for acceptance of *amicus curiae* submissions from businesses, unions, and nongovernmental organizations.<sup>85</sup>

Predictably, these changes did not satisfy the opponents of FTAs or ISDS. As Public Citizen argued when President George W. Bush proposed to include ISDS in TPA, “this extraordinary mechanism empowers

84 This is not a reference to national treatment guarantees such as those contained in NAFTA, article 1102. Rather, it refers to the hotly negotiated annexes to FTAs and BITs that list the exceptions to national treatment, in this instance ultimately with the ongoing US-China BIT negotiations in mind.

85 19 USC §3802(b)(3) (2002) (emphasis added); see also *Trade Act of 2002*, HR Rep 107-624 at 151, 156 (26 July 2002) (Conf Rep), 107th Cong, 2d Sess.



private investors and corporations to sue NAFTA-signatory governments in special tribunals to obtain cash compensation for government policies or actions that investors believe violate their new rights under NAFTA.” Further, such investor protections, claimed to be necessary to protect investors from expropriation, instead permit investors to “challenge environmental laws, regulations and government decisions at the state and local level.”<sup>86</sup> It is significant that, despite the changes, the TPA passed in late 2002 with only a one-vote majority in the House of Representatives.<sup>87</sup>

Following the enactment of the 2002 TPA, in the United States-Singapore Free Trade Agreement, an exchange of letters constituting part of the agreement was added, designed to restrict significantly and legally the scope of the “indirect” expropriation provisions as they may apply to government regulatory activities:

1. Article 15.6(1) (Expropriation) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
3. Article 15.6(1) (Expropriation) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 15.6(1) (Expropriation) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
  - (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
    - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
    - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
    - (iii) the character of the government action.
  - (b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation.<sup>88</sup>

The focus was on protecting “legitimate” government regulatory actions from being treated as compensable indirect expropriations, in part through incorporating US takings law, reflecting the TPA language that foreign investors not be “accorded greater substantive rights with respect to investment protections than United States investors in the United States.” Thus, subparagraphs 4 (a) (i) to (iii) were based on *Penn Central*, a US Supreme Court case involving an unsuccessful action against New York City claiming that restricting air rights above the terminal (where the claimant had wanted to build a skyscraper) was not a compensable taking in part because it did not deprive Penn Central of reasonable

86 Public Citizen, “NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy” (30 September 2001), at i–ii, online: <[www.citizen.org/publications/publicationredirect.cfm?ID=7076](http://www.citizen.org/publications/publicationredirect.cfm?ID=7076)>.

87 See Govtrack.us, online: <[www.govtrack.us/congress/bills/107/hr3005](http://www.govtrack.us/congress/bills/107/hr3005)> (reporting passage of the legislation by 215 to 214).

88 US-Singapore FTA, 6 May 2003 (entered into force 1 January 2004), exchange of letters between Minister for Trade and Industry George Yeo and USTR Robert Zoellick (6 May 2003), online: <[https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset\\_upload\\_file58\\_4058.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file58_4058.pdf)> [US-Singapore FTA]; see also US-Chile FTA, 6 June 2003 (entered into force 1 January 2004), annex 10-D, online: <<http://wits.worldbank.org/GPTAD/PDF/archive/UnitedStates-Chile.pdf>> [US-Chile FTA].

economic use of its property.<sup>89</sup> The negotiators presumably looked as well at other Supreme Court precedents, such as *Lucas*, where the court found a compensable taking when the government action deprived the claimant of all economically viable use of his land.<sup>90</sup>

The subparagraph 4(b) “except in rare circumstances” language was apparently intended to be a clear statement, also reflecting US Supreme Court jurisprudence, that in the absence of discrimination a presumption exists that the listed regulatory actions will not be treated as compensable expropriations by arbitral tribunals. This language also reflects the requirement in the 2002 TPA that foreign investors not be accorded greater substantive rights than US citizens litigating in US courts.<sup>91</sup> (Public Citizen’s Global Trade Watch nevertheless criticized the language because it afforded tribunals “discretion . . . to find a non-discriminatory public interest police action required compensation.”<sup>92</sup>) The assumption appears to have been that for many other countries, including Canada (which has no constitutionally mandated Fifth Amendment to protect private property), the protection offered by investment agreements does, in fact, provide broader substantive rights than local law and constitutions, in particular in nations where the rule of law is weak. The concept of “reasonable investment-backed expectations” also remains.

The troublesome concept of fair and equitable treatment also received additional language in the Singapore FTA (and all subsequent US FTA investment chapters) to define and limit its scope:

For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
- (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.<sup>93</sup>

The Singapore and similar FTAs also included a side letter (annex in the US-Chile FTA and CAFTA-DR) clarifying “the Parties’ shared understanding that customary international law results from a general and consistent practice of States that they follow from a sense of legal obligations. With regard to Article 15.5 (Minimum Standard of Treatment), the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protected the economic rights and interests of aliens.”<sup>94</sup>

This consistency through 2003 apparently reflects a reluctance on the part of the US Government to depart from the 2002 TPA language. While an argument could be made that this language could have been modified further, such changes, in particular without any actual ISDS experience beyond NAFTA Chapter 11, would have departed from the carefully created compromises among investor interests, government agency views and ISDS opponents incorporated in the 2002 TPA negotiating objectives.

The Singapore and Chile FTAs and CAFTA-DR include treaty language on transparency similar to that included in the NAFTA interpretation and follow-up statement. This is reflected in paragraph (H) of the 2002 TPA negotiating objectives, providing for transparency of arbitral proceedings, including open

89 *Penn Central Transportation Co. v New York City*, 438 US 104 (1978).

90 *Lucas v South Carolina Coastal Council*, 502 US 1003 (1992).

91 See Parvan P Parvanov & Mark Kantor, “Comparing US Law and Recent US Investment Agreements” in Karl P Sauvart, ed, *Yearbook on International Investment Law & Policy 2010–2011* (Oxford: Oxford University Press, 2011) at 778–79.

92 *Ibid* at 779.

93 US-Singapore FTA, *supra* note 88, art 15.5; see also US-Chile Free Trade Agreement, art 10.4.2, *supra* note 88.

94 Exchange of letters between Minister for Trade and Industry George Yeo and USTR Robert Zoellick (6 May 2003), online: <[https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset\\_upload\\_file665\\_4057.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file665_4057.pdf)>.

hearings, publication on the Internet of all pleadings not containing business confidential or privileged information.<sup>95</sup> Thus, the US-Singapore FTA provides that the “tribunal shall conduct hearings open to the public...” and that all notices and pleadings shall be made available to the public. Reflecting paragraph (F) of the TPA, it states, “The tribunal shall have the authority to accept and consider amicus curiae submissions from any persons and entities in the territories of the Parties and from interested persons and entities outside the territories of the Parties.”<sup>96</sup> The Singapore FTA also provides that, “Without prejudice to a tribunal’s authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made,” in an attempt (reflecting the lengthy *Methanex* proceedings) to convince arbitral tribunals to resolve procedural issues at the outset.<sup>97</sup> It also expanded slightly the proviso relating to party interpretations, stating not only that “a decision issued by the Joint Committee under paragraph 1 shall be binding on the tribunal,” but adding that “any award must be consistent with that decision.”<sup>98</sup>

Both the Singapore and Chile FTAs also include new language in the ISDS provisions that explicitly covers investment authorizations and investment agreements.<sup>99</sup> Such language has been consistently included in subsequent US FTAs, such as the US-Korea FTA (KORUS) and the TPP.<sup>100</sup>

While, as noted earlier, there was little US BIT activity during the George W. Bush administration, the 2004 model BIT and the two BITs concluded under it contained the modifications on minimum standard of treatment/fair and equitable treatment, indirect expropriation and transparency reflected in the Singapore FTA discussed above.<sup>101</sup>

## The 2004 US Model BIT

The 2004 US model BIT<sup>102</sup> was designed in large part to incorporate the 2002 TPA investment negotiating objectives into the BIT process. The short, cryptic press release accurately states that, “USTR and the State Department consulted their respective advisory committees and relevant congressional committees in the development of the new model. The United States last updated its model BIT in 1994.”<sup>103</sup> The debates over this multilateral process, and the results insofar as investment and ISDS are concerned, did not differ significantly from those relating to the 2002 TPA and thus will not be discussed at any length. It is, however, worth noting that the extensive treatment given to labour and environmental matters in the 2002 TPA and FTAs with Singapore and Chile, among others, are not replicated in the 2004 model BIT. In fact, there are no significant changes in the environmental provisions carried over from NAFTA,<sup>104</sup> and the labour provisions simply mention the core International Labour Organization (ILO) labour principles, while stopping short of the contents of contemporary FTAs.<sup>105</sup> BITs, unlike FTAs with their many additional chapters, including state-to-state arbitration of disputes, typically lack a practical mechanism for enforcing labour and environmental obligations, except through diplomatic consultations.

## 2007 BTD and the FTAs with Colombia, Panama, Peru and South Korea

The focus of the BTD negotiated between the Bush administration and the Democratic Congress was not on investment. Rather, it reflected the unhappiness of Democratic members with the Bush administration’s refusal to include in its FTAs a level of labour and environmental protection that Democrats believed was contemplated under 2002 TPA negotiating authority, such as subjecting such

95 See US-Singapore FTA, *supra* note 88, art. 15.20; see also US-Chile FTA, *supra* note 88, art 10.20.

96 US-Singapore FTA, *supra* note 88, arts 15.9.3, 15.20.1, 15.20.2; see also US-Chile FTA, *supra* note 88, arts 10.19.3, 20.1.2, 20.1.3.

97 US-Singapore FTA, *supra* note 88, art 15.19.4; see also US-Chile FTA, *supra* note 88, art 10.19.4.

98 US-Singapore FTA, *supra* note 88, art 15.22.2.

99 See United States-Singapore FTA, *supra* note 88, art 15.15.1(a)(i), United States-Chile FTA, *supra* note 88, art 10.15(a)(1).

100 See United States-Korea Free Trade Agreement, 30 June 2007 (entered into force 15 March 2012), art 11.6.1(a)(i); TPP, *supra* note 16, arts 9.1, 9.18.

101 See e.g. Rwanda BIT, *supra* note 18 at arts 5 (minimum standard of treatment), 29 (transparency) and annex B (expropriation).

102 *Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, 2004, online: <[www.state.gov/documents/organization/117601.pdf](http://www.state.gov/documents/organization/117601.pdf)> [2004 US model BIT].

103 USTR announcement, “US Model Bilateral Investment Treaty (BIT)”, November 2004, online: <[https://ustr.gov/archive/Trade\\_Sectors/Investment/Model\\_BIT/Section\\_Index.html](https://ustr.gov/archive/Trade_Sectors/Investment/Model_BIT/Section_Index.html)>.

104 See NAFTA, *supra* note 12 at art 1114; 2004 US model BIT, *supra* note 103 at art 12.

105 2004 US model BIT, *supra* note 103 at art 13.



disputes to the same trade sanctions applicable for violation of the trade provisions of the agreements,<sup>106</sup> rather than an “annual monetary assessment” of limited scope and amount.<sup>107</sup> While few of the critics appear to have expected parity, in which labour groups would have standing to bring actions directly against other parties to the agreement, they did expect that the US Government would have both the means and the will to pursue labour and environmental violations under the state-to-state dispute settlement provisions contained in all US FTAs. The only investment-related provision in the BTDA stated that “[t]he preamble provision [in the FTA] would recognize that foreign investors in the United States will not be accorded greater substantive rights with respect to investment protections than United States investors in the United States.”<sup>108</sup> This language was not only substantively redundant in light of the earlier discussion, but also the fact that it was to be preambular language presumably reflected a compromise in Congress between those who saw it as unnecessary and those who would have preferred to include it in the body of the investment chapter.

As a result of these BTDA-mandated changes, which were incorporated into amendments to the pending FTAs with Peru, Colombia, Panama and South Korea, the FTA with Peru was promptly approved in November 2007 and went into force the following year. The other three were not approved by Congress until late 2011 and entered into force in 2012.

### The 2012 US Model BIT

The 2012 model BIT,<sup>109</sup> despite its three years in gestation and resumption of the debate between pro- and anti-ISDS contingents, made relatively minor changes to the 2004 model BIT.<sup>110</sup> As the State Department explained, “The Administration made several important changes to the BIT text so as to enhance transparency and public participation; sharpen the disciplines that address preferential treatment to state-owned enterprises, including the distortions created by certain indigenous innovation policies; and strengthen protections relating to labor and the environment.”<sup>111</sup> This new model BIT attempts to deal more effectively with the market distortions created by state-owned enterprises and includes for the first time labour and environmental provisions similar to those that have appeared in recent FTAs (without enforcement mechanisms)<sup>112</sup> but not in agreements such as the BIT with Rwanda, noted earlier. Financial services provisions are also revised somewhat, reflecting those in the Rwanda BIT, including expedited procedures to deal with the “prudential” exception for host country regulation of financial services.<sup>113</sup>

Many of the suggestions advanced by critics during the BIT review, such as limiting coverage to direct expropriations, and restricting the scope of fair and equitable treatment to the standard espoused by the NAFTA governments (asserting that the customary international law on fair and equitable treatment has not changed since the *Neer* case in 1926), or to limit national treatment to “clear” cases of discrimination, along with more radical efforts to gut traditional BIT language, were rejected by the Obama administration.<sup>114</sup> Substituting state-to-state arbitration for ISDS, recommended by some (presumably those who are less concerned by the history of host government interference in such disputes, as set out in the second part of this article) was also rejected, with the ISDS provisions of the 2012 model BIT reflecting the model 2004 BIT and the four most recent Bush administration

106 Bipartisan Trade Deal, *supra* note 80 at 1–4; see also Sunghoon Cho, “The Bush Administration and Democrats Reach a Bipartisan Deal on Trade Policy” *ASIL Insights* (31 May 2007), online: <[www.asil.org/insights/volume/11/issue/15/bush-administration-and-democrats-reach-bipartisan-deal-trade-policy](http://www.asil.org/insights/volume/11/issue/15/bush-administration-and-democrats-reach-bipartisan-deal-trade-policy)> (discussing various aspects of the deal). Among the changes were that the requirement that core internationally recognized labour law obligations would be incorporated in the FTAs and that failure to comply would be grounds for dispute settlement under the state-to-state dispute settlement provisions. In a similar manner, compliance with a list of specific multilateral environmental agreements (carefully excluding the Basel Convention Controlling Transboundary Movements of Hazardous Wastes and their Disposal).

107 See e.g. US-Chile FTA, *supra* note 88 at art 22.16 (Non-Implementation in Certain Disputes).

108 Bipartisan Trade Deal, *supra* note 80 at 4.

109 *Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, 2012, online: <[www.state.gov/documents/organization/188371.pdf](http://www.state.gov/documents/organization/188371.pdf)> [2012 US model BIT].

110 *Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, 2004, online: <[www.state.gov/documents/organization/117601.pdf](http://www.state.gov/documents/organization/117601.pdf)>.

111 US State Department/USTR, “United States Concludes Review of Model Bilateral Investment Treaty” (20 April 2012), online: <[www.state.gov/r/pa/prs/ps/2012/04/188198.htm](http://www.state.gov/r/pa/prs/ps/2012/04/188198.htm)>.

112 See 2012 US model BIT, *supra* note 109 at arts 12, 13.

113 Rwanda BIT, *supra* note 18 at art 20; 2012 US model BIT, *supra* note 109 at art 20.

114 See Paolo di Rosa, “The New 2012 Model US BIT: Staying the Course” (June 2012), online: Kluwer Arbitration Blog <<http://kluwerarbitrationblog.com/blog/2012/06/01/the-new-2012-u-s-model-bit-staying-the-course/>> (discussing some of the rejected changes).

FTA investment chapters.<sup>115</sup> As far as the author is aware, no serious proposal for a government-to-government investment court was advanced at any time during this period, perhaps because of the recent (1998) failure of efforts by the Organisation for Economic Co-operation and Development (OECD) to negotiate a Multilateral Agreement on Investment (although that text contemplated more traditional ISDS rather than other alternatives),<sup>116</sup> or simply because of traditional US reluctance to create new international “courts.”<sup>117</sup> Efforts at ICSID and elsewhere to create an appellate mechanism for investor-state disputes similar to the World Trade Organization’s (WTO’s) highly successful Appellate Body have made absolutely no progress.

## ISDS and the 2015 TPA

The debate over the TPA during the first half of 2015 was perhaps the most vituperative and public in history. Because of the timing, opposition to the TPA has been difficult to separate from opposition to the TPP, in particular where investment issues and transparency have been at the forefront. This has probably been due to several factors. These include:

- the widespread use of the Internet and social media, which has facilitated the ease with which critics can make their views widely known;
- the decision of Senator Elizabeth Warren (Democrat, Massachusetts), a former Harvard law professor and a brilliant liberal voice with many admirers, to assume the leadership of the anti-trade, anti-ISDS, anti-TPA and anti-TPP forces in the Senate<sup>118</sup> and among the public; and
- the decision of the Obama administration to wait until the beginning of 2014 to request the new authority (TPA) from the Congress.

These factors virtually guaranteed that the TPA opponents would be able to join TPP opponents to present a united front.<sup>119</sup> The anti-TPA/anti-TPP/anti-trade agreement campaign mounted by the labour unions and the supporters in Congress was more effective (even though it ultimately failed) than at any time in the past in initially blocking TPA, again in part because they had ample time to organize their opposition using social media, as well as because public concerns over the negative effects of past FTAs on American workers, whether or not accurate, were probably more pronounced in 2015 than at any time in the past.

In addition, other traditional players such as Public Citizen, organized labour and the Peterson Institute, as well as groups of academics, also participated extensively. The critics have likely benefited from the roundly criticized USTR practice of shrouding the TPP and TTIP negotiations in secrecy, disclosing the substance of the negotiations only to a few hundred members of advisory committees, only a few of which include representatives of labour and environmental groups. The members of Congress and the Senate who eventually may be required to vote TPP up or down but not amend it, along with key staff members, have in fact had the opportunity to view the negotiating texts, albeit under closely monitored conditions. Also, under the TPA-like procedures followed by the USTR, they have been able to participate in regular consultations and in the negotiations. Still, even former USTR officials argue that there should be a “better balance between retaining flexibility for negotiators and keeping the public informed during the process.”<sup>120</sup>

115 *Ibid.*

116 See Multilateral Agreement on Investment: Draft Consolidated Text, online: <[www.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf](http://www.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf)>.

117 See e.g. David A Gantz, “The United States and Dispute Settlement under the North American Free Trade Agreement: Ambivalence, Frustration and Occasional Defiance” in Cesare Romano, ed, *The Sword and the Scales: The United States and International Courts and Tribunals 6* (Cambridge: Cambridge University Press, 2009) 356.

118 Along with Senator Sherrod Brown (D-Ohio), a long-time opponent of international trade agreements, while serving in both the House and Senate.

119 By the beginning of 2014, the president was sufficiently unpopular for a variety of reasons (and distasteful of rough-and-tumble politics) that both the majority leader of the Senate, Harry Reid (D-Nevada), and the minority leader in the House of Representatives, Nancy Pelosi, were able to successfully demand that consideration of TPA legislation be put off until after the November 2014 elections. See e.g. Eric Bradner and Manu Raju, “Harry Reid Rejects President Obama’s Trade Push”, *Politico* (29 January 2014), online: <[www.politico.com/story/2014/01/harry-reid-barack-obama-trade-deals-102819.html](http://www.politico.com/story/2014/01/harry-reid-barack-obama-trade-deals-102819.html)>.

120 Mark Wu, “US Should Not Negotiate Free Trade behind Closed Doors”, *Financial Times* (26 May 2015). The writer recalls that during nearly eight years of ultimately futile negotiations of an FTAA between 1995 and 2003, bracketed texts were posted on the Internet for all to see. *Free Trade Agreement of the Americas: Draft Agreement*, 21 November 2003, online: <[www.ftaa-alca.org/ftaadraft03/index\\_e.asp](http://www.ftaa-alca.org/ftaadraft03/index_e.asp)>.

As of February 2016, when the agreement was signed, the anti-trade, anti-ISDS coalition remained well positioned and appeared to be ready to continue the battle over the TPP, if and when it is submitted to Congress for approval.

This subsection focuses on the substantive aspects of the TPA, and within the TPA on the investment debate, but parts of it are inevitably applicable to the TPP and TTIP as well. Insofar as practical, the focus is on the debate as it relates to ISDS and directly related investment issues, leaving other highly contentious issues, including labour, environment and intellectual property, for others to analyze. Environmental issues are directly related to ISDS, not so much with regard to enforcing environmental standards against FTA partners, but because of concerns that broad investor protections permit such investors to challenge host governments even where the target is reasonable, non-discriminatory regulations, addressed beginning with the Chile and Singapore FTAs, as discussed earlier. It is worth emphasizing that the recent debate over ISDS, with a few exceptions, has not focused on the details of the negotiating objectives set out in this section that reflect many changes in addressing investment since NAFTA Chapter 11, as incorporated in numerous US FTA investment provisions and a handful of BITs that have been approved by the Congress and/or Senate from 2003 onward.

### The 2015 Debate on ISDS

Opponents of ISDS (and of the TPA, the TPP and trade agreements more generally) have had a new and highly articulate spokesperson in Senator Warren, who has become “the national face of opposition to Mr. Obama on the trade package.”<sup>121</sup> In an op-ed for the *Washington Post*, Senator Warren attacked ISDS: “Agreeing to ISDS in this enormous new treaty [TPP] would tilt the playing field in the United States further in favor of big multinational corporations. Worse, it would undermine US sovereignty.”<sup>122</sup> She denounced discrimination, whereby American labour unions seeking action against Vietnamese violations of trade agreements would have to make their case in Vietnamese courts.<sup>123</sup> The latter assertion was a misrepresentation, innocent or otherwise. However, the underlying discrimination argument was valid. While the inclusion of labour provisions in the TPP (and the TPA negotiating objectives) would subject Vietnam to dispute settlement under the state-to-state provisions of the TPP should Vietnam fail to enforce effectively its labour laws and the core ILO labour standards,<sup>124</sup> unlike investors who can bring disputes directly against foreign government under the investment chapters, labour disputes can be brought only where the labour advocates in the United States convince the US Government to bring a case. Warren’s attack on ISDS also mentioned the controversial *Vattenfall* and *Philip Morris* ISDS proceedings, and complained, “Giving foreign corporations special rights to challenge our laws outside of our legal system would be a bad deal. If a final TPP agreement includes Investor-State Dispute Settlement, the only winners will be multinational corporations.”<sup>125</sup>

Warren, it should be pointed out, was not a member of the Senate Finance Committee where the TPA legislation was drafted, and apparently took no part in the negotiations over its language. However, she did propose an (unsuccessful) amendment to the TPA legislation that would have removed fast-track protection for any trade agreement containing ISDS.<sup>126</sup> Thus, like other ISDS opponents, Warren chose to challenge the ISDS system rather than suggest possible further improvements over the significant changes already being advocated by the Obama administration.

Defenders of the TPA and ISDS were energetic. The director of the president’s National Economic Council, Jeffrey Zients, responded respectfully and in extensive detail to Warren, noting that, “[T]he purpose of ISDS is to provide American individuals and business who do business abroad with the same protections we provide to domestic and foreign investors alike in the United States . . . ISDS does

121 Jennifer Steinhauer, “From Senate Sideline, Elizabeth Warren is Face of Attack on Trade Bill”, *The New York Times* (15 May 2015), online: <[www.nytimes.com/2015/05/16/us/politics/elizabeth-warren-emerges-as-trade-bills-detractor-in-chief.html?\\_r=0](http://www.nytimes.com/2015/05/16/us/politics/elizabeth-warren-emerges-as-trade-bills-detractor-in-chief.html?_r=0)>.

122 Elizabeth Warren, “The Trans-Pacific Partnership Clause Everyone Should Oppose”, *Washington Post* (25 February 2015), online: <[www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html](http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html)>. Warren’s statement was included essentially verbatim in the *Congressional Record* (26 February 2015), at S1144–1145.

123 *Ibid.*

124 *Ibid.*

125 *Ibid.*

126 See “Senate Defeats Portman-Stabenow Currency Amendment, Approves Hatch Alternative”, *World Trade Online* (22 May 2015), online: <<https://insidetrade.com/>> (noting that the Warren amendment was defeated by a vote of 39–60).

not undermine US sovereignty, change US law, nor grant any new substantive rights to multinational companies.”<sup>127</sup>

Zients further noted that foreign courts do not always respect US constitutional principles or act in an unbiased or non-discriminatory manner, emphasizing that “over the last 50 years, 180 countries have entered into more than 3,000 agreements that provide investment protections.” Moreover, he stressed that “[the] TPP will make it absolutely clear that governments can regulate in the public interest, including with regard to health, safety and the environment, and narrowing the definition of what kinds of injuries investors can seek compensation for.”<sup>128</sup> He did not address the question of discrimination in terms of standing between labour interests and private investors. Given Warren’s well-articulated opposition to Wall Street and business interests in general, she, like many other Democrats, ultimately sees BITs and FTA investment provisions as making it easier for US enterprises to move jobs abroad.<sup>129</sup>

Others, such as Gary Hufbauer, were less diplomatic, simply accusing Warren of relying on false information: “These [Warren’s] claims, and some other criticisms of the TPP, have no foundation in the long history of ISDS provisions that have been in existence for more than 50 years.”<sup>130</sup> Former chief judge of the International Court of Justice and frequent international arbitrator Stephen Schwebel, long a defender of BITs, reiterated recently his defence of ICSID and BITs generally while criticizing the European Commission and Germany for proposing to exclude ISDS from the TTIP, strongly questioning the idea of a “legitimacy crisis”<sup>131</sup> but largely ignoring questions of arbitrator conflicts of interests raised by many who are generally disposed toward ISDS.

In response to continued criticism of ISDS by Warren in May, this time alleging that it could be used by a trade agreement party to undermine US banking reforms, President Obama countered that Warren “is absolutely wrong” in her discussion of possible implications if Congress grants him TPA. He ridiculed the idea that he would conclude a trade agreement (this time the TTIP) that would permit foreign investors to undercut US financial reforms.<sup>132</sup> Seldom has a sitting president issued such a ringing endorsement of regional trade agreements, including a defence of their ISDS provisions (or expressed as much frustration with members of his own party) — although personalizing the criticism may not, in the author’s view, have been the wisest approach.

Other traditional opponents of ISDS (and of international trade agreements in general), have also made their views known. For example, the American Federation of Labor and Congress of Industrial Organizations and Canadian Labour Congress charged in March 2015 that:

Of the rules tilted against labor and for global capital in these proposed agreements, one of the most egregious is investor-to-state dispute settlement, or ISDS. ISDS provides extraordinary legal rights to foreign investors so that they can seek taxpayer reimbursement for losses to expected profits from laws, regulations, administrative decisions or virtually any other government measure. The rights protected go far beyond traditional property rights and its private tribunals are staffed not by professional jurists sworn to promote the public interest, but by for-profit attorneys, many of whom represent investors when they are not sitting in judgment.<sup>133</sup>

127 Jeffrey Zients, “Investor-State Dispute Settlement (ISDI) Questions and Answers” (26 February 2015), White House Blog, online: <[www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers](http://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers)>.

128 *Ibid.*

129 See e.g. statement by Senator Sherrod Brown (D-Ohio), “Just look at the impact of trade on US manufacturing jobs...Ever since NAFTA in 1993, taking effect in 1994, we have seen the acceleration of that decline in manufacturing jobs”, *Congressional Record – Senate* (26 February 2015), at S1142.

130 Gary Clyde Hufbauer, “Senator Warren Distorts the Record on Investor-State Dispute Settlements” (2 March 2015), Peterson Institute for International Economics (blog), online: <<http://blogs.piie.com/trade/?p=137>>.

131 See Stephen M Schwebel, “In Defense of Bilateral Investment Treaties” (2014), Columbia FDI Perspectives No 135, online: <<http://cesi.columbia.edu/files/2013/10/No-135-Schwebel-FINAL.pdf>>.

132 See Kevin Bohn, “Obama says Elizabeth Warren ‘Absolutely Wrong’ on Trade”, *CNN Politics* (12 May 2015), online: <[www.cnn.com/2015/05/09/politics/barack-obama-elizabeth-warren-trade/#](http://www.cnn.com/2015/05/09/politics/barack-obama-elizabeth-warren-trade/#)>.

133 American Federation of Labor and Congress of Industrial Organizations and Canadian Labour Congress, Press Release, “AFL-CIO and Canadian Labour Congress Joint Statement on Promoting Trade Deals that Work for People over Profits” (30 March 2015), online: <[www.afcio.org/Press-Room/Press-Releases/AFL-CIO-and-Canadian-Labour-Congress-joint-statement-on-promoting-trade-deals-that-work-for-people-over-profits](http://www.afcio.org/Press-Room/Press-Releases/AFL-CIO-and-Canadian-Labour-Congress-joint-statement-on-promoting-trade-deals-that-work-for-people-over-profits)>.



This particular critique was among those that raised the issue of conflicts of interest by arbitrators,<sup>134</sup> one that the TPP makes some effort to address. And Public Citizen has continued to attack the TPP and the TPA, as it has with other trade arrangements incorporating ISDS, using arguments similar to those made by organized labour.<sup>135</sup>

In the recent TPA-related debate, disparate groups of law professors sequentially attacked and defended the inclusion of ISDS in the TPP and TTIP. The opponents representing the “Alliance for Justice” were led by Dean Erwin Chemerinsky of the University of California Irvine in a one-page letter addressed to congressional leaders and the USTR.<sup>136</sup> The letter criticized, *inter alia*, the granting of foreign corporations “a special legal privilege” through proceedings that “lack many of the basic protections and procedures of the justice system normally available in a court of law,” as well as the absence of appeals and accountability of arbitrators.<sup>137</sup>

The response, prepared primarily by Andrea Bjorklund, Susan Franck and José Alvarez, and signed by more than 40 other international economic law experts, sought to rebut the criticism in detail. It noted that entering into treaties is one of the “core” elements of national sovereignty and emphasized the procedural protections and transparency in contemporary ISDS mechanisms.<sup>138</sup> Whether either letter had any impact on the well-entrenched views of the various addressees (or the reviewing public) is questionable.

These groups are not the only academic commentators who have waded into the public debate. Jason Yackee, a law professor at the University of Wisconsin, using a Cato Institute forum, has argued that ISDS is not necessary or desirable in trade agreements, focusing on the lack of evidence that BITs and FTAs with investment provisions do much to encourage needed investment in developing countries, and the argument that many foreign investors do not pay much attention to the existence or non-existence of such ISDS agreements.<sup>139</sup> Nor is there evidence that developed countries such as Germany, the United States and the United Kingdom need the incentive of ISDS; in any event, the problem of mistreatment of foreign investment by host governments may well be exaggerated.<sup>140</sup>

Yackee also downplays the risk of the repoliticization of investment disputes in the manner that occurred in the United States in the 1970s (as discussed in the second part of this paper). At the same time, he is a skeptic when viewing claims of “regulatory chill” as a result of the existence of ISDS.<sup>141</sup> A greater concern, in his view, is the “massive” number of investment disputes that would likely arise under the 12-nation TPP. Overall, he believes the benefits of ISDS are not likely to be “significant.”<sup>142</sup> Simon Lester, another trade and investment expert associated with the Cato Institute, argues that it makes more sense to require foreign investors to take responsibility for their business decisions; if they are concerned about expropriation, they can purchase political risk insurance<sup>143</sup> and demand the inclusion of international arbitration clauses in the foreign investment clauses they conclude with foreign governments or foreign government agencies.<sup>144</sup> These views, which effectively advocate the same result — abandonment of ISDS — as the Democratic House and Senate liberals and the many other critics discussed above, have not been persuasive to the Obama administration, Republicans in

134 See e.g. Lawrence C Melton, Esq., “Conflicts of Interest Among Arbitrators” (13 August 2007), online: <[www.aboutbrokerfraud.com/2007/08/conflicts-of-in.html](http://www.aboutbrokerfraud.com/2007/08/conflicts-of-in.html)>.

135 See e.g. “TPP’s Investment Rules Harm Public Access to Essential Services” (undated), Public Citizen, online: <[www.citizen.org/documents/fact-sheet-tpp-investment-services.pdf](http://www.citizen.org/documents/fact-sheet-tpp-investment-services.pdf)>.

136 Letter from Erwin Chemerinsky and others to Majority Leader McConnell, Minority Leader Reed, Speaker Boehner, Minority Leader Pelosi and Ambassador Froman (March 2015), online: <[www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf](http://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf)>.

137 *Ibid.*

138 See Andrea Bjorklund, Susan Franck, José Alvarez et al, “An Open Letter about Investor-State Dispute Settlement to Majority Leader McConnell, Minority Leader Reed, Speaker Boehner, Minority Leader Pelosi and Ambassador Froman” (20 April 2015), online: <[www.mcgill.ca/fortier-chair/isds-open-letter](http://www.mcgill.ca/fortier-chair/isds-open-letter)>. One of the principal drafters, Andrea Bjorklund, and two of the signatories, Armand de Mestral and David Gantz, were participants in the CIGI conference of 25 September 2015.

139 Jason Yackee, “New Trade Agreements Don’t Need ISDS” (19 May 2015), Cato Unbound, online: <[www.cato-unbound.org/2015/05/19/jason-yackee/new-trade-agreements-dont-need-isds](http://www.cato-unbound.org/2015/05/19/jason-yackee/new-trade-agreements-dont-need-isds)>.

140 *Ibid.*

141 *Ibid.*

142 *Ibid.*

143 Which many do in any event, from the US Overseas Private Investment Corporation or from the World Bank’s Multilateral Investment Guaranty Agency.

144 Simon Lester, “Does Investor State Dispute Settlement Need Reform?” (11 May 2015), Cato Unbound, online: <[www.cato-unbound.org/2015/05/11/simon-lester/does-investor-state-dispute-settlement-need-reform](http://www.cato-unbound.org/2015/05/11/simon-lester/does-investor-state-dispute-settlement-need-reform)>.

Congress or business groups. In a more objective, less politicized context it would be interesting to experiment with the alternatives of no ISDS, or to see whether some sort of investment court mechanism could be negotiated. For reasons expressed earlier, the author remains skeptical that this could occur in the foreseeable future.

It is notable that for countries that have declined to conclude investment agreements, such as Brazil, the major alternative for international enterprises investing in Brazil is contract clauses with agreements requiring disputes to be resolved through international commercial arbitration, often at the International Chamber of Commerce in Paris. Some 10 percent of that organization's caseload is said to involve disputes between foreign investors and Brazilian state entities.<sup>145</sup>

Finally, presidential candidate Hillary Clinton took no position on the TPA or the TPP until after the House vote, despite her strong support of the TPP and the "pivot" to Asia while Secretary of State. Rather, with some equivocation she supported the House Democratic leadership after it had initially managed to block the TPA and Trade Adjustment Assistance (TAA). In the process, she offered relatively mild criticism of ISDS, noting that in her *Hard Choices* book she had "sounded a bit of alarm...about the investor-state dispute settlement process...because it's fundamentally an anti-democratic process." Still, she waffled, suggesting that it would matter "who ha[s] a stake in the outcome" and whether state and local governments and NGOs are heard from.<sup>146</sup> Once the negotiations were concluded, Clinton indicated her opposition to the TPP, presumably responding to populist pressure from Senator Bernie Sanders, who at the time was attracting the support of many Democrats.

## Investment Protection in the 2015 TPA

Despite the energetic and very public debate in the second quarter of 2015, viewpoints do not seem to have changed, at least among a large majority of senators and members of Congress. The TPA bill, after the acceptance of several amendments (none related to investment), and a Byzantine six weeks of procedural skirmishes, was passed (62–37) by the Senate for the first time on May 22, 2015, and again on June 24 (60–38),<sup>147</sup> with strong cooperation between the president, a dozen pro-trade Democrats and the Republican leadership in the Senate. It passed the House as a stand-alone bill (after TAA for displaced workers had earlier been caused to fail by the Democratic leadership, in the hope that it would kill the TPA as well) by a vote 218–210, with a majority of the Republicans in support but only 28 Democrats voting in favour of their president's most important second-term legislative initiative.<sup>148</sup> Ultimately, President Obama signed the TPA legislation on June 29, 2015,<sup>149</sup> after the House had relented and provided broad bipartisan support to a separate TAA bill that was signed as well.<sup>150</sup>

No parts of this debate changed the content of TPA negotiating objectives in major respects as they relate to ISDS and related investment issues. The treatment of key areas — such as fair and equitable treatment; expropriation; transparency; procedures to eliminate frivolous claims; endorsement of an appellate body, as well as the continuing overarching desire to limit foreign investor rights in the

145 Discussions with Sergio Puig, 17 August 2015.

146 Quoted in Simon Lester's blog post, "Hillary Clinton on ISDS", (15 June 2015), International Economic Law and Policy Blog, online: <<http://worldtradelaw.typepad.com/ielpblog/2015/06/hillary-clinton-on-isds.html>>.

147 The first vote, May 22, combined TPP and TPA: H.R. 1314 – Ensuring Tax Exempt Organizations the Right to Appeal Act, online: <[www.congress.gov/bills/114th-congress/house-bill/1314](http://www.congress.gov/bills/114th-congress/house-bill/1314)>. Because revenue bills must originate in the House of Representatives (US Const art I, § 7, cl 1: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills"), the Senate co-opted an earlier House bill and substituted TPA for the original language. The second bill, having been received from the House with only the TPA language, was designated H.R. 2146. See US Senate Roll Call Votes 114th Congress – 1st Session, 24 June 2015, online: <[http://insidetrade.com/sites/insidetrade.com/files/documents/jun2015/wto2015\\_2018a.pdf](http://insidetrade.com/sites/insidetrade.com/files/documents/jun2015/wto2015_2018a.pdf)>.

148 Len Bracken, "House Passes Trade Authority 210-208", *Int'l Trade Daily* (BNA) (18 June 2015), online: <[www.bna.com/international-trade-daily-p6099/?PROMOCODE=GPSLEGAL&utm\\_source=google&utm\\_medium=ppc&utm\\_campaign=1909&gclid=CO2myOk2MOCFcNkhgodf6oJ1w](http://www.bna.com/international-trade-daily-p6099/?PROMOCODE=GPSLEGAL&utm_source=google&utm_medium=ppc&utm_campaign=1909&gclid=CO2myOk2MOCFcNkhgodf6oJ1w)>. The House initially passed the TPA portion of the legislative package by a vote of 219–211, but only after rejecting the other essential element, TAA, by the overwhelming vote of 126–302, with the Democrats opposing a program they have supported for four decades in an unsuccessful procedural ploy to derail TPA. "House Republicans Settle on Route to Delay Deadline for TPA Revote to July 30", *World Trade Online* (15 June 2015), online: <<https://insidetrade.com/>>.

149 See Cheryl Bolen, "Obama Signs Trade Bills Needed to Negotiate Trans-Pacific Partnership", *Int'l Trade Daily* (BNA) (29 June 2015) (reporting the signature of the "Defending Public Safety Employees' Retirement Act" (H.R. 2146), to which the TPA was attached, and the Trade Preference Adjustment Act, which provides an extension of TAA).

150 The TAA bill passed the House the second time as a separate bill by a vote of 286–138, with strong backing this time from the Democrats. "House Approves TAA-Preferences Bill 286-138, with Strong Democratic Support", *World Trade Online* (25 June 2015), online: <<https://insidetrade.com/>>. H.R. 1295 renews TAA for six years, the African Growth and Opportunity Act for 10 years, and the Generalized System of Preferences until the end of 2017; the first two of these have received strong support from Democrats in the past.

United States to those enjoyed by US citizens — all differ significantly from NAFTA. However, the actual negotiating objectives language in this newest version of the TPA reflect only relatively minor innovations beyond the extensive shifts reflected in the 2002 TPA.

- (a) *OVERALL TRADE NEGOTIATING OBJECTIVES.*— The overall trade negotiating objectives of the United States for agreements subject to the provisions of section 103 are—

...

- (3) to further strengthen the system of international trade and investment disciplines and procedures, including dispute settlement . . . .

- (b) *PRINCIPAL TRADE NEGOTIATING OBJECTIVES.*—

...

- (3) *FOREIGN INVESTMENT.*—Recognizing that United States law on the whole provides a high level of protection for investment, consistent with or greater than the level required by international law, the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade distorting barriers to foreign investment, *while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice, by—*

(A) reducing or eliminating exceptions to the principle of national treatment;<sup>151</sup>

(B) freeing the transfer of funds relating to investments;

(C) reducing or eliminating performance requirements, forced technology transfers, and other unreasonable barriers to the establishment and operation of investments;

(D) *seeking to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice;*

(E) *seeking to establish standards for fair and equitable treatment, consistent with United States legal principles and practice, including the principle of due process;*

(F) providing meaningful procedures for resolving investment disputes;

(G) seeking to improve mechanisms used to resolve disputes between an investor and a government through—

(i) *mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims;*

(ii) *procedures to ensure the efficient selection of arbitrators and the expeditious disposition of claims;*

(iii) *procedures to enhance opportunities for public input into the formulation of government positions; and*

<sup>151</sup> See earlier discussion of this language in the 2002 TPA. This is not a reference to national treatment guarantees such as those contained in NAFTA, article 1102. Rather, it refers to the hotly negotiated annexes to FTAs and BITs that list the exceptions to national treatment, in this instance ultimately with the ongoing US-China BIT negotiations in mind.

- (iv) *providing for an appellate body* or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements; and
- (H) *ensuring the fullest measure of transparency* in the dispute settlement mechanism, to the extent consistent with the need to protect information that is classified or business confidential, by—
  - (i) ensuring that all requests for dispute settlement are promptly made public;
  - (ii) ensuring that—
    - (I) *all proceedings, submissions, findings, and decisions are promptly made public*; and
    - (II) all hearings are open to the public; and
  - (iii) establishing a mechanism for acceptance of amicus curiae submissions from businesses, unions, and nongovernmental organizations.<sup>152</sup>

In other words, the endorsement of ISDS by President Obama and the US Congress was fully consistent with the US investment protection policies developed since 2002, again reflecting a continuing process of refinements in the direction of greater host state regulatory flexibility, as reflected in the TPP text as discussed in the next section of this paper. Given that the 2015 TPA objectives will be in force for six years, they will apply to the TTIP negotiations as well. In this author's view there will not likely be a TTIP without at least some form of ISDS, although it is premature to consider the outcome of negotiations that will not be concluded before late 2017 at the earliest. Still, it seems unlikely that any US president who decides to pursue the TTIP negotiations, given the need for continuing business community support, would seek to conclude the negotiation without significant levels of protection for foreign investment.

## THE LATEST ACT: THE TPP

In recent years, the Obama administration has supported negotiations of three US agreements with ISDS: the TPP, the US-China BIT and the TTIP. With the enactment of the TPA, every effort was made to conclude the TPP promptly and success was announced on October 5, 2015.<sup>153</sup> Conclusion of the US-China BIT and the TTIP remain for a future president and are not discussed here. Even with the signing of the TPP on February 4, 2016, its ultimate fate is unclear, given the ongoing disagreements discussed earlier and the vagaries of the 2016 presidential election cycle.

The last issues to be resolved in the TPP were largely unrelated to ISDS (dairy market access in Canada; rice, beef and auto market access in Japan; sugar market access in the United States and Mexico; and Canada's insistence on higher regional value content for autos and small trucks to protect its auto and auto parts industries' preferred access to the US and Canadian markets; and US efforts to expand patent protection for biologic drugs).<sup>154</sup> With the negotiations completed and the text public, the bitter debate has, as predicted, resumed,<sup>155</sup> with the president, most Republicans in Congress and business interests on one hand, and most Democrats, organized labour and various NGOs on the other.<sup>156</sup> The outcome in Congress for the TPP is uncertain. Because of TPA requirements, it could not be signed by President

152 Senate 2015 TPA, H.R. 2146, 114th Cong., 1st Sess (italics added).

153 Bloomberg News, "TPP Deal: Who Stands to Gain, Suffer in Asia-Pacific", 32 *Int'l Trade Rep.* (BNA) 1759 (15 October 2015), online: <[www.bna.com/international-trade-reporter-p6101/](http://www.bna.com/international-trade-reporter-p6101/)>.

154 See "In Hill Briefing, USTR Official Signals TPP Ministerial Unlikely in August", *World Trade Online* (7 August 2015), online: <<https://insidetrade.com/>> (with Assistant USTR Barbara Weisel outlining some of the remaining issues).

155 See Carter Dougherty & Angela Greiling Keane, "Obama Victory on Trade Wins Him Another Fight With Fellow Democrats", *Int'l Trade Daily* (BNA) (26 June 2015), online: <[www.bna.com/international-trade-daily-p6099/?PROMOCODE=GPSLEGAL&utm\\_source=google&utm\\_medium=ppc&utm\\_campaign=1909&gclid=CIXfz\\_CJ2M0CFYJZhgodlAUFNA](http://www.bna.com/international-trade-daily-p6099/?PROMOCODE=GPSLEGAL&utm_source=google&utm_medium=ppc&utm_campaign=1909&gclid=CIXfz_CJ2M0CFYJZhgodlAUFNA)>.

156 The divisions are less along party lines than at most times in the past, with the Republican presidential candidate on record as opining that "TPP is a horrible deal..." See "Donald Trump on Free Trade", *On the Issues*, online: <[www.ontheissues.org/2016/Donald\\_Trump\\_Free\\_Trade.htm](http://www.ontheissues.org/2016/Donald_Trump_Free_Trade.htm)>.



Obama for 90 days after it was concluded<sup>157</sup> on February 4, 2016, or sent to Congress until well into the second quarter of 2016.<sup>158</sup> For political reasons, the TPP may not be transmitted to Congress until after the November elections.<sup>159</sup> Approval (or rejection) of the agreement may thus await a new Congress and a new president in 2017.

The investment chapter maintains ISDS for both developed and developing country parties. Earlier opposition by Australia to ISDS in principle seems to have disappeared with the most recent change in government.<sup>160</sup> A series of exceptions to national treatment and non-discrimination remains, as in previous FTAs. In addition, there are a number of important innovations beyond even the most recent US FTA investment chapters and the 2015 TPA. Such modifications reflect the fact that there were 12 nations with diverse views and legal systems at the table, but also the leadership by the Obama administration in seeking to balance the need to protect US investors abroad with increasing host state regulatory flexibility. As Melida Hodgson writes, “TPP’s chapter on Investment strengthens the rule of law in the Asia-Pacific region, deters foreign governments from imposing discriminatory or abusive requirements on American investors, and protects the right to regulate in the public interest, and building on US experience since NAFTA, the innovations take investment agreements to a new level in terms of protecting host state discretion in such areas as guarding the government’s regulatory discretion in such areas as public health and the environment.”<sup>161</sup>

The TPP investment chapter generally includes much language that is broadly similar to that of earlier US FTAs (such as Singapore and CAFTA-DR), providing for preliminary consideration of procedural issues,<sup>162</sup> and for transparency in respect to arbitral pleadings and open hearings.<sup>163</sup> (This result is reinforced by the fact that at least two of the TPP parties have signed the UN Transparency Convention, an extension of the UNCITRAL Transparency Rules adopted in 2014.<sup>164</sup>) TPP tribunals would retain the authority to “accept and consider” *amicus curiae* submissions, but with the caveat that the submission must be “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.”<sup>165</sup> The language found in US FTA investment chapters since Chile and Singapore, defining “customary international law” as resulting from “a general and consistent practice of states that they follow from a sense of legal obligation” remains in place,<sup>166</sup> as does the now-traditional expropriation annex, including (with minor changes in word order) these key words: “Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations, except in rare circumstances.”<sup>167</sup> The incorporation of the Singapore language defining “fair and equitable treatment” as including “The obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world” remains.<sup>168</sup>

157 The most important of these is the required International Trade Commission report analyzing the impact of the TPP. See Sidley Austin LLP, *Trans-Pacific Partnership Agreement Faces Long Road to Approval* (6 November 2015), online: <[www.sidley.com/~media/update-pdfs/2015/10/20151020-international-trade-update.pdf](http://www.sidley.com/~media/update-pdfs/2015/10/20151020-international-trade-update.pdf)>.

158 See Bipartisan Trade Priorities and Accountability Act of 2015, P.L. 114-26, § 106(a)(1)(A) & (B) (2015) (stipulating, *inter alia*, that the president must notify Congress of the conclusion of a trade agreement 90 days before he can sign it).

159 See Len Bracken, “TPP Supporters Seek May-July Consideration of Trade Pact”, *Int’l Trade Rep.* (BNA), (14 January 2016), online: <[www.bna.com/international-trade-reporter-p6101/](http://www.bna.com/international-trade-reporter-p6101/)>. Bracken notes that while some supporters are hoping for earlier consideration, others believe consideration is not likely before the post-election lame duck session.

160 By the Gillard Government; see Kyla Tienhaara & Patricia Ranald, “Australia’s Rejection of Investor-State Dispute Settlement: Four Potential Contributing Factors”, *Investment Treaty News* (12 July 2011), online: <[www.iisd.org/itm/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/](http://www.iisd.org/itm/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/)>.

161 See Melida Hodgson, “The Trans-Pacific Partnership Investment Chapter Sets a New Worldwide Standard”, *Columbia FDI Perspectives* (9 November 2015), at 3, online: <<http://ccsi.columbia.edu/files/2013/10/No-160-Hodgson-FINAL.pdf>>. The article also provides an excellent discussion of some of the more obscure innovations in the TPP investment chapter.

162 TPP, *supra* note 16, art 9.22.4.

163 *Ibid*, art 9.23.

164 Convention on Transparency in Treaty-Based Investor-State Arbitration, 17 March 2015, online: <[www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf)>; Esme Shirlow, “A Step Toward Greater Transparency: The UN Transparency Convention” (30 March 2015), Kluwer Arbitration Blog, online: <<http://kluwerarbitrationblog.com/blog/2015/03/30/a-step-toward-greater-transparency-the-un-transparency-convention/>>.

165 TPP, *supra* note 16, art 9.22.3.

166 *Ibid*, annex 9-A: see US-Chile FTA, *supra* note 88, annex 10-A.

167 TPP, *supra* note 16, annex 9-B.

168 *Ibid*, art 9.6.2(a).

Still, the fact that this is a further swing of the pendulum is reflected in the preamble to the TPP, where the parties recognize “their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.”<sup>169</sup>

Other notable changes (some buried in footnotes) include, among others, the following:

1. While the national treatment (and most favoured nation treatment) language generally remains the same, the “in like circumstances” requirement is made somewhat more difficult for investors to satisfy through requiring the determination to depend “on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.”<sup>170</sup>
2. Limiting the scope of investors’ “reasonable expectations” as a basis for a finding of a denial of fair and equitable treatment by providing that “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 [9.6], even if there is loss or damage to the covered investment as a result.”<sup>171</sup> This may be significant, given that tribunals often give weight to an investor’s “legitimate expectations” when finding a denial of fair and equitable treatment.<sup>172</sup> Similarly, the failure of the host government to issue, renew or maintain a subsidy, or the decision to reduce a subsidy, is not a breach of fair and equitable treatment.<sup>173</sup>
3. Where the arbitration concerns an alleged breach of a party’s obligation in an attempt to make an investment (pre-investment violations, which are covered), “the only damages that may be awarded are those that the claimant has proven were sustained in the attempt to make the investment....”<sup>174</sup> This change could also be important where a dispute arises over the state’s pre-investment conduct, as in *Bilcon v Canada*.<sup>175</sup>
4. Where the claimant submits a claim based on an investment authorization or investment agreement, the “respondent may make a counterclaim in connection with the factual or legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.”<sup>176</sup> This is the first agreement (to the author’s knowledge) where counterclaims have been explicitly permitted.
5. The chapter makes explicit what has been implicit in the past: the “investor has the burden of proving all elements of its claims....”<sup>177</sup>
6. While there is no explicit code of conduct for arbitrators in the chapter, the parties have effectively agreed to apply the code of conduct for panellists in state-to-state dispute settlement proceedings to investor-state arbitration, with “any necessary modifications to the Code of Conduct to conform to the context of the investor-state dispute settlement.”<sup>178</sup> Many will see this as long overdue.

169 *Ibid*, Preamble, para 9.

170 *Ibid*, art 9.4, n 14.

171 *Ibid*, art 9.6.4.

172 See Gary B Born, *International Arbitration: Law and Practice* (Alphen aan den Rijn: Wolters Kluwer, 2012) at 430.

173 TPP, *supra* note 16, art 9.6.5.

174 *Ibid*, art 28.4.

175 *Clayton/Bilcon v Government of Canada*, Award on Jurisdiction and Liability, 17 March 2015, Permanent Court of Arbitration Case No 2009-04), online: <[www.italaw.com/sites/default/files/case-documents/italaw4212.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf)>; opinion of Donald McCrae, online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-13.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-13.pdf)>.

176 TPP, *supra* note 16, art 9.18.2.

177 *Ibid*, art 9.22.7.

178 *Ibid*, art 9.21.6.

7. Certain tobacco control options are provided, permitting any party “to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party.” That election can be made up to and including the period when arbitration proceedings are under way.<sup>179</sup>
8. The TPP goes beyond some but not all US investment chapters in extending coverage explicitly to state enterprises, to measures adopted or maintained by “any person, including a state enterprise or any other body, when it exercises any governmental authority delegated to it by central, regional or local governments or authorities of that Party.”<sup>180</sup> This language is important in part because of the existence of a separate TPP chapter purporting to regulate the activities of the parties’ state-owned enterprises.<sup>181</sup>
9. While investment agreements and investment authorizations are generally within the coverage of the chapter, violations of an “investment authorization” explicitly do not include “(i) actions taken by a Party to enforce laws of general application, such as competition, environmental, health or other regulatory laws; (ii) non-discriminatory licensing regimes; and (iii) a Party’s decision to grant to a covered investment or an investor of another Party a particular investment incentive or other benefit, that is not provided by a foreign investment authority in an investment authorisation.”<sup>182</sup>
10. A provision encourages tribunals to decide as a preliminary matter not only situations where a claim is not one for which an award under the chapter can be granted, but also explicitly an “objection that a dispute is not within the competence of the tribunal....”<sup>183</sup> In both situations the tribunal is encouraged in “frivolous” cases to award attorneys’ fees to the respondent.<sup>184</sup> These are modest expansions to similar provisions found in other recent agreements, such as the KORUS.<sup>185</sup> The extent to which tribunals will heed such entreaties may vary from tribunal to tribunal.

The only obvious retreat in the TPP investment chapter relates to an appellate mechanism for investment disputes. As discussed earlier, US TPA negotiating objectives since 2002 provided for consideration of an appellate mechanism for investment disputes, and such language has been included in all post-NAFTA FTAs, as in the KORUS.<sup>186</sup> (There is no publicly available evidence that any such negotiations have ever occurred.) The TPP language provides only that, “In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future *under other institutional arrangements*, the Parties shall consider whether awards rendered under Article 9.28 (Awards) should be subject to that appellate mechanism.”<sup>187</sup> Unless by some chance the TTIP parties agree on an appellate mechanism, it is highly unlikely that such a tribunal will be developed elsewhere, since amendment of the ICSID Convention to provide for such a mechanism is politically and practically impossible.<sup>188</sup>

The extent to which these innovations will make a significant difference in the results of investment arbitrations depends on their use in actual disputes, which is not likely to occur soon, given that the TPP will almost certainly not enter into force for several years. This makes the significance of this more host-country-friendly approach to ISDS even more difficult to predict.

179 *Ibid*, art 29.5.

180 TPP, *supra* note 16, art 9.2.2(b).

181 *Ibid*, ch 17.

182 *Ibid*, art 9.1, n 10.

183 *Ibid*, art 9.22.4-5.

184 *Ibid*, art 9.28.4.

185 United States-Korea Free Trade Agreement, *supra* note 100, arts 11.20.6-7, 11.20.8, annex 11-D.

186 *Ibid*, annex 11-D.

187 TPP, *supra* note 16, art 9.22 (emphasis added).

188 Article 66 of the ICSID Convention requires that amendments be approved by two-thirds of the members of the Administrative Council, and that the amendment comes into effect only when ratified by *all* ICSID members.

## CONCLUSIONS

The TPP, if approved by Congress and most of the other 11 parties, will set a new, more host-state-friendly standard for ISDS while retaining the basic elements of the process as found in NAFTA and then contemporary agreements.<sup>189</sup> In the future, many members of the Democratic Party and organized labour are likely to remain opposed to trade agreements in general (including, but by no means limited to, ISDS) because, rightly or wrongly, they are seen as the means to encourage the export of American jobs, hold down working-class wages, despoil the environment, favour large enterprises at the cost of ordinary people, facilitate frivolous foreign business claims and increase the costs of prescription drugs to consumers.<sup>190</sup> It seems to the author that such concerns should not be dismissed, in particular in light of domestic policies in the United States that under-fund education and training, encourage poor income distribution and fail to provide a sufficient federal tax base to support road and port infrastructure maintenance and basic research and development. That being said, if there is to be reconsideration regarding the advisability of including ISDS in BITs or FTA investment chapters, it is highly unlikely to occur in the immediate future. Even should the newest proposals from the European Commission (that is, an investment chapter that includes an investment “court” and appellate mechanism, with the members chosen in both instances by government)<sup>191</sup> gain momentum, abandonment of ISDS does not seem likely, given its broad business support and the risk, in the absence of ISDS, of reverting to a system in which such disputes are resolved through formal or informal espousal by home governments that could threaten other foreign policy objectives.

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189 There seems to be no doubt from publicly available information that the US-China BIT, if successfully concluded, will closely follow the very similar approaches of the 2012 model BIT and KORUS investment provisions.

190 See e.g. “President Obama Must Use Trade Authority to Reach Better Agreements”, *The New York Times* (24 June 2015), online: <[www.nytimes.com/2015/06/24/opinion/president-obama-must-use-trade-authority-to-reach-better-agreements.html](http://www.nytimes.com/2015/06/24/opinion/president-obama-must-use-trade-authority-to-reach-better-agreements.html)>.

191 EU Commission, “Transatlantic Trade and Investment Partnership — Trade in Services, Investment and E-Commerce: Chapter III-Investment”, (September 2015), online: <[http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf)>.

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