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David A. Gantz

Increasing Host State Regulatory Flexibility in Defending Investor-State Disputes: The Evolution of U.S. Approaches from NAFTA to the TPP

DAVID A. GANTZ*

Abstract

Building on the negotiation of U.S. bilateral investment treaties beginning in the early 1980s, U.S. free trade agreements incorporating specific host-state obligations to foreign investors and binding investor-state dispute settlement (ISDS) have been a feature of U.S. trade and investment policy since 1992 (when the NAFTA negotiations were concluded). Presidents Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush and Barack Obama have all endorsed ISDS, despite opposition by many Democratic legislators, organized labor and environmental groups.

Yet the content of these investment chapters shows a significant evolution from NAFTA to the Australia-United States FTA ("AUSFTA," without ISDS), the United States-Chile FTA and the Singapore-United States FTA (2003) to the Trans-Pacific Partnership (TPP) (2015). The changes have been driven largely by the concerns of civil society and government officials over the dozens of NAFTA investment claims filed against the NAFTA Parties. They also reflect the perceived need for the United States and other host governments to maintain a higher level of regulatory flexibility and discretion, particularly in such areas as protecting the environment and maintaining public health. The United States' Trade Promotion Authority (TPA) legislation enacted in 2002 and 2015 also mirrors these post-NAFTA changes. The newest iteration of the mechanism (Chapter 9 of the TPP), should it eventually enter into force for all or most of the signatories or be incorporated in other U.S. trade agreements such as a renegotiated NAFTA, would thus afford host governments far more regulatory discretion than earlier agreements such as NAFTA, along with increased transparency, making it more difficult for foreign investors to prevail against host governments with claims of denial of "fair and equitable treatment" and "regulatory takings." The evolution of U.S. sponsored investment protection provisions into a significantly more host government friendly, regulatory friendly, process, is the principal theme of this paper.

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* Samuel M. Fegtly Professor of Law, Rogers College of Law, University of Arizona; Visiting Professor of Law, Georgetown University Law Center, Fall 2016. This article draws extensively on a paper written for a conference in Ottawa in September 2015, sponsored by the Center for International Governance Innovation (CIGI) in Ontario, "Investor-State Dispute Settlement in U.S. Law, Politics and Practice: The Debate Continues."

I. Introduction and Historical Background

The United States was a latecomer to the negotiation and conclusion of bilateral investment treaties (BIT). While Germany, the Netherlands, the United Kingdom and other European nations began concluding BITs twenty years earlier,[1] the United States did not sign the first BIT, with Panama, until 1982,[2] with several others signed in 1983 following the completion of the first U.S. model BIT.[3] But, unlike some of the early European BITs, which did not include investor state dispute settlement (ISDS),[4] from the outset the U.S. 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.[5] Most U.S. BITs (some forty-seven) were concluded between 1983 and 2000 by the Reagan, George H.W. Bush and Clinton Administrations.[6] Only two, with Uruguay and Rwanda, have been concluded since 2000.[7] The Obama Administration has concluded none to date but is pursuing a BIT with China.[8]

It was not an accident that all U.S. BITs contained ISDS provisions. In addition to the U.S. Government's desire to afford greater protection for U.S. investors in developing countries; to encourage needed investment in the developing world; and to strengthen U.S. views that takings are governed by international law, a significant driving force behind the United States' decision to abandon the formal or informal espousal process that had been followed in recent years, particularly in Latin America in the 1970s.

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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). *See* UNCTAD INVESTMENT HUB: GERMANY, http://investmentpolicyhub.unctad.org/IIA/CountryBits/78#iiaInnerMenu (last visited May 8, 2015). The Netherlands concluded agreements with Cameroon and the Ivory Coast in 1965. *See* UNCTAD INVESTMENT HUB: NETHERLANDS, http://investmentpolicyhub.unctad.org/IIA/CountryBits/148#iiaInnerMenu.

2. *U.S. Bilateral Investment Treaties*, U.S. DEPT. OF STATE, http://www.state.gov/e/eb/ifd/bit/117402.htm [hereinafter "US BITS"].

3. *See* K. Scott Gudgeon, *U.S. Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW. 105, 106 (1986) (discussing the development of the model BIT).

4. *See e.g.*, Treaty for the Promotion and Reciprocal Protection of Investments, Ger.–Ceylon, Nov. 8, 1962 (since terminated), *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/1419.

5. *See, e.g.*, Treaty Concerning the Treatment and Protection of Investment, Pan. – U.S., art. VII(2), Oct. 27, 1982, *available at* 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. US BITS, *supra* note 2.

7. *Id.*

8. *Toward a US-China Investment Treaty*, PETERSEN INSTITUTE FOR INT'L ECON., at 3 (Feb. 2015), http://www.iie.com/publications/briefings/piieb15-1.pdf [hereinafter "Petersen-China BIT"]; David A. Gantz, *Challenges for the U.S. in Negotiating a Bit with China: Reconciling Reciprocal Investment Protection with Policy Concerns*, 31 ARIZONA J. INT'L & COMP. L. 203, 204 (2014) [hereinafter "Gantz–China BIT"].

The objective was to make available a third party process that would allow the United States to avoid espousal in most circumstances. It was thought that such a process would remove investment disputes from the forefront of bilateral and regional relations (and significant inter-agency disputes),[9] as with Peru and other members of the Organization of American States during the 1968 to 1976 period.[10]

U.S. Government support of ISDS in free trade agreements (or in BITs with some FTA parties) has been consistent despite extensive public and Congressional opposition beginning with the negotiation and conclusion of NAFTA[11] by the George H.W. Bush Administration.[12] The policy has been consistent despite the fact that there is little hard evidence that BITs, as distinct from other factors creating a favorable 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.[13] The George W. Bush Administration, however, proceeded to negotiate more than a dozen FTAs, covering seventeen countries, which with one exception (Australia)[14] contain investment chapters with ISDS, obligations except for those FTAs with countries (*e.g.*, Bahrain) with pre-existing BITs.[15] The Obama Administration's one and only FTA, the Trans-Pacific Partnership

9. *See* KENNETH A. RODMAN, SANCTITY VS. SOVEREIGNTY: THE U.S. AND THE NATIONALIZATION OF NATURAL RESOURCE INVESTMENTS 45-51 (1988) (relating the strong disagreements between the State Department and Treasury Department as to how best to deal with Latin American expropriations).

10. *See infra* Part II.

11. The earlier United States – Israel free trade agreement and the now-superseded United States – Canada free trade agreement contain no ISDS provisions. *See* Agreement on the Establishment of a Free Trade Area between the Gov't of Isr. and the Gov't of the U.S. of Am., Isr. – U.S., Aug. 19, 1985, *available at* http://tcc.export.gov/trade_agreements/all_trade_agreements/exp_005439.asp; U.S. – Can. free trade agreement, Can. – U.S., Jan. 2, 1988, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf.

12. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), *available at* https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement [hereinafter "NAFTA"].

13. The 1985 FTA with Israel, negotiated by the Reagan Administration, contains no investment provisions and no BIT exists between the United States and Israel. *See* Agreement on the Establishment of a Free Trade Area, Jordan–U.S., Oct. 24, 2000, *available at* https://ustr.gov/sites/default/files/Jordan%20FTA.pdf.

14. 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 (art. 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* United States—Australia Free Trade Agreement, May 18, 2004, *available at* https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file428_5167.pdf (hereinafter "AUSFTA"). *See also Free Trade Agreements*, USTR, https://ustr.gov/trade-agreements/free-trade-agreements.

15. U.S. BITs, *supra* note 2; *See U.S.–Bahrain Free Trade Agreement*, U.S.–Bahr., Sep. 14, 2004, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text.

(TPP) includes ISDS provisions applicable to all Parties including Australia, albeit with some exceptions.[16]

U.S. BITs for the most part have not been particularly controversial, presumably in large part because a) all to date have been concluded with developing nations, mostly small ones, or the nations of Eastern Europe which at the time were developing or emerging market nations; b) the obligations, including ISDS, are reciprocal but the likelihood of, for example, a Uruguayan enterprise demanding arbitration of a claim against the United States Government, is small; and c) BITs are concluded as treaties with the advice and consent of two-thirds of the senators present and voting.[17] As the provisions of U.S. BITs are considered either self-executing or enforceable through existing legislation,[18] the House of Representatives typically has no direct role in their approval. Controversy has arisen primarily during the negotiation (or revision) of model BITs in 2004 and 2012, where the disagreement between business interests on one side and organized labor and environmentalists on the other has been 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 Trade Promotion Authority (TPA) legislation enacted in 2002 and re-enacted after an eight year hiatus in 2015. The possible conclusion of BIT negotiations between the United States in China, underway for more than five years but with the negotiations progressing only recently,[19] will likely raise the ISDS controversy to a previously unknown level if and when a BIT text is concluded and made public. Significantly, the defenders of ISDS, principally the U.S. Government and the U.S. business community, have focused more extensively on the many modifications to the NAFTA model incorporated in all U.S. FTAs and BITs concluded since 2003, while most of the opponents largely ignore the changes, directing their opposition instead

16. Trans-Pacific Partnership, art. 9.20, Feb. 4, 2016 (not in force), *available at* https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf [hereinafter "TPP Text"].

17. *See* U.S. CONST. art. II, § 2, cl. 2 ("[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. Investment Treaty with Rwanda (Treaty Doc. 110-23), S. Exec. Rep. No. 111-8, at Ch. VI (B) (2010), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-111erpt8/html/CRPT-111erpt8.htm [hereinafter "Rwanda BIT"]. (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 "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (TIAS 6697) and related provisions of the Federal Arbitration Act (9 U.S.C. 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 U.S.C. Sec. 1650a).").

19. *See* Gantz–China BIT, *supra* note 8.

toward the perceived undesirability of ISDS (and protection of U.S. investments abroad) more generally.

This paper is structured as follows: Part II discusses the NAFTA chapter 11 as a reflection of 1980s and early 1990s BITs, and practical experience under NAFTA and concerns raised among civil society and government officials. Part III considers the 2002 TPA and 2003 Australia, Chile, and Singapore FTAs, the first post-NAFTA investment chapters to reflect a new approach to protecting foreign investment in FTAs, and briefly notes the changes in the later Bush Administration FTAs. Part IV considers other more recent developments relating to U.S. policy on investment in FTAs and BITS. Part V discusses the 2015 TPA, while Part VI summarizes the further refinements embodied in Chapter 9 of the TPP (many of which reflect the more recent United States-Korea Free Trade Agreement (KORUS)).[20] The final Part VII speculates on how the revised features of TPP may affect ISDS among the twelve TPP Parties (assuming of course that the TPP eventually enters into force).

II. NAFTA's Investment Provisions and Experience Under Chapter 11

A. NAFTA's Precursors

NAFTA Chapter 11 is based on U.S. BITs negotiated earlier, and on the model BIT completed in 1984. It is beyond the scope of this article to discuss BIT provisions in extensive detail.[21] 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. Critically, U.S. BITs and investment chapters have permitted individual foreign investors to bring actions against foreign government 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 U.S. 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 made part of 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,

20. U.S.–Korea Free Trade Agreement, U.S.–S. Kor., June 30, 2007, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text [hereinafter "KORUS"].

21. *See e.g.* Jeswald W. Salacuse, The Law of Investment Treaties (2nd ed. 2015).

and the treaties establish mechanisms to ensure that arbitration may proceed even if the host State refused to cooperate.[22]

That being said, the ISDS provisions in the early U.S. treaties, and in the 1984 model BIT, were less explicit than in later agreements, although perhaps equally effective in requiring binding arbitration upon the demand of the foreign investor. In particular, where consultation and negotiation between the investor and the host government failed, arbitration was mandatory, requiring that "the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures."[23] 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 ICSID or, where the Centre is not available because the host government is not a party to ICSID, to the ICSID Additional Facility.[24]

Including Chapter 11 in NAFTA was thus not a radical move for the United States. The sources were the United States-Canada Free Trade Agreement (for the obligations to the investor), various U.S. BITs, and the 1992 "model" BIT (for ISDS).[25] The inclusion in NAFTA of international law standards for the treatment of foreign investment along with a compulsory third-party arbitration procedure to settle investment disputes is, rightly, viewed as a major achievement for the Departments of State, Treasury, and the U.S. Trade Representative's Office (USTR) as well as the U.S. business community, considering that it overcame many decades of Mexico's adherence to the Calvo Clause[26] and a long and troubled history of

22. Wayne Sachs, *The New U.S. Bilateral Investment Treaties*, 2 INT'L TAX & BUS. L. 192, 219 (1984).

23. *Text of the U.S. Model Treaty concerning the Reciprocal Encouragement and Protection of Investment of February 24, 1984*, 4 BERKELEY J. INT'L L. 136, 140 art. VI(2) (1986).

24. *Id.* at art. VI(3).

25. Daniel M. Price & P. Bryan Christy III, *Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, in* THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 167, n. 6 (Judith H. Bello et al., eds. 1994).

26. 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. Article 27 of the Mexico 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 or of waters. *The State may grant the same right to foreigners, provided they agree before the Ministry of Foreign Relations to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto; under penalty, in case of noncompliance with this agreement, of forfeiture of the property acquired to the Nation.*

Constitutión Política de los Estados Unidos Mexicanos [Political Constitution of the United Mexican States] [C.P.], art. 27., Diario Oficial de la Federacion [DO], 55 de Febrero de 1919 (Mex.). (Emphasis added.)

investment disputes between Mexico the United States, including the petroleum industry expropriation in 1938.[27] What *was* radical was the inclusion for the first time of ISDS in an agreement with another developed nation (Canada).

B. THE NAFTA EXPERIENCE

Over twenty-two years NAFTA has generated more than 50 ISDS claims. Of the seventeen 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.[28] Still, the majority of the claims, some thirty-five (including notices of arbitration for cases that were never pursued), have been filed and in many instances litigated, not against Mexico but between two developed nations, investors of the United States against Canada, and vice versa.[29] (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 three years the latter proceeding, under CAFTA-DR, has not progressed beyond the "notice of intent to arbitrate" stage.)[30] Also, only one case has been brought by a Canadian investor against Mexico.[31]

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

Because literature elsewhere extensively analyzes the NAFTA and post-NAFTA changes in investment chapters,[32] this discussion is restricted to the highlights in terms of changes in provisions relating to fair and equitable treatment, expropriation, transparency in the arbitral proceedings and

27. RODMAN, *supra* note 9, at 110-22.

28. *See Cases Filed Against the Government of Canada*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/c3740.htm, for cases against Canada; see *Cases Filed Against the United States of America*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/c3741.htm, for cases against the U.S.

29. *See id.*

30. *Id.*; A total of eight ISDS claims have been filed by U.S. nationals and/or corporations against Costa Rica (1), the Dominican Republic (3), Guatemala (2) and El Salvador (2). Guatemalan, Costa Rican and Dominican Claimants (Stanford Ponzi Scheme) v. United States, Dec. 31, 2012, *available at* http://www.state.gov/s/l/c56919.htm (based on the alleged failure of U.S. regulators to exercise the international standard of due diligence to stop the Stanford Ponzi scheme and thus protect the claimant investors against fraud).

31. *Cases Filed Against the United Mexican States*, U.S. DEP'T OF STATE, https://www.state.gov/s/l/c3742.htm (last visited Jan. 14, 2017).

32. *See e.g.*, PRICE & CHRISTY, *supra* note 25; David A. Gantz, *Settlement of Disputes under the Central American-Dominican Republic-United States Free Trade Agreement*, 30 BOSTON COLLEGE INT'L & COMP. L. REV. 331 (2007).

various procedural issues designed to eliminate frivolous claims from the outset, particularly as reflected in the AUSFTA and TTP.

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 under Article 1102,[33] "fair and equitable treatment" under Article 1105,[34] and fair compensation in the event of expropriation or nationalization, direct or indirect, under Article 1110.[35] (Many cases have turned on national treatment and non-discrimination under Article 1102 but the application of the requirement has been more straight-forward despite some issues of interpretation, and the national treatment language in subsequent agreements does not vary materially from NAFTA.)[36] Tribunals established under Chapter 11 "decide the issues in accordance with this Agreement and applicable rules of international law."[37]

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,[38] normally through the World Bank's International Center for the Settlement of Investment Disputes (ICSID) "Additional Facility"[39] or under the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL). The ICSID Additional Facility is available if only one, the host state or the investor's home state, is a Party to the Convention.[40] These mechanisms are not mandatory for the foreign investor who may elect to submit disputes to

33. "1. Each Party shall accord to investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale of or other disposition of investments." NAFTA, *supra* note 12, art. 1102.

34. "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." *Id.*, art. 1105.

35. "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 (d) on payment of compensation in accordance with paragraphs 2 through 6 [fair market value]." *Id.*, art. 1110.

36. *See e.g.*, LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 83 (2nd ed., Kluwer Law 2010).

37. NAFTA, *supra* note 12, art. 1131 § 1.

38. *Id.*, art. 1120, 1122.

39. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%20575/volume-575-I-8359-English.pdf; *ICSID Additional Facility Rules*, art. 2 (1), Apr. 2006, *available at* http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/facility/partd-chap02.htm.

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

the local courts.[41] NAFTA provisions include the essential elements of the ISDS process, such as the investor's choice of arbitration before ICSID, the ICSID additional facility or under UNCITRAL Rules; the three year statute of limitations; and the "choice in the road" between national court litigation and international arbitration, which have not changed markedly in U.S. FTAs since NAFTA.[42]

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 "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."[43] One limitation in NAFTA that was changed in 2003 in the Singapore FTA, 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."[44]

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

Explicit opposition to Chapter 11 did not spread until after the first Chapter 11 case was filed by the Ethyl Corporation, in April 1997.[45] 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

41. If the investor decides to bring a NAFTA claim for damages based on a NAFTA government's measure or measures, the investor must waive her 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).

42. *Id.*, arts. 1116. § 2, 1120, 1121.

43. *Id.*, art. 1131 § 2.

44. *See id.*, art. 1116 § 2.

45. *Cases Filed Against Can. Ethly Corp. v. Gov't of Can.*, GLOBAL AFFAIRS CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng.

> present and future international economic pacts could pose to environmental regulations and other laws that protect the public.[46]

While *Ethyl* was settled in the aftermath of a finding adverse to the Canadian government by a Canadian federal-provincial dispute settlement arbitration panel,[47] the controversy generated and the concerns of opponents were on-going, particularly with regard to the *Methanex* and *Loewen* cases against the United States (discussed *infra*) and the *Pope and Talbot* and *S.D. Myers* cases against Canada.

The ensuing NAFTA-based litigation changed many views. As one then senior U.S. State Department official, Mark Clodfelter, commented seven years after NAFTA 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 has so much investment in our territory.[48]

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 U.S. government attention until well after the fact, when thoughtful officials such as Mr. Clodfelter commented on it.[49]

The cases against the United States have inevitably involved not only the State Department and USTR, but also domestic agencies such as the Department of Justice and the Environmental Protection Agency (the latter particularly for the Methanex claim that raised environmental issues arising

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46. Michelle Sforza & Mark Vallianatos, *Ethyl Corporation vs. Government of Canada: "Now Investors Can Use NAFTA to Challenge Environmental Safeguards"*, PUB. CITIZEN 1998, http://www.citizen.org/trade/article_redirect.cfm?ID=6221.

47. *See NAFTA – Chapter 11 – Investment, Cases Filed Against the Government of Canada, Ethyl Corporation v. the Government of Canada*, GLOBAL AFFAIRS CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng.

48. Mark Clodfelter, *U.S. State Department Participation in International Economic Dispute Resolution*, 42 S. TEX. L. REV. 1273, 1283 (2001). Mr. Clodfelter was the Assistant Legal Adviser of the Office of International Claims and Investment Disputes.

49. The State Department's guidance on the U.S. BIT program a few years ago listed as one of the "basic aims" to "[p]rotect investment abroad in those countries where investors' rights are not already protected through existing agreements . . . ." *Bilateral Investment Treaties*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/bilateral-investment-treaties (last visited Jan. 14, 2017). The guidance says nothing about reciprocal actions by foreign investors against the United States. *See id.*

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 that are principally concerned with encouraging U.S. investment abroad and foreign trade (State and USTR) and, on the other hand, those that are more concerned with defending federal government and state actions[50] 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 reevaluation of U.S. government support of investment disputes fall into one of several areas. First, there are differences arising from conflicts between trade and "legitimate" government regulatory action, including but not limited to actions protecting the environment. This is particularly true with regard to the expropriation provision, Article 1110. Second, concerns exist, primarily among non-governmental organizations and some Members of Congress, regarding the appropriateness of having NAFTA tribunals effectively review decisions of U.S. 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 U.S. territory under NAFTA than do American citizens under the Takings Clause of the 5th Amendment of the U.S. Constitution.[51] Fourth, broad dissatisfaction is expressed over the lack of transparency of the arbitral process, whereby 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[52] 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' operations was not "legally significant" so as to satisfy the "relating to" language in NAFTA, 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,

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

51. U.S. CONST. amend. V. ("[N]or shall private property be taken for public use, without just compensation.").

52. Methanex Corp. v. United States, 44 I.L.M. 1345 (2005).

rejecting as well Methanex's claims of violations of national treatment and fair and equitable treatment.[53]

Anti-NAFTA groups in the United States had also seized on *Loewen* as "an all-out attack on democracy. If successful, it would undermine the jury system, which is fundamental to our system of justice."[54] In *Loewen*, a Louisiana state court trial, conducted in 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.[55] 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 NAFTA, Article 1105 and of customary international law. The arbitral proceedings were initially dismissed on procedural grounds, with the Tribunal holding that availability of the Chapter 11 mechanism had been lost when Loewen, in bankruptcy, transferred its interests to a U.S. firm. In extensive dicta, the Tribunal analyzed the Louisiana state court proceedings at considerable length, characterizing them as a "disgrace." But the tribunal nevertheless concluded in further dicta that the decision was not cognizable under NAFTA and international law because Loewen had not received a final court verdict within the United States court system, and there had thus not been a denial of justice (in addition to the loss of Canadian nationality of the corporate claimant).

A subsequent ruling by the arbitral tribunal, after Raymond Loewen, one of the individual 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 exhaustion of national judicial remedies by the Claimants.

A few years later, evidence surfaced that one of the arbitrators in *Loewen*, former Congressman and U.S. appellate court judge Abner Mikva, had been improperly influenced by the U.S. Department of Justice while serving on

53. *See* Howard Mann, *The Final Decision in Methanex v. United States: Some New Wine in New Bottles*, INT'L INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Aug. 2005), http://www.iisd.org/pdf/2005/commentary_methanex.pdf.

54. David A. Gantz, *The United States and Dispute Settlement under the North American Free Trade Agreement: Ambivalence, Frustration, and Occasional Defiance in* THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 356, 370 (Cesare P.R. Romano ed., 1999).

55. Among other things, Loewen alleged that the court permitted repeated appeals to the jury's anti-Canadian, racial and class biases. Loewen Group, Inc. v. United States, 42 I.L.M. 811, 812-16 (2003).

the tribunal. As Judge Mikva related the incident at a conference in 2004, a Justice Department official had said to Mikva, "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."[56] This remarkable exchange confirms the extraordinary level of concern felt by U.S. government officials when the United States was a respondent in controversial ISDS proceedings (and may explain a puzzling, pro-U.S. Government result in a case which 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. But the mere possibility that they might do so was enough to lead the American private sector and U.S. 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."[57] Similarly, one American official suggested that "[the] promise [of NAFTA as a model for the FTAA 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."[58]

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 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."[59] (Business confidential information and privileged governmental information were to remain confidential, in both pleadings and hearings.) Fully two years later, after the enactment of TPA in 2002 (discussed below), the United States and Canada stated that they would

56. *See* Jan Paulsson, Michael R. Klein Distinguished Scholar Chair, University of Miami Law School, Inaugural Lecture: Moral Hazard in International Dispute Resolution (Apr. 29, 2010), *available at* http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf.

57. Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment*, INT'L INSTITUTE FOR SUSTAINABLE DEVELOPMENT (1999), http://www.iisd.org/pdf/nafta.pdf (last visited June 10, 2015).

58. Clodfelter, *supra* note 48, at 1283.

59. Free Trade Commission, *Notice of Interpretation of Certain Chapter 11 Provisions*, July 31, 2001, para. A(1-2), *available at* http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp [hereinafter "NAFTA Interpretation"].

consent to opening hearings in Chapter 11 disputes.[60] 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.[61] Each of the NAFTA governments maintains a website where documents can be found.[62]

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 "[t]he 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."[63] (This 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 U.S. FTAs and BITs as discussed below.

III. 2002 Trade Promotion Authority, U.S.-Australia FTA, U.S.-Chile FTA and the U.S.-Singapore FTA

The various pressures on the George W. Bush Administration and Congress to introduce changes led to new negotiating instructions in the President's TPA for 2002, legislation which was effectively necessary for the President and his U.S. Trade Representative 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 favor U.S. 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 FTA negotiations.[64] The statutory negotiating objectives in TPA, one of the benefits for Congress in

60. U.S. Dep't of State, Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations (Oct. 7, 2003), https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf (last visited May 21, 2015).

61. *See* Don McCrae, *Amicus Curiae Submissions to the NAFTA Chapter 11 Tribunal: Methanex Corp. v. United States of America*, INT'L INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Mar. 12, 2004), https://www.iisd.org/publications/amicus-curiae-submissions-nafta-chapter-11-tribunal-methanex-corp-v-united-states (discussing the IISD amicus submission).

62. *See NAFTA Investor-State Arbitrations*, U.S. DEP'T OF STATE, https://www.state.gov/s/l/c3439.htm; *See also NAFTA – Chapter 11 – Investment: Cases Filed Against the Government of Canada*, GLOBAL AFFAIRS CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng.

63. NAFTA Interpretation, *supra* note 59, para. 1.2.

64. *See* S. REP. NO. 93-1298, at 107 (1974) ("Our negotiators cannot be expected to accomplish the negotiating goals of Title I if there are no reasonable assurances that the negotiated agreements would be voted up-or-down on their 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 1, 4 (June 15, 2015), https://fas.org/sgp/crs/misc/RL33743.pdf.

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 TPA). As the Congressional Research Service describes the situation with 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 U.S. 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.[65]

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 labor rights and environmental provisions also succeeded to the extent of having them included in TPA,[66] albeit without the right to bring labor and environmental actions directly against Parties to the agreements. Still, beginning with the 2002 TPA, the investment protection pendulum has 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; expropriation, particularly indirect expropriation; transparency, including amicus briefs; procedures to deal with frivolous claims; and provision for an appellate mechanism to review arbitral decisions.[67]

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 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 . . . ."[68] It is

65. Fergusson, *supra* note 64, at 11 (emphasis added).

66. *See* Fergusson, *supra* note 64, at 7 (The 2002 TPA did not, however, mandate the inclusion of minimal enforceable labor standards, a deficiency that was remedied only with the Bipartisan Trade Deal in 2007, as discussed below.).

67. 19 U.S.C. § 3802(b)(3) (2002); *see also* Trade Act of 2002, Conference Report, Jul. 26, 2002, 107th Cong., 2d Sess., Report 107-624, at 151, 156.

68. *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy*, PUB. CITIZEN i, ii (Sept. 2001), http://www.citizen.org/publications/publicationredirect.cfm?ID=7076.

significant that despite the changes TPA passed in late 2002 with only a one vote majority in the House of Representatives.[69]

Following the enactment of 2002 TPA, in the AUSFTA an annex was included (which also appears as an annex in the Chile FTA and as an exchange of letters in the United States – Singapore Free Trade Agreement), designed to restrict significantly and legally the scope of the "indirect" expropriation provisions as they may apply to government regulatory activities.[70]

The focus was on protecting "legitimate" government regulatory actions from being treated as compensable indirect expropriations, in part through incorporating U.S. 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 U.S. 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 economic use of its property.[71] The negotiators presumably looked as well at other Supreme Court precedents, such as *Lucas*, where the Court found a compensable

69. *See H.R. 3005 (107th): Bipartisan Trade Promotion Authority Act of 2002*, GovTrack, https://www.govtrack.us/congress/bills/107/hr3005.

70. Stating:

> The Parties confirm their shared understanding that Article 1.7.1 [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 11.7.1 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 11.7.1 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.

AUSFTA, *supra* note 14, Annex 11-B. *See also* United States—Chile Free Trade Agreement, Annex 10-D, Jan. 1, 2004, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text [hereinafter "U.S.–Chile FTA"].

71. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978).

taking when the government action deprived the claimant of all economically viable use of his land.[72]

The "except in rare circumstances" language was apparently intended to be a clear statement, also reflecting U.S. 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 U.S. citizens litigating in U.S. courts.[73] The assumption appears to have been that for many other countries, including Canada (which has no constitutionally mandated Fourth Amendment equivalent to protect private property), the protection offered by investment agreements in fact does provide broader substantive rights than local law and constitutions, particularly in nations where the rule of law is weak. The concept of "reasonable investment-backed expectations" also remains. Similarly, the troublesome concept of fair and equitable treatment received additional language in the Chile FTA (but not the AUSFTA) and in subsequent U.S. FTA investment chapters to define and limit its scope to the narrow standard of customary international law.[74]

The Singapore and similar FTAs, including the AUSFTA, also included a side letter or annex 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

72. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1032-33 (1992).

73. *See* Parvan P. Parvanov & Mark Kantor, *Comparing U.S. Law and Recent U.S. Investment Agreements*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010-2011 741, 779 (Karl. P. Sauvant, ed., 2011).

74. Stating, in part:

> 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.

United States–Singapore Free Trade Agreement, U.S.-Sing., art. 15.5, May 6, 2003, 42 I.L.M. 1026 (2003) [hereinafter "Singapore FTA"].

But Cf. United States—Chile Free Trade Agreement, *supra* note 70, art. 10.4.2.

international law principles that protected the economic rights and interests of aliens."[75]

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, as reflected in the 2002 TPA negotiating objectives, providing for transparency of arbitral proceedings, including open hearings, publication on the Internet of all pleadings not containing business confidential or privileged information.[76] The Singapore FTA also provides that "[w]ithout 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 (likely reflecting the lengthy *Methanex* proceedings) to convince arbitral tribunals to resolve procedural issues at the outset.[77] Both the Singapore and Chile FTAs also include new language in the ISDS provisions that explicitly covers investment authorizations and investment agreements.[78] Such language has been consistently included in subsequent U.S. FTAs, such as the KORUS and TPP.[79]

IV. Other Precursors to TPP

The 2004 U.S. model BIT was designed in large part to incorporate the 2002 TPA investment negotiating objectives into the BIT process.[80] The 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 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. Even the "Bipartisan Trade Deal" (BTD) negotiated between the Bush Administration and the Democratic Congress focused on the unhappiness of Democratic Members with the Bush Administration's refusal to include in its FTAs a level of labor and environmental protection that Democrats

75. Letter from George Yeo, Singapore Minister for Trade and Industry, to Robert Zoellick, U.S. Trade Representative (May 6, 2003) (on file with author).

76. Singapore FTA, *supra* note 74, art. 15.5; *see also* U.S.—Chile FTA, *supra* note 70, art. 10.20.

77. Singapore FTA, *supra* note 74, art. 15.19.4; *see also* U.S.—Chile FTA, *supra* note 70, art. 10.19.4.

78. Singapore FTA, *supra* note 74, 15.15.1(a)(i); U.S.—Chile FTA, *supra* note 70, art. 10.15(a)(1).

79. *See* KORUS, *supra* note 20, art. 11.6.1(a).

80. Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, U.S. DEP'T OF STATE (2004), https://www.state.gov/documents/organization/117601.pdf [hereinafter "2004 U.S. Model BIT"].

believed was contemplated under 2002 TPA negotiating authority.[81] The only investment-related provision in the BTD 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."[82]

As a result of these BTD 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 almost 2010 and entered into force in 2011. These FTAs, however, contained investment provisions that differed in only minor respects from the Australia/Chile/Singapore genre of FTAs.

The 2012 Model BIT,[83] despite its three years in gestation and resumption of the debate between pro and anti-ISDS contingents, made only relatively minor changes to the 2004 Model BIT.[84] As the State Department explained, "[t]he 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."[85]

V. 2015 Trade Promotion Authority

The debate over TPA during the first half of 2015 was perhaps the most vituperative and public in history; because of the timing, the TPA opposition has been difficult to separate from opposition to TPP, particularly where investment issues and transparency have been at the forefront. This has probably been due to several factors. These include: a) the widespread use of the Internet and social media, which has facilitated the ease with which critics can make their views widely known; b) the decision of Senator Elizabeth Warren, Democrat of Massachusetts, a former Harvard law professor and liberal voice with many admirers, to assume the leadership of the anti-trade, anti ISDS, anti-TPA, and anti-TPP forces among the public

81. *Trade Facts: Bipartisan Trade Deal*, UNITED STATES TRADE REPRESENTATIVE 1, 1-4 (May 2007), https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf; *see also* Sunghoon Cho, *The Bush Administration and Democrats Reach a Bipartisan Deal on Trade Policy, ASIL Insights* (May 31, 2007), http://www.asil.org/insights/volume/11/issue/15/bush-administration-and-democrats-reach-bipartisan-deal-trade-policy (discussing various aspects of the Bipartisan Trade Deal).

82. *Trade Facts: Bipartisan Trade Deal, supra* note 81, at 4.

83. 2004 U.S. Model BIT, *supra* note 80.

84. *Id.*

85. *United States Concludes Review of Model Bilateral Investment Treaty*, U.S. DEP'T OF STATE (Apr. 20, 2012), http://www.state.gov/r/pa/prs/ps/2012/04/188198.htm.

and in the Senate;[86] and c) the unfortunate decision of the Obama Administration to wait until the beginning of 2014 before formally requesting TPA from the Congress. These factors virtually guaranteed that the TPA opponents would be able to join TPP opponents to present a united front.[87] The anti-TPA/anti-TPP/anti-trade agreement campaign mounted by the labor 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, 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.

Opponents of ISDS (and of TPA, 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."[88] In an op-ed piece 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 U.S. sovereignty."[89] She denounced discrimination, whereby American labor unions seeking action against Vietnamese violations of trade agreements would have to make their case not in ISDS but only in Vietnamese courts.[90] The latter assertion was a misrepresentation, innocent or otherwise. But the underlying discrimination argument was valid. While the inclusion of labor 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 labor laws and the core ILO labor standards,[91] unlike investors who can bring disputes directly against foreign government under the investment chapters, labor disputes can only

86. Along with Senator Sherrod Brown of Ohio, a long-time opponent of international trade agreements while serving in both the House and Senate. *See Sen. Sherrod Brown, Fair Trade over Free Trade*, NPR (Jan. 8, 2007), http://www.npr.org/templates/story/story.php?storyId=6740161.

87. By the beginning of 2014, President Obama was sufficiently unpopular for a variety of reasons. The Majority leader of the Senate, Harry Reid (D, Nevada) and the minority leader in the House of Representatives, Nancy Pelosi, successfully demanded that consideration of TPA legislation be put off until after the November 2014 elections. *See* Eric Bradner & Manu Raju, *Harry Reid Rejects President Obama's Trade Push*, POLITICO (Jan. 29, 2014), http://www.politico.com/story/2014/01/harry-reid-barack-obama-trade-deals-102819.html.

88. Jennifer Steinhauer, *From Senate Sideline, Elizabeth Warren is Face of Attack on Trade Bill*, N.Y. TIMES (May 15, 2015), https://www.nytimes.com/2015/05/16/us/politics/elizabeth-warren-emerges-as-trade-bills-detractor-in-chief.html?_r=0.

89. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), 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 [hereinafter "Warren, TPP"]. Warren's statement was included essentially verbatim in the CONGRESSIONAL RECORD, Feb. 26, 2015, at S1144-1145.

90. *Id.*

91. *Id.*

be brought where the labor advocates in the United States convince the U.S. government to bring a case. Warren's attack on ISDS also mentioned the controversial *Vattenfall* and *Philip Morris* ISDS proceedings, and complained that "[g]iving 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."[92]

The director of the President's National Economic Council, Jeffrey Zients, noted that foreign courts do not always respect U.S. 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."[93] Moreover, he stressed that "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."[94] He did not address the question of discrimination in terms of standing between labor interests and private investors. Given Warren's well-articulated opposition to Wall Street and business interests in general, like many other Democrats, she ultimately sees BITs and FTA investment provisions as making it easier for U.S. enterprises to move jobs abroad.[95] Others, such as Gary Hufbauer, were less diplomatic, simply accusing Warren of relying on false information: "[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."[96]

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 by the Senate the first time on May 22, 2015 (62-37) and again on June 24 (60-38),[97] with

92. Warren, *supra* note 89.

93. Jeffrey Zients, *Investor-State Dispute Settlement (ISDI) Questions and Answers*, WHITE HOUSE BLOG (Feb. 26, 2015), https://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers.

94. *Id.*

95. *See e.g.*, CONG REC. S1,142 (daily ed. Feb. 26, 2015) (statement of Sen. Brown) ("Just look at the impact of trade on U.S. manufacturing jobs. . . . Ever since NAFTA in 1993, taking effect in 1994, we have seen the acceleration of that decline in manufacturing jobs.").

96. Gary Clyde Hufbauer, *Senator Warren Distorts the Record on Investor-State Dispute Settlements*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (Mar. 2, 2015), https://piie.com/blogs/trade-investment-policy-watch/senator-warren-distorts-record-investor-state-dispute.

97. H.R. 1314, 114th Cong., (2015) (enacted) *available at* https://www.congress.gov/bill/114th-congress/house-bill/1314 (last visited May 27, 2015) Ensuring Tax Exempt Organizations the Right to Appeal Act: The first vote, May 22, combined TPP and TPA. Because revenue bills must originate in the House of Representatives (U.S. Const., Art. I, sec. 7, clause 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

strong cooperation among President Obama, a dozen pro-trade Democrats and the Republican leadership in the Senate. It passed the House as a stand-alone bill (after Trade Adjustment Assistance 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 about a twenty-eight Democrats voting in favor of their President's most important second term legislative initiative.[98] Ultimately, President Obama signed the TPA legislation on June 29, 2015,[99] after the House had relented and provided broad bipartisan support to a separate TAA bill that was signed as well.[100]

None 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 United States to those enjoyed by U.S. citizens, all differ significantly from NAFTA. But the actual negotiating objectives language in this newest version of TPA reflects only relatively minor innovations beyond the extensive shifts reflected in the 2002 TPA and in the U.S. FTAs with Chile, Australia, and Singapore, along with the single modification required in the Bipartisan Trade Deal of 2007, all as discussed earlier in this article.

VI. TPP's Investment Provisions

This enactment of TPA gave the Obama Administration, at long last, the authority it needed to conclude the TPP, without the need for any major changes, at least in the investment area. Ironically, the last issues to be resolved in 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; Canada's insistence on higher regional value

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* U.S. SENATE ROLL CALL VOTES 114TH CONGRESS – 1ST SESSION (June 24, 2015) *available at* http://insidetrade.com/sites/insidetrade.com/files/documents/jun2015/wto2015_2018a.pdf (last visited June 25, 2015).

98. Cristina Marcos & Vicki Needham, *House approves fast-track 218-208, sending bill to Senate*, THE HILL (June 18, 2015, 12:27 PM), http://thehill.com/business-a-lobbying/245417-house-approves-fast-track-218-208-sending-bill-to-senate.

99. *See* Cheryl Bolen, *Obama Signs Trade Bills Needed to Negotiate Trans-Pacific Partnership*, INT'L TRADE DAILY (BNA) (June 29, 2016) (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).

100. 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 (June 25, 2015) (H.R. 1295 renews TAA for six years, the African Growth and Opportunity Act for ten 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).

content for autos and small trucks to protect their auto and auto parts industries' preferred access to the U.S. and Canadian markets; and U.S. efforts to expand patent protection for biologic drugs.)[101] With the negotiations completed and the text public, the bitter debate among the Administration, most Republicans in Congress, and business interests on one hand and most Democrats, organized labor, and various NGOs on the other[102] as predicted has resumed.[103] Even with the signing of TPP on February 4, 2016, its ultimate fate was unclear given the ongoing disagreements discussed earlier and the vagaries of the 2016 Presidential election. Thus, TPP as a practical matter could not have been transmitted to Congress at the earliest until after the November 2016 elections.[104] Because the Congress did not act on TPP in the "lame duck" session,[105] approval (or rejection) of the Agreement awaits a new Congress and a President Trump in 2017, and could be delayed for months or years, or even abandoned entirely.

A series of exceptions to national treatment and non-discrimination remains in TPP, as in previous FTAs. In addition, there are a number of important innovations beyond even the most recent U.S. FTA investment chapters and the 2015 TPA. As one expert observed:

> 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, and building on U.S. 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.[106]

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101. *See In Hill Briefing, USTR Official Signals TPP Ministerial Unlikely in August*, WORLD TRADE ONLINE (Aug. 7, 2015), https://insidetrade.com/daily-news/hill-briefing-ustr-official-signals-tpp-ministerial-unlikely-august?utm_source=dlvr.it&utm_medium=twitter.

102. The divisions are less along party lines than at most times in the past, with the leading candidate for the Republican presidential nomination on record as opining that "TPP is a horrible deal . . . ." See *Donald Trump on Free Trade*, ON THE ISSUES, *available at* http://www.ontheissues.org/2016/Donald_Trump_Free_Trade.htm (last visited Jan. 22, 2016).

103. *See* Carter Dougherty & Angela Greiling Keane, *Obama Victory on Trade Wins Him Another Fight With Fellow Democrats*, INT'L TRADE DAILY (BNA) (June 26, 2015).

104. *See* Len Bracken, *TPP Supporters Seek May-July Consideration of Trade Pact*, INT'L TRADE REP. (BNA) (Jan. 14, 2016) (noting that while some supporters are hoping for earlier consideration others believe consideration is not likely before the post-election lame duck session).

105. *Trade Deals Working For All Americans*, WHITE HOUSE, https://www.whitehouse.gov/trade-deals-working-all-americans (last visited Jan. 22, 2017) (stating President Trump's official opposition to TPP).

106. *Investment – The Trans-Pacific Partnership*, MEDIUM, https://medium.com/the-trans-pacific-partnership/investment-c76dbd892f3a#.nt04qy4sd (last visited Jan. 14, 2016).

Chapter 9 generally includes extensive language that is broadly similar to that of earlier U.S. FTAs (such as Singapore and CAFTA-DR) providing for preliminary consideration of procedural issues,[107] and for transparency in respect to arbitral pleadings and open hearings.[108] (This result is reinforced by the fact that at least two of the TPP parties have signed the U.N. Transparency Convention, an extension of the UNCITRAL Transparency Rules adopted in 2014.)[109] 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 . . . ."[110]

The language found in U.S. FTA investment chapters since Australia, 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,[111] as does the now-traditional expropriation annex, including with minor changes in word order the key "[n]on-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."[112] Also, the incorporation of the standard language defining "fair and equitable treatment" as including "[t]he 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.[113]

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 . . . .[114]

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107. TPP Text, *supra* note 16, at art. 9.22.4.

108. *Id.* at art. 9.23.

109. *U.N. Convention on Transparency in Treaty-Based Investor-State Arbitration* (Mar. 17, 2015), *available at* 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*, KLUWER ARBITRATION BLOG (Mar. 30, 2015), http://kluwerarbitrationblog.com/blog/2015/03/30/a-step-toward-greater-transparency-the-un-transparency-convention/.

110. TPP Text, *supra* note 16, at art. 9.22.3

111. TPP Text, *supra* note 16, at Annex 9-A; *see* AUSFTA, *supra* note 14, at Annex 11-A; *see* U.S.-Chile FTA, at Annex 10-A.

112. TPP Text, *supra* note 16, at Annex 9-B ¶ 3(b); *see* AUSFTA, *supra* note 14, at Annex 11-B ¶ 4(b).

113. TPP Text, *supra* note 16, at art. 9.6.2(a); AUSFTA, *supra* note 14, at art. 11.5.2(a).

114. TPP Text, *supra* note 16, at Preamble, ¶ 9.

Other notable changes (some buried in footnotes) include:

1. The "in like circumstances" requirement in the national treatment article is made somewhat more difficult for investors to satisfy, 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."[115]
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."[116] 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.[117] Similarly, the failure of the host government to issue, renew or maintain a subsidy, or to reduce a subsidy, is not a breach of fair and equitable treatment.[118]
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 . . . ."[119] This change also could be important where a dispute arises over the state's pre-investment conduct, as in *Bilcon v. Canada*.[120]
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."[121] This is the first agreement where to the author's knowledge counterclaims have been explicitly permitted.
5. The chapter makes explicit what has been implicit (and universally observed) in the past; the "investor has the burden of proving all elements of its claims . . . ."[122]

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115. *Id.* at art. 9.4, n.14.

116. *Id.* at art. 9.6.4.

117. *See* GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 430 (The Netherlands: Wolters Kluwer, 2012).

118. TPP Text, *supra* note 16, at art. 9.6.5.

119. *Id.* at art. 9.29.2-4.

120. *See Bilcon v. Canada*, Award on Jurisdiction and Liability [Permanent Court of Arbitration] (Mar. 17, 2015), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-12.pdf (Can.); *See also Bilcon v. Canada*, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-13.pdf (Prof. McCrae, dissenting) (Can.).

121. TPP Text, *supra* note 16, art. 9.19.1-2.

122. *Id.* art. 9.23.7.

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 panelists in state-to-state dispute settlement proceedings to ISD arbitration, with "any necessary modifications to the Code of Conduct to conform to the context of the investor-state dispute settlement."[123] Many will see this as long overdue.

7. Certain tobacco control opt-outs 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 underway,[124] and has already been provisionally exercised by Australia.[125]

8. The TPP goes beyond some but not all U.S. 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."[126] 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.[127]

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.[128]

10. Tribunals are encouraged 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 explicitly an "objection that a dispute is not within the competence of the tribunal . . . ."[129] In both situations the tribunal is also encouraged in "frivolous" cases to award attorneys' fees

123. *Id.* art. 9.22.6.

124. *Id.* at art. 29.5.

125. *Notification by Austl.*, Feb. 2016 (Pursuant to Article 29.5 of the Trans-Pacific Partnership Agreement (TPP) signed in Auckland, New Zealand on 4 February 2016, Australia hereby elects to deny the benefits of Section B (Investor-State Dispute Settlement) of Chapter 9 (Investment) of the TPP with respect to any claim in relation to its tobacco control measures. Accordingly, no claim can be submitted to arbitration under the TPP's investor-state dispute settlement mechanism in respect of any tobacco control measure of Australia.).

126. TPP Text, *supra* note 16, at art. 9.2.2(b).

127. *Id.* at ch. 17.

128. *Id.* at art. 9.1, n.10.

129. *Id.* at art. 9.23.4.

to the respondent.[130] These are modest expansions to similar provisions found in other recent agreements, such as the KORUS.[131] The extent to which tribunals will heed such entreaties may vary from tribunal to tribunal.

11. If either disputing party (investor or host government) requests, the tribunal is required to provide its proposed award on liability to the disputing parties for comment within a sixty day period. The tribunal must then "consider any comments" but is not bound by them.[132] This is similar to the "initial report" procedures found in both TPP and NAFTA,[133] but nothing similar exists in NAFTA, Chapter 11.[134] This right of comment could provide the disputing parties, particularly the host government, an additional opportunity to sway (or pressure) the tribunal with regard to the tribunal's proposed results and reasoning, with only a modest delay in the proceedings.

The only obvious retreat in the TPP investment chapter relates to an appellate mechanism for investment disputes. U.S. 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 KORUS.[135] (There is no publicly available evidence that any such negotiations have ever occurred.) The TPP language provides only that "[i]n 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."[136] This presumably reflects USTR Ambassador Froman's belief that an appellate body for investment disputes is unnecessary.[137] Unless by some chance the TTIP Parties agree on an appellate mechanism,[138] it is highly unlikely that such a tribunal with significant membership will be developed elsewhere, since amendment of

130. *Id.* at art. 9.29.4.

131. KORUS, *supra* note 20, at arts. 11.20.6-8.

132. TPP Text, *supra* note 16, at art. 9.23.10.

133. *Id.* at art. 28.17; NAFTA, *supra* note 12, at art. 2016.

134. *See* NAFTA, *supra* note 12, art. 1135 (providing only for a final award).

135. KORUS, *supra* note 20, at Annex 11-D.

136. TPP Text, *supra* note 16, at art. 9.23.11 (emphasis added).

137. *See* Michael Scaturro, *TTIP Talks Slow on EU's Investor Court System*, INT'L TRADE REP. (BNA), Feb. 25, 2016 (reporting that "U.S. Trade Representative Michael Froman, for his part has said he does not think the use of an appellate body is necessary" in discussions with the EU Commission).

138. *See* Commission draft text TTIP- Investment, art. 10 (Nov. 2015), *available at* http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (last visited Mar. 28, 2016) (the EU Commission proposal for the TTIP Parties to agree on an appellate mechanism).

the ICSID Convention to provide for such mechanism is politically and practical impossible.[139]

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 surely 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.

VII. Conclusions

Should the TPP ultimately go into force for many if not all of the TPP Parties, it will establish a more host state friendly standard for ISDS, affording governments a new and higher level of regulatory flexibility. The practical significance of these changes will probably not be evident for at least several years after the TPP enters into force. Some of the changes would have an obvious impact on future ISDS—for example, Phillip Morris could not bring an action under TPP, Chapter 9 against Australia or any other Party that resorts to plain-packaging rules for cigarettes (perhaps Canada).[140] In specific cases, the other changes listed above could also become significant. Even if the United States never becomes Party to the TPP the TPP investment provisions are likely to be reflected in other U.S. FTA negotiations, such as the renegotiation of NAFTA likely to begin by mid-2017.[141]

This assumes of course that the TPP Parties who have other FTAs with investment chapters indicate clearly and unequivocally that TPP, Chapter 9 supersedes earlier investment provisions that may be friendlier to foreign investors and less protective of host state regulatory flexibility, such as Chapter 11 of NAFTA. The need for such indications is made necessary by the language in TPP that indicates that as a general rule TPP provisions should "coexist" with the WTO Agreements and the many free trade agreements to which one or more of the TPP Parties are also parties.[142] With NAFTA, the prospect of Chapter 11 "coexisting" with TPP, Chapter 9 should be of considerable concern to the NAFTA Parties, since all NAFTA

139. International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules* (April 10, 2006), *available at* http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/main-eng.htm.

140. *See* Daniel Hurst, *Australia Wins International Legal Battle with Philip Morris over Plain Packaging*, THE GUARDIAN (Dec. 17, 2015, 9:19 PM), http://www.theguardian.com/australia-news/2015/dec/18/australia-wins-international-legal-battle-with-philip-morris-over-plain-packaging.

141. *See* Patrick Gillespie, *Trump Wants to 'Speed' Up NAFTA talks, Calls Deal a 'Catastrophe*, CNN MONEY (Feb. 2, 2017), http://money.cnn.com/2017/02/02/news/economy/mexico-nafta-negotiations-90-days/ (last visited Feb. 22, 2017) (reporting that both Mexico and the United States had indicated that negotiations could begin after a ninety-day period for Mexican consultation with its stakeholders and the Trump administration with Congress under Trade Promotion Authority legislation).

142. TPP Text, *supra* note 16, at art. 1.2.1.

governments have assured their constituents that TPP provides them with a much higher level of regulatory flexibility than NAFTA Chapter 11.

Regardless of these concerns, the TPP investment provisions are the latest, although undoubtedly not the final, step in the evolution of the balance between investor protection and host state preservation of a higher level of regulatory flexibility.