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Trans-Pacific Partnership: Continuity and breakthroughs in U.S. investment treaty practice

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ARTICLE: TRANS-PACIFIC PARTNERSHIP: CONTINUITY AND BREAK THROUGHS IN U.S. INVESTMENT TREATY PRACTICE

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Text

[*145] In October 2015, the United States completed negotiations for the TransPacific Partnership ("TPP"), a free trade agreement among twelve Pacific Rim states. [1] According to the White House, TPP will "rewrite the rules of trade," will include "high standards . . . that . . . upgrade our existing agreements," and will "have a profound impact on . . . how we invest in the developing world." [2] By contrast, the leading presidential candidates from both parties offer distinctly negative assessments of TPP. Hillary Clinton has opined that TPP does not meet the "very high" bar she would set for producing new jobs, increasing wages, and protecting national security. [3] To the contrary, she has emphasized the "risk[]" that such trade agreements "will end up doing more harm than good for hard-working American families." [4] Even more emphatically, Donald Trump has declared TPP to be a "horrible deal" that would "lead to nothing but trouble," and was "designed for China to . . . take advantage of everyone." [5] Thus, while differing substantially in tone and orientation, statements from the White House and the campaign trail seem to coincide on the point that TPP marks a significant turn in the course of U.S. trade and investment policy.

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[1] Don Lee, *Fight Over Pacific Trade Agreement Begins*, L.A. TIMES, Nov. 5, 2015, *available at* http://www.latimes.com/business/la-fi-pacific-trade-20151105-story.html (last visited Feb. 5, 2016); Don Lee,*Signing of Trans-Pacific Partnership Trade Deal Opens Up Tough Battle in U.S.*, L.A. TIMES, Feb. 4. 2016, available at http://www.latimes.com/business/la-fi-pacific-trade-agreement-signed-20160204-story.html (last visited Feb. 5, 2016).

[2] The White House, *The Trans-Pacific Partnership: What You Need to Know About President Obama's Trade Agreement* [hereinafter What You Need to Know], *available at* https://www.whitehouse.gov/issues/economy/trade (last visited Feb. 5, 2016).

[3] Peter Nicholas & William Maudlin, *Hillary Clinton Comes Out Against Trans-Pacific Partnership Trade Deal*, WALL ST. J., Oct. 8, 2015, available at http://www.wsj.com/articles/hillary-clinton-comes-out-against-trans-pacific -partnership-trade-deal-1444249761 (last visited Feb. 5, 2016).

[4] *Id.*

[5] John Brinkley, *Donald Trump: Stalking the Wild TPP*, FORBES, Nov. 12, 2015, available at http://vvww.forbes.com/sites/johnbrinkley/2015/11/12/donald-trump-stalking-the-wild-tpp/#55a0884870cc (last visited Feb. 5, 2016). China is not among the twelve Pacific Rim states expected to ratify TPP.*See* Office of the U.S. Trade Rep., *What Is TPP?, available at* https://ustr.gov/tpp (last visited Feb. 5, 2016) (listing the twelve Pacific Rim states expected to ratify TPP).

[*146] Given the descriptions of TPP in political circles, one feels a sense of irony when reviewing its chapter on foreign investment and investor-state dispute settlement ("ISDS"). As recognized by a diverse range of observers, TPP's investment chapter closely resembles analogous provisions in free trade agreements ("FTAs") recently concluded by the United States. [6] Because those include FTAs already in force between the United States and six other states parties to TPP, some observers have gone so far as to describe TPP's investment chapter as "largely redundant" with the status quo in U.S. treaty practice. [7] Such assessments directly contradict the perception that TPP heralds important shifts in U.S. policy, at least in respect to the protection of foreign direct investment ("FDI") under international law.

Although TPP's investment chapter may seem unremarkable when compared to recent trends in U.S. treaty practice, it appears much more dynamic when viewed from the perspective of U.S. investors having investment claims against other states parties. [8] Viewed from that angle, TPP's investment chapter becomes a fascinating puzzle that changes the state of play for U.S. investors in dramatically different ways, depending on the state party and the nature of the claims involved. [9]

Seeking to develop the points just made, Part I recounts the historical development of U.S. investment treaty practice. [10] Part II describes the broad contours of TPP, and provides a more detailed examination of its investment chapter. [11] Part III examines assessments of TPP's investment chapter and, in particular, its conformity with recent U.S. treaty practice. [12] By contrast, Part IV identifies the ways in which TPP's investment chapter alters the state of play for particular U.S. investors. In so doing, Part IV(A) describes the ways that TPP alters the state of play for U.S. investors in states parties that do not yet have FTAs with the United States. [13] Part IV(B), in turn, explains how TPP alters the state of play for U.S. investors in states parties that already have FTAs with the United States, often in dramatically different ways depending on the particular host state and the particular claims involved. [14] Part IV(C) discusses the possibility that even familiar investment treaty provisions may operate in unexpected and unwelcome ways when applied to the multilateral context of TPP. [15] Adopting a wider frame of reference, Part V concludes with a brief discussion of the under-appreciated, geo-strategic purposes of layering TPP on top of several existing FTAs. [16]

[*147] I. HISTORY

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[6] *See infra* notes 423-25 and accompanying text.

[7] *See infra* note 434 and accompanying text.

[8] *See infra* note 436 and accompanying text.

[9] *See infra* notes 437-38 and accompanying text.

[10] *See infra* notes 17-312 and accompanying text.

[11] *See infra* notes 313-413 and accompanying text.

[12] *See infra* notes 414-35 and accompanying text.

[13] *See infra* notes 440-80 and accompanying text.

[14] *See infra* notes 481-560 and accompanying text.

[15] *See infra* notes 561-74 and accompanying text.

[16] *See infra* notes 575-606 and accompanying text.

A generation ago, the United States developed an investment treaty program to advance geo-political (as opposed to chiefly economic) goals. [17] Although the basic contours of U.S. investment treaties have not changed, their elaboration reflects a series of four distinct phases, each one of which responded to shifts in historical and political context. To illustrate these themes, Part I describes the United States' adoption of an investment treaty program, its enduring structure, and the shifts in textual nuance that accompanied four phases of evolution.

A. *Phase One: The 1984 U.S. Model BIT*

During the decades leading up to the 1970s, the United States faced an environment in which the forces of communism and decolonization threatened to disrupt the global order in which capitalism had thrived. [18] The expansion of [*148] communism and the process of decolonization led to changes of government and dramatic shifts in policy across the globe. [19] Newly established governments sought to consolidate their authority and independence, often by seizing the main levers of the economy. [20] As a result, U.S. and other Western investors faced waves of expropriations, [21] typically by governments that recognized no obligation to compensate for the reversal of what they saw as an unfair status quo. [22]

Contemporaneously with the uncoordinated waves of nationalizations, communist and newly independent states joined forces at the United Nations, strategically using their new majority in the General Assembly to call for a New International Economic Order ("NIEO"), in which states could take investment property for public purposes without incurring any obligation to compensate foreign investors under international law. [23] Although it seems implausible to the [*149] modern ear, the calls for a NIEO became so sharp that the United States Supreme Court expressed doubts that customary international law continued to require compensation for the taking of investment property and, in any event, flatly refused to hear such claims on prudential grounds. [24]

In the tense and uncertain environment just described, [25] Western European states successfully launched a bilateral investment treaty ("BIT") program, pursuant to which developing countries undertook to guarantee foreign

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[17] *See* Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 209-10 (1988) (explaining that the State Department proposed the development of BITs in 1977 for the purposes of enhancing the security of U.S. investments in states parties, reaffirming the importance of protecting U.S. FDI as an element of foreign policy, and establishing a body of state practice that would support traditional U.S. views regarding customary international law on the protection of FDI); *see also K. Scott Gudgeon, United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW. 105, 110-11 (1986) (describing how the "BIT initiative gained momentum within the bureaucracy in the mid 1970s after a cycle of expropriation activity by developing countries," and explaining that "BITs were proposed as a means of strengthening principles of customary international law and practice as observed and advocated by the United States").

The BIT program did not aim to stimulate outbound U.S. FDI because organized labor in the United States opposed such policies. ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 47 (2009); *see also* KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 26 (2009) ("While organized labor could be expected to oppose programs that might result in the export of investment and, thus, jobs, there was no evidence that the BITs would promote outward investment"); Gudgeon, *supra*, at 111-12 (opining that U.S. BITs were "not designed to catalyze investment decisions," and explaining that "the absence of evidence of a capital flow relationship" was "advantageous in rallying support for the BIT program, since evidence of a positive correlation between investment treaties and increased capital flow abroad could have spurred opposition by organized labor and regional economic interest groups within the United States").

[18] *See* KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES 41-42 (2010) (identifying the spread of communism and decolonization as two of the major forces that shaped the international investment regime after World War II); *see also* ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 483 (2d ed. 2008) (describing the combined force of decolonization and the spread of communism in sparking nationalizations of FDI); NEWCOMBE & PARADELL, *supra* note 17, at 18-19 (describing the combined force of decolonization and the spread of communism sparking nationalizations of FDI and, thus, investment disputes).

investors the sorts of protections that they had rejected as a matter of customary international law. [26] Given the successful launch of European BIT programs, the United States government resolved to launch its own investment treaty program in 1977. [27] Due to a lengthy inter-agency process, the United States took several years to adopt a model text for treaty negotiations. [28] Although the United States adopted negotiating texts in 1981 and 1983, those models proved unsatisfactory, due in part to excessive length. [29] They were replaced with a brief, seven-page negotiating text in 1984, [30] which essentially remained the model used by the United States for the next decade. [31]

[*150] In broad outline, one may divide the 1984 U.S. model BIT into three parts: (1) definitions; [32] (2) the host state's substantive obligations with respect to the treatment of covered investors and their investments; [33] and (3) the modalities for dispute resolution through arbitration proceedings brought directly by foreign investors against their host states. [34] While the content and relative emphasis on each part has shifted over time, the basic structure of U.S. investment treaties has not. [35]

Turning to the content of the 1984 U.S. Model BIT, the first part sets forth a broad definition of "investments" entitled to treaty protection. In particular, it extends treaty protection to "every kind of investment . . . owned or controlled, directly or indirectly by nationals or companies of the other party, such as equity, debt, and service and investment contracts." [36] In addition, the definition sets forth a non-exclusive, illustrative list that includes "tangible and intangible property," "a company or shares of stock," "a claim to money or a claim to performance having economic value, and associated with an investment," "intellectual property," including "goodwill," "any right conferred by contract or law," and "any licenses and permits pursuant to law." [37]

The next two articles of the 1984 U.S. Model BIT set forth the basic substantive guarantees that continue to lie at the heart of U.S. investment treaty practice. These include guarantees of national treatment, MFN treatment, and "fair and equitable treatment" for "investments" (with the last-mentioned concept not linked to international law). [38] The guarantees also include a prohibition of the use of performance requirements as conditions to the

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[19] *Id.*

[20] *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 22 (2d ed. 2004) ("There was . . . a need felt on the part of the newly independent states to recover control over vital sectors of their economies from foreign investors . . . ."); VANDEVELDE, *supra* note 18, at 42 (explaining that "newly independent states were fiercely protective of their independence and some of them came to regard foreign investment as a form of neocolonialism because it involved foreign control over the means of production").

[21] *See* LOWENFELD, *supra* note 18, at 483-84 (explaining that "nationalizations of all kinds took place" during "the quarter century following the end of World War II," particularly in Eastern Europe, China, Cuba, Bolivia, Brazil, Argentina, Peru, Guatemala, Indonesia, Iran, Egypt, Algeria, Iraq, Saudi Arabia, and nearly all the Arab states"); NEWCOMBE & PARADELL, *supra* note 17, at 18-19 (describing "large-scale nationalizations of key sectors of the[] economies" in Eastern European states, China, Cuba, Argentina, Bolivia, Brazil, Chile, Guatemala, Peru, Indonesia, Egypt, Algeria, Iran, Iraq, Libya, Kuwait and Saudi Arabia); SORNARAJAH, *supra* note 20, at 22 (describing "a wave of nationalizations of foreign property"); VANDEVELDE, *supra* note 17, at 25 ("Expropriations of American property in Brazil and Cuba in 1959 commenced two decades of repeated seizures of U.S. property overseas. One commentator, for example, reported 87 instances of expropriatory acts during a two-year period in the early 1970s."); Vandevelde, *supra* note 17, at 209 (explaining that "a series of expropriations of U.S. investment during the 1960s and 1970s underscored the need for strong investment protection, while the rapid growth of U.S. overseas investment put more wealth at risk of expropriation").

[22] *See* VANDEVELDE, *supra* note 18, at 41 (explaining that "new communist countries generally argued that no compensation for expropriated foreign property was owed, emphasizing that a restructuring of the national economy along communist or socialist lines was a different phenomenon than the seizure of isolated parcels of property within a liberal economic system); *see also* NEWCOMBE & PARADELL, *supra* note 17, at 19 (describing how "newly independent and developing states asserted that, upon independence, states were entitled to review concession agreements that had been granted by colonial powers and, furthermore, maintained that compensation for expropriation of property would be based on national [as opposed to international] laws").

establishment, maintenance or expansion of investments. [39] However, the treaty provisions dealing with performance requirements seem strikingly sparse and vague, extending only to requirements relating to export performance, use of local goods or services, and "any other similar requirements." [40]

[*151] The 1984 U.S. Model BIT also prohibits direct and indirect expropriation of covered investments, except for a public purpose, on a non-discriminatory basis, in accordance with due process, and upon prompt payment of adequate and effective compensation. [41] Finally, the 1984 U.S. Model BIT contains a so-called "umbrella clause," in which the states parties undertake to "observe any obligation [they] may have entered into with regard to investments." [42] Although not universally accepted, the general view is that such umbrella clauses "internationalize" state contracts by transforming the host state's observance of contracts into a treaty obligation. [43] While representing the heart of substantive guarantees, the six undertakings mentioned above occupy only two pages of text. [44] In other words, the 1984 Model U.S. BIT elaborated concepts at an exceedingly high level of generality and, thus, left their specification by the arbitral tribunals constituted to hear investment disputes. [45]

Despite the obvious importance of substantive disciplines, many observers regard the provisions on dispute settlement as the most innovative and significant aspect of the entire U.S. BIT program. [46] By providing for arbitration of claims brought directly by investors against host states under the ICSID Convention and the Additional Facility Rules of ICSID, [47] the 1984 U.S. Model BIT simultaneously gave investors effective tools to enforce their rights and eliminated the inevitable "politicization" of claims that occurs when states have to resolve investment claims at the level of intergovernmental relations. [48]

[*152] Looking at the framework for arbitration established by the 1984 U.S. Model BIT, three factors stand out. First, the 1984 U.S. Model BIT permits arbitration for three categories of claims: (1) disputes involving the interpretation or application of investment agreements (contracts) between investors and their host states; (2) disputes involving the interpretation or application of investment authorizations issued by hosts states; and (3) disputes involving alleged violations of obligations set forth in the BIT. [49] Second, the 1984 U.S. Model BIT discouraged pursuit of local remedies in the sense that first recourse to "the courts of justice or administrative

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[23] LOWENFELD, *supra* note 18, at 489-92; NEWCOMBE & PARADELL, *supra* note 17, at 31-32; VANDEVELDE, *supra* note 18, at 47-48; *see also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 4-5 (2d ed. 2012); VANDEVELDE, *supra* note 17, at 25-26; Vandevelde, *supra* note 17, at 209.

[24] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-30, 436-37 (1964).

[25] *See* DOLZER & SCHREUER, *supra* note 23, at 5 (recognizing that "this period of confrontation led to insecurity about the customary international rules governing foreign investment"); NEWCOMBE & PARADELL, *supra* note 17, at 41 (describing the development of BITs as "primarily a response to the uncertainties and inadequacies of the customary international law of state responsibility for injuries to aliens and their property").

[26] *See* DOLZER & SCHREUER, *supra* note 23, at 6-7; NEWCOMBE & PARADELL, *supra* note 17, at 42-43; VANDEVELDE, *supra* note 18, at 54-56.

[27] See Vandevelde, *supra* note 17, at 208-09 (describing the successful expansion of the European BIT program, and explaining that the launch of a U.S. BIT program in 1977 responded in part to that development); *see also* Gudgeon, *supra* note 17, at 109 (recounting the successful development of BIT programs by European countries during the 1960s, and stating that the "legal Adviser's Office of the State Department . . . recommended that the United States emulate the European example"). According to some observers, U.S. business interests pressed the United States government to adopt an investment treaty program to secure the same sorts of protections already enjoyed by European competitors. NEWCOMBE & PARADELL, *supra* note 17, at 47; VANDEVELDE, *supra* note 17, at 25.

[28] Vandevelde, *supra* note 17, at 210; Kenneth Vandevelde, *A Comparison of the 2004 and 1994 US Model BITs*, 2008-2009 Y.B. INT'L INV. L & POL'Y 283, 283 [hereinafter Vandevelde, Comparison].

[29] Vandevelde, *supra* note 17, at 210-11; Vandevelde, *Comparison, supra* note 28, at 283.

tribunals or agencies" of the host state would extinguish the right to demand arbitration. [50] Third, the 1984 U.S. Model BIT made no attempt to regulate the arbitration proceedings, to set time limits for asserting claims, or to impose any limitations on remedies. To the contrary, the 1984 U.S. Model BIT left all such questions to the arbitration rules and applicable principles of law. [51] Given the novelty of investor-state arbitration and the discretion conferred on tribunals to elaborate vague substantive obligations, the failure to regulate dispute settlement in more detail seems puzzling.

B. *Phase Two: NAFTA's Investment Chapter*

In December 1992, President George H.W. Bush signed the final text of the North American Free Trade Agreement ("NAFTA"), [52] which President William J. Clinton signed into law a year later, [53] and which entered into force as of January 1, 1994. [54] Chapter 11 of NAFTA regulates the treatment of investments made by [*153] nationals of one NAFTA state party on the territory of other states parties. [55] While Chapter 11 follows the broad, three-part structure of the 1984 U.S. Model BIT, it also represents just one component of a much broader trade agreement. [56] As a result, one finds significant shifts in details relating to definitions, substantive disciplines, and dispute settlement. [57]

Starting with definitions, the most striking feature represents a narrowing of the definition of investments covered by Chapter 11. [58] Instead of an all-encompassing reference to "every kind of investment" followed by a non-exclusive list of illustrative examples, [59] Chapter 11 defines investment in terms of an exhaustive and closed list of eight categories, including an enterprise, equity securities, certain debt securities, certain loans to enterprises, certain interests that entitle the owner to share in income or profits of enterprises, certain interests that entitle the owner to share in assets of an enterprise on dissolution, tangible and intangible property, and commitments of capital to long-term projects such as turnkey contracts or concessions. [60] Notably, this closed list omits a number of items that appeared in the 1984 U.S. Model BIT's illustrative list, including "a claim to money or a claim to performance having economic value, and associated with an investment," and "goodwill." [61]

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[30] *See* Vandevelde, *supra* note 17, at 211 (describing the adoption of a "streamlined" and "much shorter" model text in 1984); Vandevelde, *Comparison, supra* note 28, at 283 (recounting the adoption of a "shortened version" of the model in 1984); *see also* 1984 U.S. Model BIT, *reprinted in* VANDEVELDE, *supra* note 17, at 789.

[31] *See* Vandevelde, *Comparison, supra* note 28, at 283 (indicating that "with only isolated changes," the 1984 U.S. Model BIT "would remain the model in use for the next decade").

[32] 1984 U.S. Model BIT, *supra* note 30, Art. 1.

[33] *Id.* Arts. 2-4.

[34] *Id.* Art. 6; *see also* DOLZER & SCHREUER, *supra* note 23, at 13 (indicating that BITs "typically consist of three parts," including "definitions," "substantive standards," and provisions on "dispute settlement"); NEWCOMBE & PARADELL, *supra* note 17, at 65 (describing the typical structure of BITs, which start with definitions, and continue with substantive disciplines, followed by provisions on dispute settlement).

[35] *See* VANDEVELDE, *supra* note 18, at 5 ("The content of most BITs follows a typical pattern. Similar provisions appear in more or less the same order in nearly every BIT."); *see also* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION 26 (2007) ("BITs tend to resemble each other in purpose and content"); NEWCOMBE & PARADELL, *supra* note 17, at 65 ("The actual content of [international investment agreements] also follows a pattern"); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 126 (2010) ("Although the specific provisions of individual investment treaties are not uniform . . . , virtually all investment treaties address the same issues and they generally follow a similar structure").

[36] 1984 U.S. Model BIT, *supra* note 30, Art. 1.

[37] *Id.*

[*154] Turning to substantive disciplines, NAFTA's investment chapter includes the same core undertakings as the 1984 U.S. Model BIT, while elaborating or expanding them in ways generally designed to enhance the protection of foreign investment. For example, NAFTA extends the guarantees of national treatment and MFN treatment not just to investments, but also to investors, while specifying that the guarantees apply to all stages of investment activity, including establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. [62] While U.S. negotiators also considered extending the guarantee of fair and equitable treatment to investors (and not just to investments), they resolved not to do so based in part on concerns that such an extension could give rise to personal injury claims under NAFTA. [63] To the extent that NAFTA's drafters altered the guarantee of fair and equitable treatment, they arguably narrowed its scope by yoking it back to international law. [64]

Perhaps consistent with NAFTA's emphasis on trade liberalization, Chapter 11 substantially expanded the prohibition of performance requirements. [65] Whereas the 1984 U.S. Model BIT expressly prohibited only two types of requirements, [66] NAFTA's investment chapter increased the list to seven. [67] In addition, it clarified that the prohibition of performance requirements applied at *almost* all stages of investment, including the establishment, acquisition, expansion, management, conduct, or operation of investments. [68] Also, NAFTA broke new ground by prohibiting states parties from adopting measures that conditioned the receipt of an advantage on requirements to (a) achieve a given level of domestic content, (b) to purchase goods locally, (c) to relate the value or volume of imports to the value or volume of exports, or (d) to restrict local sales of the investor's goods by relating them to the value or volume of export performance. [69] Contrary to the 1984 U.S. Model BIT, [70] however, NAFTA's [*155] investment chapter emphasized that its expanded list of prohibitions was not illustrative, but an exhaustive list of unlawful performance requirements. [71]

Like the 1984 U.S. Model BIT, NAFTA's provision on expropriation forbids direct or indirect takings of investments, unless for a public purpose, on a non-discriminatory basis, in accordance with due process, and upon prompt payment of adequate and effective compensation. [72] However, NAFTA's investment chapter breaks new ground

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[38] *Id.* Art. 2(1)-(2).

[39] *Id.* Art. 2(5).

[40] *Id.*

[41] *Id.* Art. 3(1).

[42] *Id.* Art. 2(2).

[43] DOLZER & SCHREUER, *supra* note 23, at 166-75; NEWCOMBE & PARADELL, *supra* note 17, at 437-38; SALACUSE, *supra* note 35, at 273-84; VANDEVELDE, *supra* note 18, at 257, 263-66; Gudgeon, *supra* note 17, at 126.

[44] *See* 1984 U.S. Model BIT, *supra* note 30, Arts. 2-3.

[45] *Cf.* Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 460 (2010) (observing that "it is within investor-state arbitrations that the most important decisions about the investment regime are decided").

[46] *See* SALACUSE, *supra* note 35, at 137 (describing investor-state arbitration under BITs as a "revolutionary innovation"); Diana Marie Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 J. INT'L BUS. & L. 239, 252 (2012) ("Investor-state arbitration, as a mechanism to enforce the substance of BITs, was one of the most important innovations in BITs"); Philip J. MacFarlane, Comment, *U.S and Chinese Investment Treaties in Latin America: Convergence or Competition*?, 37 HOUS. J. INT'L L. 927, 939 (2015) (opining that "investor-state arbitration is often considered the most important investor protection in a BIT"); *see also* Jason Pierce, Note, *A South American Investment Treaty: How the Region Might Attract Foreign Investment in a Wake of Resource Nationalism*, 44 CORNELL INT'L L.J. 417, 436 (2011) ("Perhaps one of the most important features of the [Energy Charter Treaty], is its section governing dispute resolution").

[47] 1984 U.S. Model BIT, *supra* note 30, Art. 6(3).

by identifying standards for valuation, including going concern value (a generous measurement of market value not previously embraced by developing states). [73] Also, NAFTA's investment chapter provides guidance on the calculation of exchange rates, depending on whether the host state elects to pay in a G7 currency or another currency. [74]

While NAFTA Chapter 11 elaborates and expands substantive disciplines at the margins, its dispute settlement provisions represent one of the treaty's great achievements. [75] Among other things, it marks the first time that Mexico agreed to investor-state arbitration, as well as the first time that two OECD states agreed to investor-state arbitration. [76] Given these facts, and NAFTA's emphasis on dispute settlement in several areas, [77] it seems unsurprising that the drafters carefully sought to regulate the process of investor-state arbitration.

As in the 1984 U.S. Model BIT, NAFTA Chapter 11 allows investors to demand arbitration under the ICSID Convention and the Additional Facility Rules [*156] of ICSID. [78] In addition, however, it gives investors the option to demand arbitration under the UNCITRAL Arbitration Rules, [79] which would be the sole choice for investment disputes brought by Canadian investors against Mexico, or Mexican investors against Canada, as neither of the states had ratified the ICSID Convention, thus foreclosing arbitration under the ICSID Convention or even under the Additional Facility Rules for such matters. [80]

Regardless of the arbitration rules selected by the investor, however, NAFTA provides that those rules apply only as modified by Chapter 11. [81] Those modifications include a number of procedural refinements designed to encourage pursuit of alternative dispute settlement and local remedies, to streamline the arbitration process, to assist and to guide tribunals in the elaboration of substantive principles, and to control the exposure of states parties to liability.

Starting with the encouragement to pursue alternative dispute settlement and local remedies, Chapter 11 imposes two waiting periods before investors can bring claims. First, they must wait six months after the events giving rise to

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[48] SALACUSE, *supra* note 35, at 373-74; SORNARAJAH, *supra* note 20, at 250; VANDEVELDE, *supra* note 18, at 432; Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, *56 HARV. INT'L L.J. 353, 383 (2015);* Eric Gillman, *The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008*, *19 AM. REV. INT'L ARB. 269, 271 (2008);* Kenneth J. Vandevelde, U.S. Bilateral Investment Treaties: The Second Wave, *14 MICH. J. INT'L L. 621, 626 (1993);* *see also* VANDEVELDE, *supra* note 17, at 576 ("From the standpoint of the U.S. government, the most important aspect of the investor-state disputes provision of the 1983 model was that it provided an effective remedy for investors without the involvement of the investor's government. To the extent that the investor-state disputes provision is effective, it also reduces the pressure on the United States to impose sanctions on an expropriating government.").

[49] 1984 U.S. Model BIT, *supra* note 30, Art. 6(1).

[50] *Id.* Art. 6(3)(a)(ii); *see also* VANDEVELDE, *supra* note 17, at 580 ("The effect of this . . . condition obviously is to discourage resort to local remedies").

[51] As a condition precedent to arbitration, however, the 1984 U.S. Model BIT does, however, require the expiration of six months following "the date on which the dispute arose." 1984 U.S. Model BIT, *supra* note 30, Art. 6(3)(a). Drafters saw this as a "cooling-off" period during which parties could seek resolution of differences through consultations and negotiations. VANDEVELDE, *supra* note 17, at 581.

[52] David M. McPherson, *Is the North American Free Trade Agreement Entitled to an Economically Rational Countervailing Duty Scheme*?, *73 B.U. L. REV. 47, 48 (1993).*

[53] Natalie Sears, *The Shadows that Became the Star of the Show: The North American Agreement on Environmental Cooperation and the North American Agreement on Labor Cooperation*, 21 L. & BUS. REV. AM. 185, 185 (2015).

[54] David Lopez, *Dispute Resolution Under NAFTA: The Early Experience*, *32 TEX. INT'L L.J. 163, 165 (1997).*

[55] North American Free Trade Agreement, Dec. 17, 1992, Ca.-Mex.-U.S., ch. 11, ***32 I.L.M. 605, 639-49*** [hereinafter NAFTA].

their claims. [82] Second, they must give written notice of intent to bring claims 90 days before actually submitting them to arbitration. [83] In principle, these requirements create a space in which investors and host states may negotiate their differences or have recourse to other forms of dispute settlement. [84] Also, NAFTA's investment chapter encourages pursuit of local remedies in two ways. Unlike the 1984 U.S. Model BIT, which required an election between local remedies and investor-state arbitration, [85] NAFTA permits investors to have first recourse to local remedies and, then, to pursue arbitration, provided that they waive in writing the right to initiate or continue any other dispute settlement processes relating to the measure(s) alleged to violate NAFTA's investment chapter. [86] In addition, NAFTA' s investment chapter further encourages pursuit of local remedies by exempting from the waiver requirement proceedings seeking injunctive, declaratory or other extraordinary relief (not involving claims for damages) from the host state's judicial or administrative tribunals. [87]

[*157] Turning to provisions designed to streamline the arbitration process, NAFTA's investment chapter designates the Secretary-General of ICSID as the appointing authority for arbitration proceedings and empowers the incumbent to appoint arbitrators to any vacancies remaining 90 days after submission of a claim to arbitration. [88] In addition, NAFTA's investment chapter permits consolidation of two or more arbitrations that have a common question of law or fact, provided that consolidation would promote the fair and efficient resolution of claims. [89] Upon receipt of a request for consolidation, the Secretary-General of ICSID has 60 days to appoint a tribunal to hear the request and, if it grants consolidation, to hear the consolidated matters. [90] The consolidation tribunal operates under the UNCITRAL Arbitration Rules, and it seems relevant to mention that the disputing parties have no right under Chapter 11 to participate in the appointment of the members of consolidation tribunals. [91]

Under NAFTA's investment chapter, states parties have two ways of assisting and guiding tribunals in the elaboration of norms. First, under Article 1128, non-disputing states parties have the right to make submissions to tribunals on questions of interpretation of NAFTA. [92] To the extent that the submissions of all three states parties coincide, some tribunals have regarded the shared views as a subsequent practice that establishes the agreement

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[56] *See* Sarah Richardson, *Sovereignty, Trade, and the Environment -- The North American Agreement on Environmental Cooperation*, 24 CAN.-U.S. L.J. 183, 186 (1998) (describing NAFTA as the "broadest trade agreement in history").

[57] *See* Lucy Reed & Robert Kirkness, *Old Seeland, New Netherland and New Zealand: Some Thoughts on the Possible "Discovery" of Investment Treaty Arbitration in New Zealand*, 43 VICT. U. WELLINGTON L. REV. 687, 704 (2012) (indicating that, when combined with negotiations on trade in goods, trade in services, protection of intellectual property and numerous other topics, the outcomes of negotiations on the protection of foreign investment become harder to predict and more likely to shift as a result of trade-offs made on other topics).

[58] *See* VANDEVELDE, *supra* note 17, at 133-34 (opining that the NAFTA's definition of investment has two "unique" features, namely (1) the use of an exhaustive list of assets that qualify as "investments," and (2) the population of that list with content that differs from the illustrative lists found in U.S. Model BITs).

[59] *See supra* notes 36-37 and accompanying text.

[60] NAFTA, *supra* note 55, Art. 1139.

[61] *Compare id. with* 1984 U.S. Model BIT, *supra* note 30, Art. 1(b); *see also* VANDEVELDE, *supra* note 17, at 134 (observing that NAFTA departed from the 1984 U.S. Model BIT by excluding "goodwill" from the definition of "investments" covered by NAFTA's investment chapter). According to one observer, the United States, Canada and Mexico have all argued that market share does not qualify as an investment for purposes of NAFTA. VANDEVELDE, *supra* note 17, at 133. The United States has also expressed the view that goodwill and customer base do not qualify as investments for purposes of NAFTA. *Id.* In reaching this conclusion, the United States has in part relied on the exhaustive definition of investments under NAFTA. *Id.* It has also relied on the broader assertion that goodwill, market share, and customer base do not represent property interests capable of expropriation under international law. *Id.* at 133-34.

[62] NAFTA, *supra* note 55, Arts. 1102(1)-(2), 1103(1)-(2).

[63] VANDEVELDE, *supra* note 17, at 313-14.

of the states parties on the application of the treaty for purposes of Article 31(3)(c) of the Vienna Convention on the Law of Treaties. [93] Other tribunals have approached the submissions with a degree of caution inasmuch as they reflect the self-interested views of perpetual respondents in NAFTA arbitrations. [94]

In addition to non-disputing party submissions, the trade ministers of the three NAFTA parties also have the right to convene as the Free Trade Commission and, in that capacity, to adopt joint interpretations of NAFTA, which tribunals must accept as binding. [95] As of this writing, the Free Trade Commission has invoked the power to make joint interpretations only once. [96] That involved a so-called "interpretation" of fair and equitable treatment to be coextensive with the [*158] minimum standard of treatment for aliens required by customary international law, which observers widely regarded as an effort to narrow the scope of substantive protection, to swing the outcomes of pending matters in favor of the states parties, and to force a particular tribunal to reopen a partial award that had, in fact, become res judicata. [97] While observers have debated whether the incident truly involved an interpretation or an ultra vires amendment of NAFTA, [98] the fact is that the optics conveyed an unfortunate image of self-dealing. [99] This may explain the states parties' reluctance to adopt any further interpretations of disputed provisions.

In addition to assisting and guiding tribunals in the development of norms, the states parties benefit from a handful of NAFTA provisions designed to limit their exposure to liability. First, Chapter 11 includes a fairly short statute of limitations, which requires investors to submit claims within three years after they have acquired knowledge of alleged treaty violations and knowledge that they have incurred loss or damage. [100] Second, unlike the 1984 U.S. Model BIT, NAFTA's investment chapter only permits investor-state arbitration of claims that allege treaty violations; it does not permit investor-state arbitration of claims alleging violations of investment agreements or investment authorizations. [101] Consistent with the exclusion of investment agreements and investment authorizations from dispute settlement, Chapter 11 omits the umbrella clause, [102] which would have elevated the host state's contractual commitments to treaty obligations. [103] Third, Chapter 11 limits the remedies that tribunals may award. Specifically, tribunals may only award monetary damages plus interest, or restitution. [104] In the event that tribunals

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[64] *See* NAFTA, *supra* note 55, Art. 1105(1) (requiring "treatment in accordance with international law, including fair and equitable treatment"); *see also infra* note 95-99 and accompanying text.

[65] *See* VANDEVELDE, *supra* note 17, at 403 (observing that the NAFTA's provisions on performance requirements represented "a substantial departure from language that had appeared in prior BIT models"); *see also* SORNARAJAH, *supra* note 20, at 237-38 (explaining that while performance requirements increase the value of foreign investment to the host state, they are thought to distort trade flows).

[66] *See supra* note 40 and accompanying text.

[67] NAFTA, *supra* note 55, Art. 1106(1).

[68] *Id.* Unlike the provisions on national treatment and MFN treatment, Article 1106(1) does not extend coverage to measures imposed in connection with the "sale or other disposition of investments." *Compare id.* Art. 1102(1)-(2), *and* Art. 1103(1)-(2), *with* Art. 1106(1); *see also* VANDEVELDE, *supra* note 17, at 403 (observing that Article 1106(1) "does not prohibit the imposition of performance requirements in connection with the sale or other disposition of an investment").

[69] NAFTA, *supra* note 55, Art. 1106(3).

[70] *See supra* note 40 and accompanying text.

[71] NAFTA, *supra* note 55, Art. 1106(5).

[72] *Id.* Art. 1110(1)-(6).

[73] *Id.* Art. 1110(2); *see also* VANDEVELDE, *supra* note 17, at 507 (recognizing that "NAFTA contains unique language" expressly identifying going concern value as a means of determining market value, and stating that the United States has long

award restitution, they must give states parties the option of paying monetary damages plus interest in lieu of [*159] restitution. [105] Thus, tribunals have no power to enjoin treaty violations, [106] to declare that states must withdraw offending measures, [107] or to award punitive damages even for the most egregious violations. [108]

C. Phase Three: The 1994 US. Model BIT

In 1994, the United States revised its Model BIT based on experience gained in the process of negotiating NAFTA's investment chapter. [109] However, because it represented an integral part of a broader constellation of undertakings relating to trade in goods, [110] government procurement, [111] trade in services (including telecommunications and financial services), [112] competition policy, [113] and intellectual property, [114] the drafters of the 1994 U.S. Model BIT did not seek to replicate NAFTA's investment chapter. [115] To the contrary, they took previous U.S. Model BITs as their foundation, and sought to introduce certain refinements developed during the process of negotiating NAFTA, [116] and subsequently identified as appropriate for use in the more limited context of treaties aimed only at investor protection, as opposed to the formation of trading blocks. [117]

Turning to the 1994 U.S. Model BIT's section on definitions, one sees the abandonment of NAFTA's closed-list approach and the restoration of the all-encompassing definition of investments to include "every kind of investment owned or controlled directly or indirectly" by an investor of the other party, followed by an illustrative list of six examples, which include a company, equity and debt interests in a company, certain contractual rights (such as turnkey contracts, construction contracts, concessions and similar contracts), tangible and intangible property, intellectual property (not expressly defined to include goodwill this time), and rights conferred pursuant to law, such as licenses and permits. [118] As observed elsewhere, [119] the illustrative list omitted a particularly broad example of investment that had appeared in the 1984 U.S. Model BIT, [*160] namely: "a claim to money or a claim to performance having economic value, and associated with an investment." [120] However, according to one source, this omission arguably had no effect because the all-encompassing definition already applied to "every kind of investment." [121] Also, the examples relating to certain contracts, licenses, and permits likely encompassed the

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treated going concern value as an appropriate method of valuation, but explaining that "some developing countries" have resisted the use of going concern value as a method of valuation); *cf.* SORNARAJAH, *supra* note 20, at 487 (indicating that book value represents the tool most often used for valuing property, and that book value "was widely used in the petroleum nationalizations that took place in the 1970s).

74 NAFTA, *supra* note 55, Art. 1110(4)-(5).

75 *See* Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727, 731 (1993) (describing investor-state dispute settlement under NAFTA as "one of the key achievements of the investment chapter"); *see also* Stefan Matiation, *Arbitration with Two Twists: Loewen v. United States and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes*, 24 U. PA. J. INT'L, ECON. L. 451, 464 (2003) ("The most significant innovation of NAFTA Chapter 11 is that it allows an investor from one NAFTA Party to directly sue another NAFTA Party in which that investor has an investment").

76 Price, *supra* note 75, at 731; *see also* SORNARAJAH, *supra* note 20, at 289 (observing that NAFTA's investment chapter represents the first treaty between two developed states providing investor-state arbitration).

77 *See* Horacio Grigera Naon, *Sovereignty and Regionalism*, 27 LAW & POL'Y INT'L BUS. 1073, 1163-68 (1996) (describing the three different dispute-settlement mechanisms established by Chapters 11, 19, and 20 of the NAFTA).

78 NAFTA, *supra* note 55, Art. 1120(1)(a)-(b).

79 *Id.* Art. 1120(1)(c).

80 Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes--Adoption, Adaptation and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1346 n.40 (2006); Todd Weiler, *Foreign Investment Law and the United States: You Can't Tell the Players Without a Scorecard*, 37 INT'L LAW. 279, 282 n.23 (2003).

81 NAFTA, *supra* note 55, Art. 1120(2).

chief examples of situations involving "claims to money or claims to performance having economic value, and associated with an investment." [122]

Turning to substantive disciplines, the 1994 U.S. Model BIT incorporates a number of refinements drawn from NAFTA's investment chapter, but also omits or scales back on other refinements found in NAFTA's investment chapter. For example, whereas Chapter 11 had extended the guarantees of national treatment and MFN treatment to both investments *and investors*, [123] the 1994 U.S. Model BIT returned to previous formulations in which states parties made those undertakings only with respect to investments. [124] With respect to investments, however, the 1994 U.S. Model BIT followed NAFTA's lead by applying the guarantees of national treatment and MFN treatment to virtually all phases of the investment lifecycle, including establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of covered investments. [125]

Alongside the guarantees of national treatment and MFN treatment, the 1994 U.S. Model BIT includes an undertaking to provide fair and equitable treatment. [126] Like NAFTA and the 1984 U.S. Model BIT, [127] this undertaking extends only to investments (and not also to investors). [128] As in the 1984 U.S. Model BIT, the states parties undertook to provide covered investments fair and equitable treatment "at all times." [129] Contrary to NAFTA, [130] the 1994 U.S. Model BIT does not explicitly yoke the concept of fair and equitable treatment back to international law. [131]

With respect to performance requirements, the 1994 U.S. Model BIT again incorporates some of NAFTA's refinements, but scales back on others. For [*161] example, consistent with NAFTA Chapter 11, [132] the 1994 U.S. Model BIT includes a fairly extensive list of six requirements that host states could not enforce as conditions for the establishment, acquisition, expansion, management, conduct or operation of covered investments. [133] These include requirements to achieve a given level of domestic content, to limit imports of products or services, to achieve a particular level of export performance, to limit sales of products or services in the host state (thereby essentially requiring exports instead), to transfer technology, or to perform research and development in the host

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[82] *Id.* Art. 1120(1).

[83] *Id.* Art. 1119.

[84] Mark Clodfelter, *U.S. State Department Participation in International Economic Dispute Resolution*, 42 S. TEX. L. REV. 1273, 1278-79 (2001); Vandevelde, *Comparison, supra* note 28, at 312-13.

[85] *See supra* note 50 and accompanying text.

[86] NAFTA, *supra* note 55, Art. 1121(1)(b), 1121(2)(b); Vandevelde, *Comparison, supra* note 28, at 312.

[87] NAFTA, *supra* note 55, Art. 1121(1)(b), 1121(2)(b).

[88] *Id.* Art. 1124(1)-(2).

[89] *Id.* Art. 1126(2).

[90] *Id.* Art. 1126(2), (5).

[91] *Id.*; VANDEVELDE, *supra* note 17, at 658.

[92] NAFTA, *supra* note 55, Art. 1128.

[93] *See* Canadian Cattlemen for Fair Trade v. United States, Award on Jurisdiction 188-89 (Jan. 28, 2008).

[94] *See* Andrea K. Bjorklund, *NAFTA Chapter 11, in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 465, 517 (Chester Brown ed., 2013) (describing the effect of Article 1128 submissions as "an open question," recalling Mexico's assertion that they qualify as a subsequent agreement or practice under the Vienna Convention, but stating that tribunals "have taken a slightly more cautious view").

state. [134] Unlike Chapter 11, [135] however, the 1994 U.S. Model BIT does not prohibit states parties from imposing such requirements as conditions on the receipt of an advantage, [136] such as tax holidays. [137] In other words, while hosts states could not force investors to accept performance requirements as a condition for making investments, they could pay investors to accept the same conditions. [138] When one views the differing purposes of NAFTA and of BITs, the scaled-back emphasis on performance requirements in BITs makes sense. As part of a treaty that primarily addresses trade in goods, [139] NAFTA' s investment chapter understandably aspires to eliminate performance requirements likely to disrupt trade in goods. [140] By contrast, because BITs only seek to protect foreign investment and make no attempt to regulate trade in goods, the drafters of those instruments limit the emphasis on performance requirements to those areas most likely to disrupt cross-border investment, as opposed to trade in goods. [141]

[*162] Turning to expropriation, the 1994 U.S. Model BIT largely reproduces the substance of the corresponding provisions of Chapter 11, though often stating the relevant principles more concisely. [142] For example, on the measure of compensation, the 1994 U.S. Model BIT used the following, tightly worded paragraph as a replacement for three separate paragraphs in NAFTA's investment chapter:

> Compensation shall be paid without delay; be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken ("the date of expropriation"); and be fully realizable and freely transferable. The fair market value shall not reflect any change in value occurring because the expropriatory action had become known before the date of expropriation. [143]

The 1994 U.S. Model BIT's provisions on expropriation also contain some departures from NAFTA. For example, when discussing exchange rates for compensation, NAFTA's investment chapter distinguishes between G7 currencies and other currencies. [144] By contrast, the 1994 U.S. Model BIT distinguishes between currencies that are "freely usable," and those that are not. [145] Perhaps more significantly, the 1994 U.S. Model BIT omits any mention of valuation criteria, such as "going concern value," [146] which appears in NAFTA and has been regarded as an important recognition of valuation criteria that favor investors. [147]

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[95] NAFTA, *supra* note 55, Art. 1131(2).

[96] Notes of Interpretation of Certain NAFTA Chapter 11 Provisions, July 31, 2001, *available at* http://www.state.gov/documents/organization/38790.pdf (last visited Mar. 21, 2016).

[97] Charles H. Brower II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT'L L. 347, 353-56, 358-63 (2006); Charles H. Brower II, *Mitsubishi, Investor-State Arbitration, and the Law of State Immunity*, 20 AM. U. INT'L L. REV. 907, 925-26 (2005); Charles H. Brower II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 COLUM. J. TRANSNAT'L L. 465, 485-86 (2002).

[98] *Id.*

[99] *See* Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration, in* TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 129, 148 (Malgosia Fitzmaurice et al. eds., 2010) ("This method is efficient but has a serious drawback. . . . It is obvious that a mechanism whereby a party to a dispute is able to influence the outcome of judicial proceedings, by issuing official interpretation to the detriment of the other party, is incompatible with principles of a fair procedure and is hence undesirable.").

[100] NAFTA, *supra* note 55, Arts. 1116(1), 1117(2).

[101] *Compare* 1984 U.S. Model BIT, *supra* note 30, Art. 6(1), *with* NAFTA, *supra* note 55, Arts. 1116(1)(a), 1117(1)(a); *see also* VANDEVELDE, *supra* note 17, at 655.

[102] Waste Mgmt. v. Mexico, ICSID Case No. ARB(AF)/00/3, Award P 73 (Apr. 30, 2004).

[103] *See supra* note 43 and accompanying text.

[104] NAFTA, *supra* note 55, Art. 1135(1).

Rounding out the substantive disciplines, the 1994 U.S. Model BIT mirrors NAFTA's omission of an umbrella clause. [148] As explained below, the United States did not necessarily object to investor-state arbitration of certain disputes involving state contracts. [149] To the contrary, the omission of an umbrella clause appears to reflect the facts that (1) by the mid-1990s, the United States was engaged in a multilateral negotiation relating to the protection of foreign investment, and (2) U.S. negotiators developed a concern that investors and tribunals might come to see umbrella clauses as incorporating obligations under other treaties affecting the protection of foreign investment. [150]

[*163] Concluding with the dispute-settlement provisions of the 1994 U.S. Model BIT, one finds the sharpest departures from NAFTA. Consistent with past BIT practice, [151] the 1994 U.S. Model BIT provides few details on dispute settlement. As in past BITs, [152] the 1994 U.S. Model BIT authorized arbitration of investment claims under the ICSID Convention and the Additional Facility Rules of ICSID. [153] Consistent with NAFTA's investment chapter, [154] the 1994 U.S. Model BIT gives investors the further option of arbitration under the UNCITRAL Rules. [155] Consistent with past U.S. BIT practice (but contrary to NAFTA), [156] the 1994 U.S. Model BIT defines investment disputes to include claims for violations of the BIT, investment agreements with national authorities, and investment authorizations. [157] In other words, investors may seek arbitration not only for alleged treaty violations, but also for violations of certain contractual and regulatory undertakings made by the host state. However, unlike its 1984 counterpart, the 1994 U.S. Model BIT narrowly defines investment agreements only to include written agreements with national authorities that grant "rights with respect to natural resources or other assets controlled by national authorities." [158]

Consistent with past U.S. BIT practice, [159] the 1994 U.S. Model BIT discourages pursuit of local remedies in the sense that initial recourse to "the courts or administrative tribunals" of the host state generally extinguishes the right to demand arbitration of investment disputes. [160] However, partially incorporating one of NAFTA's refinements, [161] the 1994 U.S. Model BIT holds open the possibility for investors to seek certain extraordinary relief from the host state's courts and administrative tribunals before or during the arbitration proceedings. [162] But, whereas NAFTA's

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[105] *Id.* Art. 1135(1)(b).

[106] *Id.* Art. 1134.

[107] *See* Bjorklund, *supra* note 94, at 523 (indicating that NAFTA excludes awards of declaratory relief and specific performance).

[108] NAFTA, *supra* note 55, Art. 1135(3).

[109] VANDEVELDE, *supra* note 17, at 102; Vandevelde, *Comparison, supra* note 28, at 285.

[110] NAFTA, *supra* note 55, chs. 3-8.

[111] *Id.* ch. 10.

[112] *Id.* chs. 12-14.

[113] *Id.* ch. 15.

[114] *Id.* ch. 17.

[115] VANDEVELDE, *supra* note 17, at 103; Vandevelde, *Comparison, supra* note 28, at 285.

[116] *Id.*

[117] *See* VANDEVELDE, *supra* note 17, at 389 (indicating that "the 1994 model gave the U.S. BIT negotiators an opportunity to refine the NAFTA language and to place it in an instrument that addressed solely investment-related issues").

investment chapter permits investors to seek any form of injunctive, declaratory or other extraordinary relief not involving a claim for damages, [163] the 1994 U.S. Model BIT permitted recourse to the host state's courts only for interim injunctive relief and only for the purpose of the preservation of rights and interests pending an award. [164] Consistent with the requirement for investors to elect remedies, the 1994 U.S. Model BIT does not incorporate both of NAFTA's waiting periods for submitting [*164] disputes to arbitration. [165] To the contrary, the 1994 U.S. model BIT only requires a single, three-month pause between the date on which a dispute arises and the date of submission to arbitration. [166]

Also consistent with previous U.S. BIT practice, [167] the 1994 U.S. Model BIT makes no attempt to regulate the arbitration proceedings, to streamline the arbitration process, to assist and to guide tribunals in the elaboration of substantive principles, or to control exposure to liability. Thus, one finds no provisions designating an appointing authority, [168] establishing mechanisms for consolidation of proceedings, [169] establishing a right of submissions by non-disputing states parties, [170] recognizing the power of states parties to adopt binding interpretations, [171] imposing statutes of limitations, [172] or limiting the scope of remedies available in arbitration. [173]

D. *Phase Four: The 2004 U.S. Model BIT*

During the late 1990s and early 2000s, a combination of three factors produced a substantial shift in U.S. BIT practice. First, starting in 1998, a number of Canadian investors brought claims against the United States under NAFTA's investment chapter. [174] Although the United States has a perfect record in defending investment treaty claims, [175] certain claims against the United States [*165] have placed very substantial amounts in controversy. [176] Several cases involved sensitive issues, such as environmental regulation, [177] preservation of sacred places for indigenous peoples, [178] buy-local requirements, [179] and the integrity of state court proceedings. [180] At least one claim had sufficient merit to create a real prospect of liability, [181] though the United States maintained its unblemished record based on a technicality. [182] To the North and South, however, Canada and Mexico lost a handful of high-profile cases during this period. [183] In this context, public discourse came to reflect a sense of

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118 1994 U.S. Model BIT, Art. 1(d), *reprinted in* VANDEVELDE, *supra* note 17, at 817.

119 VANDEVELDE, *supra* note 17, at 121.

120 *Compare* 1984 U.S. Model BIT, *supra* note 30, Art. 1(b), *with* 1994 U.S. Model BIT, *supra* note 118, Art. 1(d).

121 1994 U.S. Model BIT, *supra* note 118, Art. 1(d); *see also* VANDEVELDE, *supra* note 17, at 120 (indicating that changes to the illustrative list do not affect the substance of the definition, "which embraces 'every kind of investment'").

122 VANDEVELDE, *supra* note 17, at 121.

123 *See supra* note 62 and accompanying text.

124 1994 U.S. Model BIT, *supra* note 118, Art. 2(1).

125 *Id.*

126 *Id.* Art. 2(3)(a).

127 *See supra* notes 38, 63 and accompanying text.

128 1994 U.S. Model BIT, *supra* note 118, Art. 2(3)(a).

129 *Id.*

130 *See supra* note 64 and accompanying text.

131 1994 U.S. Model BIT, *supra* note 118, Art. 2(3)(a).

outrage against the use of corporate [*166] claims to challenge the regulatory policies of host states, [184] and the states parties to NAFTA themselves slipped into a state of near panic at the prospect of liability. [185]

While NAFTA represented (and continues to represent) the only source of investment treaty claims against the United States, the MFN provision of NAFTA's investment chapter raised the probability that NAFTA investors would invoke any more favorable provisions in BITs subsequently concluded by the United States. [186] Faced with that sobering possibility (on top of the concerns already raised by NAFTA claims then pending against Canada, Mexico and the United States), the United States initiated a review of its BIT practice and ceased all BIT negotiations as of autumn 1999. [187]

Contemporaneously, a second factor contributed to a substantial shift in U.S. BIT practice. By late 2000, the United States had begun negotiations for FTAs with Singapore and Chile. [188] Because expectations clustered around NAFTA as the benchmark for FTAs with the United States, [189] the investment chapters of the U.S.-Singapore and U.S.-Chile agreements drew heavily from NAFTA's investment chapter. [190] Because the United States quickly opened negotiations for additional FTAs with Australia, Colombia, Morocco, Panama, and Peru, [191] and because their investment chapters tended to follow the same mode1, [192] the United States reached a point where its investment treaty practice seemed likely to split into two distinct branches, with BITs and FTAs having inconsistencies on matters of both substance and procedure. [193] Given the ubiquitous guarantee of MFN treatment, [194] and the enthusiasm of investors to use MFN provisions to access the more favorable provisions of subsequent treaties, [195] U.S. BIT negotiators concluded that the time had come to align BIT practice with the country's faster-moving and more significant FTA practice. [196]

Just as U.S. negotiators resolved to harmonize BIT practice with FTA practice, a third factor came into play. In 2002, Congress adopted the Bipartisan [*167] Trade Promotion Authority Act ("TPA"), which established a number of objectives for U.S. FTA negotiations. [197] These included a stronger commitment to national treatment and a greater emphasis on suppression of performance requirements, [198] as well as instructions to develop clearer

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[132] *See supra* note 67 and accompanying text.

[133] 1994 U.S. Model BIT, *supra* note 118, Art. 6; *see also* VANDEVELDE, *supra* note 17, at 389 (stating that the "list of prohibited performance requirements was considerably lengthened" to include "six categories").

[134] 1994 U.S. Model BIT, *supra* note 118, Art. 6; *see also* VANDEVELDE, *supra* note 17, at 390 (noting that restrictions on local sales "would have the same effect as requiring exports").

[135] *See supra* note 69 and accompanying text.

[136] 1994 U.S. Model BIT, *supra* note 118, Art. 6.

[137] VANDEVELDE, *supra* note 17, at 390.

[138] *Id.*

[139] *See* James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, *86 WASH L. REV. 421, 433 (2011)* (indicating that "NAFTA was primarily intended to liberalize trade in goods"); John H. Knox, *The 2005 Activity of the NAFTA Tribunals*, *100 AM. J. INT'L L. 429, 429 (2006)* (opining that "NAFTA primarily concerns trade in goods and services").

[140] *See* Patricia McKinstry Robin, Comment, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, *33 AM. U. L. REV. 931, 949 n.125 (1984)* ("Some commentators believe that performance requirements are 'the most serious non-tariff distortion to international trade') (quoting THE LABOR-INDUSTRY COALITION FOR INTERNATIONAL TRADE, PERFORMANCE REQUIREMENTS 26 (1981)).

[141] *See* Jose E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT'L L. & *POL. 17*, 29 (2009) (noting that "[o]nly some investment agreements prohibit performance requirements"); *see also* VANDEVELDE, *supra* note 17, at 389 (indicating that "the 1994

linkages between substantive disciplines and U.S. constitutional principles, particularly with respect to expropriation and fair and equitable treatment, [199] so that foreign investors in the United States would not receive more favorable treatment than U.S. investors in the United States. [200]

TPA's negotiating objectives also included certain improvements to investor-state arbitration, such as more expeditious appointment of arbitrators. [201] development of mechanisms to eliminate frivolous claims, [202] exploration of an appellate mechanism to facilitate the development of coherent jurisprudence, [203] a greater commitment to transparency as demonstrated by requirements for timely publication of submissions and decisions, [204] opening hearings to the public, [205] and creation of mechanisms for acceptance of amicus curiae submissions from businesses, unions, and nongovernmental organizations. [206]

Based on the coincidence of circumstances just discussed, the United States adopted a new Model BIT in 2004 that sought to achieve three objectives: (1) to address concerns that had arisen in claims under NAFTA's investment chapter; (2) to eliminate inconsistencies between U.S. BIT and FTA practice; and (3) to satisfy the negotiating objectives established by TPA. [207]

Starting with the definition of investment, the 2004 U.S. Model BIT adopts and refines the all-encompassing formulation used in previous BITs (but not in NAFTA). [208] Thus, it defines investment to mean "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment." [209] Unlike previous texts, the 2004 U.S. Model BIT defines the characteristics of an investment to include "the commitment of capital," "the expectation of gain or profit," and "the assumption of risk." [210] As in previous BITs (but not in NAFTA), [211] the 2004 U.S. Model BIT sets forth an illustrative list of investments [*168] that include familiar examples such as an enterprise, equity interests in an enterprise, debt interests in an enterprise (including long-term loans), certain contracts (including turnkey, construction, and concession agreements), intellectual property rights (now omitting any illustrative examples), certain licenses and permits, as well as tangible and intangible property rights. [212] In addition, the illustrative list includes futures, options and derivatives. [213] By contrast, it expressly excludes "an order or judgment entered in a judicial or administrative action." [214] This new exclusion seems puzzling because

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model gave the U.S. BIT negotiators an opportunity to refine the NAFTA language and to place it in an instrument that addressed solely investment-related issues").

142 *See* VANDEVELDE, *supra* note 17, at 477 ("Numerous changes were made to the language of the expropriation provision, though generally without affecting the substance").

143 1994 U.S. Model BIT, *supra* note 118, Art. 3(2). *Compare id. with* NAFTA, *supra* note 55, Art. 1110(2), (3), (6).

144 NAFTA, *supra* note 55, Art. 1110(4)-(5).

145 1994 U.S. Model BIT, *supra* note 118, Art. 3(3)-(4).

146 *Id.* Art. 3(2).

147 *See supra* note 73 and accompanying text.

148 VANDEVELDE, *supra* note 17, at 261.

149 *See infra* notes 157-58 and accompanying text.

150 VANDEVELDE, *supra* note 17, at 261.

151 *See supra* note 51 and accompanying text.

152 *See supra* note 47 and accompanying text.

153 1994 U.S. Model BIT, *supra* note 118, Art. 9(3)(i)-(ii).

154 *See supra* note 79 and accompanying text.

the 1984 U.S. Model BIT had defined investments to include at least certain claims to money, [215] and if that basic insight remains valid, it seems hard to understand why the merger of a claim into a judgment or order should affect its status as an investment. [216]

Turning to substantive disciplines, the 2004 U.S. Model BIT strengthens the guarantees of national and MFN treatment, as well as the prohibition of performance requirements. Thus, as in NAFTA (but not previous BITs), [217] the 2004 Model U.S. BIT extends the guarantees of national treatment and MFN treatment to both investments *and investors* at virtually every stage of the investment process, including the acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. [218]

Likewise, the 2004 U.S. Model BIT prohibits host states from imposing any of the following as conditions to establishment, acquisition, expansion, management, conduct, operation or sale or other disposition of an investment: requirements to (1) achieve a particular level of export performance; (2) achieve a given level of domestic content; (3) purchase goods or services locally; (4) relate imports to exports; (5) restrict sales of goods or services in the host state; (6) transfer technology for use in the host state; or (7) to supply goods and services to regional and global markets exclusively from the host state. [219] In addition, the 2004 U.S. Model BIT departs from past BIT practice, [220] and more closely approximates NAFTA, [221] by prohibiting states parties from conditioning the receipt of an advantage on requirements to: (1) achieve a given level of domestic content; (2) source goods in the host state; (3) relate the value of imports to the value of exports; or (4) restrict sales of goods to services in the host state. [222]

However, in addressing fair and equitable treatment and expropriation, the 2004 U.S. Model BIT adopts formulations designed to limit the discretion of tribunals, to preserve the regulatory discretion of states parties, and thus to restrict [*169] their exposure to liability. [223] Thus, the 2004 U.S. Model BIT yokes the guarantee of "fair and equitable treatment" back to customary international law, [224] expressly stipulating that the provision "prescribes the customary international law minimum standard of treatment of aliens," [225] does "not require

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[155] 1994 U.S. Model BIT, *supra* note 118, Art. 9(3)(iii).

[156] *See supra* notes 49, 101 and accompanying text.

[157] 1994 U.S. Model BIT, *supra* note 118, Art. 9(1).

[158] *Id.* Art. 1(h); *see also* VANDEVELDE, *supra* note 17, at 591 (explaining that "[n]o sectoral limitations had appeared in prior models").

[159] *See supra* note 50 and accompanying text.

[160] 1994 U.S. Model BIT, *supra* note 118, Art. 9(2)(a), 9(3)(a).

[161] *See supra* note 87 and accompanying text.

[162] 1994 U.S. Model BIT, *supra* note 118, Art. 9(3)(b).

[163] *See supra* note 87 and accompanying text.

[164] 1994 U.S. Model BIT, *supra* note 118, Art. 9(3)(b).

[165] *See supra* notes 82-84 and accompanying text.

[166] 1994 U.S. Model BIT, *supra* note 118, Art. 9(3)(a); see also VANDEVELDE, *supra* note 17, at 592 (noting that the 1994 U.S. Model BIT shortened the cooling-off period from six months to three months, and explaining that the "purpose of this change was to expedite resort to investor-state arbitration").

[167] *See supra* note 51 and accompanying text.

treatment in addition to or beyond" that required by custom, [226] and does not incorporate treaty standards set forth in the BIT or in other international agreements. [227]

In addition, the 2004 U.S. Model BIT includes an annex confirming the understanding that customary international law results from the general and consistent practice of states performed out of a sense of obligation. [228] Factual proof of those elements often places insurmountable burdens on claimants. [229]

However, the 2004 U.S. Model BIT identifies one requirement imposed by the customary international law minimum standard of treatment, and ties it back to U.S. legal principles. Thus, the text recognizes that '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." [230]

[*170] Likewise, while the 2004 U.S. Model BIT includes a provision on expropriation that closely follows its antecedents in NAFTA and the 1994 U.S. Model BIT, [231] the 2004 U.S. Model BIT also includes an annex that confirms certain understandings regarding the scope and definition of expropriations. [232] For example, the annex states that measures cannot constitute expropriations unless they interfere with a "tangible or intangible property right or property interest in an investment." [233] Drafters presumably intended this qualification to forestall arguments that destruction and loss of market share constitute an expropriation. [234] In addition, the annex clarifies that "[e]xcept in rare circumstances, 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." [235] Finally, the annex clarifies that assessments of indirect expropriations involve a "case-by case, fact-based inquiry" that focuses on three factors normally associated with U.S. constitutional jurisprudence on takings. [236] These are: (1) the economic impact of the government action; (2) the extent to which that action interferes with reasonable, investment-backed expectations; and (3) the character of the government action. [237] Application of these factors should tend to increase the probability that claims for indirect expropriation will produce

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[168] *See* Vandevelde, *Comparison, supra* note 28, at 309 (noting that the "1994 model left the method of tribunal formation to the applicable arbitral rules").

[169] *Id.* at 310.

[170] *See id.* at 296-98 (identifying certain provisions that might enhance the opportunities for states parties to express views, or to make determinations, regarding questions of treaty interpretation, and stating that "such provisions have no counterpart in the 1994 model").

[171] *Id.*

[172] *Id.* at 313.

[173] *See id.* at 301 (observing that the "1994 model was silent concerning the remedies that an investor-state tribunal could award").

[174] VANDEVELDE, *supra* note 17, at 64; Vandevelde, *Comparison, supra* note 28, at 285.

[175] VANDEVELDE, *supra* note 17, at 65; Barton Legum, *Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions*, 19 ICSID REv.-FILJ 344, 347 (2004); Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, 24 BERKELEY J. INT'L L. 444, 461 (2006); Yadullah Hussain, *After Keystone XL Rejection, TransCanada Corp Looks to Beef Up U.S. Gulf Coast Presence*, NAT'L POST, Jan. 21, 2016, *available at* http://www.nationalpost.com/after+keystone+rejection+transcanada+corp+looks+beef+gulf+coast+presence/11667851/story.html (last visited Mar. 22, 2016); Lise Johnson,*The 2012 US Model BIT and What Changes (or Lack Thereof) Suggest About Future Investment Treaties*, POL. RISK INS. NEWSL, Nov. 2012, at 1; U.S. Trade Rep., Investor-State Dispute Settlement ISDS, *available at* https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds (last visited Mar. 27, 2016).

results that generally coincide with a range of outcomes that one might expect under U.S. takings jurisprudence. [238]

[*171] Turning to provisions on dispute settlement, one finds continuity in the sense that the 2004 U.S. Model BIT repeats the practice of allowing investors to pursue arbitration under the ICSID Convention, ICSID's Additional Facility Rules, or the UNCITRAL Arbitration Rules for claims alleging a violation of the BIT's substantive disciplines, investment agreements, and investment authorizations. [239] Unlike its predecessor, [240] however, the 2004 U.S. Model BIT defines investment agreements more broadly to include written undertakings that grant rights in three economic sectors: (1) natural resources that the government controls; (2) supply of public services such as power, water or telecommunications on behalf of the host state; and (3) infrastructure projects such as construction of roads, bridges, canals, dams or pipelines that are not exclusively or primarily for government use. [241]

Moving beyond the general undertaking to arbitrate investment disputes, the 2004 U.S. Model BIT's dispute settlement provisions reflect a dramatic shift in U.S. BIT practice, [242] as well as the reason why the 2004 U.S. Model BIT triples in length when compared to the 1994 U.S. Model BIT. [243] Simply put, whereas previous U.S. Model BITs had barely sought to regulate the arbitration process, [244] the 2004 U.S. Model BIT incorporated most of NAFTA's procedural refinements, [245] as well as those identified by Congress as negotiating objectives in TpA. [246] Thus, the 2004 U.S. Model BIT includes refinements designed to encourage the pursuit of alternative remedies and local remedies, to streamline the arbitration process, to enhance transparency, to guide and to regulate the arbitrators' decisions, and to limit the host state's exposure to liability.

Like NAFTA, [247] the 2004 U.S. Model BIT includes a number of provisions designed to encourage the pursuit of alternative dispute settlement and local remedies. In this context, the 2004 U.S. Model BIT includes a new provision admonishing (but not requiring) investors to seek resolution of investment disputes through consultation and negotiation. [248] To facilitate consultation and negotiation, the 2004 U.S. Model BIT adopts two waiting periods drawn from [*172] NAFTA' s investment chapter. [249] First, before submitting claims to arbitration, investors must

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[176] *See* Statement of Claim, Methanex Corp. v. United States at 13 (Dec. 3, 1999) (seeking $ 970 million in damages); Notice of Claim, Loewen Group, Inc. v. United States P 187 (Oct. 30, 1998), *available at* *http://www.state.gov/documents/organization/3922.pdf* (last visited Mar. 22, 2016) (seeking $ 750 million in damages).

[177] Methanex Corp. v. United States, Final Award on Jurisdiction and Merits (Aug. 3, 2005), *available at* *http://www.state.gov/documents/organization/51052.pdf* (last visited Mar. 22, 2016).

[178] Glamis Gold Ltd. v. United States, Award (June 8, 2009), *available at* *http://www.state.gov/documents/organization/125798.pdf* (last visited Mar. 22, 2016).

[179] ADF Group, Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), *available at* *http://www.state.gov/documents/organization/16586.pdf* (last visited Mar. 22, 2016).

[180] Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), *available at* *http://www.state.gov/documents/organization/22094.pdf* (last visited Mar. 22, 2016); Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award (Oct. 12, 2002),*available at* *http://www.state.gov/documents/organization/14442.pdf* (Mar. 22, 2016).

[181] *See Loewen, supra* note 180, PP 119, 137 (finding that "by any standard of measurement," a trial conducted by a Mississippi state court was a "disgrace" that also violated the minimum standard of treatment required by customary international law).

[182] *See id.* PP 217, 237 (dismissing the case because the investor did not exhaust judicial remedies by filing a petition for certiorari with the United States Supreme Court, and because the Canadian investor went into bankruptcy and reorganized as a U.S. company, thereby losing the Canadian nationality that gave it standing to assert claims against the United States under NAFTA' s investment chapter).

wait for six months following the events said to give rise to their claims. [250] Second, they must give written notice of intent to bring claims 90 days before actually submitting their claims to arbitration. [251]

Like NAFTA, [252] the 2004 U.S. Model BIT also encourages pursuit of local remedies by allowing investors to have first recourse to the host state's courts or administrative tribunals and then, to pursue arbitration, provided that they waive in writing the right to continue any other dispute settlement processes relating to the measure(s) alleged to violate the treaty, investment agreement or investment authorization. [253] Like NAFTA, the 2004 U.S. Model BIT further encourages pursuit of local remedies by exempting from the waiver proceedings seeking certain extraordinary relief from the host state's judicial and administrative tribunals. [254] However, unlike NAFTA, the 2004 U.S. Model BIT does not permit the continuation of local actions seeking declaratory or permanent injunctive relief against the host state. [255] To the contrary, it only permits actions that seek interim injunctive relief, not involving the payment of damages, and only for the purpose of preserving rights and interests during the pendency of the arbitral proceedings. [256]

Turning to provisions designed to streamline the arbitration process, the 2004 U.S. Model BIT includes a new requirement for investors to identify their party-appointed arbitrators when submitting notices of arbitration. [257] Like NAFTA, [258] the 2004 U.S. Model BIT designates the Secretary-General of ICSID as the [*173] appointing authority for arbitration proceedings. [259] However, whereas NAFTA had empowered the incumbent to fill vacancies remaining 90 days after submission of a claim to arbitration, [260] the 2004 U.S. Model BIT reduces that time period to 75 days. [261]

As under NAFTA, [262] the 2004 U.S. Model BIT permits consolidation of two or more arbitrations having a common question of law or fact. [263] However, the 2004 U.S. Model BIT adds a requirement that the consolidated claims "arise out of the same events or circumstances." [264] Like NAFTA, [265] the 2004 U.S. Model BIT requires disputing parties to submit requests for consolidation to the Secretary-General of ICSID. [266] However, the 2004 U.S. Model BIT gives the incumbent 30 days to deny a "manifestly unfounded" request for consolidation. [267] As under NAFTA,

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[183] S.D. Myers, Inc. v. Canada, Second Partial Award (Oct. 21, 2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/myers-review-02.pdf (last visited Mar. 22, 2016); Pope & Talbot, Inc. v. Canada, Award in Respect of Damages (May 31, 2002),*available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/pope-phase-36.pdf (last visited Mar. 22, 2016); Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16. 2002), http://www.italaw.com/sites/default/files/case-documents/ita0319.pdf (last visited Mar. 23, 2016); Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000),*available at* http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf (last visited Mar. 23, 2016).

[184] Charles H. Brower II, *Corporations as Plaintiffs Under International Law: Three Narratives About Investment Treaties*, 9 SANTA CLARA J. INT'L L. 179, 205-08 (2011) [hereinafter Brower, *Corporations*]; Charles H. Brower II, *Investor-State Disputes Under NAFTA: Initial Thoughts About Second-Generation Rights*, 36 VAND. J. TRANSNAT'L L. 1533, 1553-54 (2003).

[185] Brower, *Corporations, supra* note 184, at 191.

[186] VANDEVELDE, *supra* note 17, at 72; Vandevelde, *Comparison, supra* note 28, at 286.

[187] Vandevelde, *Comparison, supra* note 28, at 286.

[188] VANDEVELDE, *supra* note 17, at 66; Vandevelde, *Comparison, supra* note 28, at 286.

[189] *Id.*

[190] Vandevelde, *Comparison, supra* note 28, at 286.

[191] *See* VANDEVELDE, *supra* note 17, at 79-80.

[192] *Id.* at 66.

[268] consolidation tribunals operate under the UNCITRAL Arbitration Rules. [269] However, unlike NAFTA, [270] the 2004 U.S. Model BIT contemplates that the claimants (collectively) and the host state will each have the opportunity to appoint one member of the consolidation tribunal. [271]

Consistent with the negotiating objectives set forth in TPA, [272] the 2004 U.S. Model BIT also streamlines the arbitration process by giving respondent states the right to seek preliminary determinations that claims either fail as a matter of lavv, [273] or do not fall within the tribunal's competence. [274] An application on either ground suspends proceedings on the merits. [275] For expedited applications involving either of the preliminary determinations just mentioned, tribunals generally have 150 days to issue their decisions. [276]

Perhaps bridging the topics of streamlining and transparency, the 2004 U.S. Model BIT gives the disputing parties a right to insist that tribunals circulate drafts of decisions or awards on liability, in which case the disputing parties [*174] receive 60 days to comment on "any aspect of the proposed decision or award," and tribunals receive an additional 45 days following expiration of the comment period to issue their decisions or awards in final form. [277]

Turning to provisions that tend to promote transparency, consistent with the negotiating goals set forth in TPA, [278] the 2004 U.S. Model BIT authorizes tribunals to accept amicus curiae submissions, although it does not identify any criteria for accepting or rejecting such submissions. [279] Also consistent with the negotiating objectives set forth in TPA, [280] the 2004 U.S. Model BIT requires respondent states to make key documents available to the public in every proceeding. [281] These include the notice of intent, the notice of arbitration, pleadings, memorials, briefs, amicus submissions, submissions by non-disputing states parties, transcripts of hearings, as well as orders, awards and decisions of the tribunal. [282] The 2004 U.S. Model BIT further requires tribunals to conduct public hearings. [283]

Turning to provisions that empower states parties to assist and to guide tribunals in the elaboration of norms, the 2004 U.S. Model BIT gives the non-disputing state party a right to make submissions regarding the interpretation of

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193 *Id.* at 72; Vandevelde, *Comparison, supra* note 28, at 286.

194 NEWCOMBE & PARADELL, *supra* note 17, at 201; SALACUSE, *supra* note 35, at 251.

195 VANDEVELDE, *supra* note 17, at 72; Vandevelde, *Comparison, supra* note 28, at 286.

196 VANDEVELDE, *supra* note 17, at 72; Vandevelde, *Comparison, supra* note 28, at 286-87.

197 19 U.S.C. § 3802(b)(3); VANDEVELDE, *supra* note 17, at 70-71; Vandevelde, *Comparison, supra* note 28, at 286.

198 19 U.S.C. § 3802(b)(3)(A), (C).

199 *Id.* § 3802(b)(3)(D)-(E).

200 *Id.* § 3802(b)(3).

201 *Id.* § 3802(b)(3)(G)(ii).

202 *Id.* § 3802(b)(3)(G)(i).

203 *Id.* § 3802(b)(3)(G)(iv).

204 *Id.* § 3802(b)(3)(H)(ii)(I).

205 *Id.* § 3802(b)(3)(H)(ii)(II).

206 *Id.* § 3802(b)(3)(H)(iii).

207 Vandevelde, *Comparison, supra* note 28, at 287-88.

the BIT. [284] In a slight departure from NAFTA, the 2004 U.S. Model BIT expressly specifies that this includes the right to make both written and oral submissions. [285] As under NAFTA's investment chapter, [286] the states parties have the right to adopt binding understandings of BIT provisions. [287] However, in another departure from NAFTA, the formulation of the 2004 U.S. Model BIT leaves no room for tribunals or observers to question whether the states parties have exceeded the legitimate scope of interpretation. [288] Thus, the 2004 U.S. Model BIT provides that a "*joint decision* of the [states parties] . . . *declaring their interpretation*. . . shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that *joint decision*." [289]

Like NAFTA, the 2004 U.S. Model BIT includes a handful of provisions designed to limit the states parties' exposure to liability. First, as under NAFTA, [290] the 2004 U.S. Model BIT adopts a three-year statute of limitations. [291] [*175] Unlike NAFTA, the 2004 U.S. Model BIT expressly designates timely submission of claims as a condition on consent to arbitration. [292] Second, as under NAFTA, [293] the 2004 U.S. Model BIT limits tribunals to awarding monetary damages or restitution. [294] In the event that tribunals award restitution, they must give states parties the option of paying monetary damages in lieu of restitution. [295] Thus, tribunals have no power to enjoin treaty violations, [296] or to declare that states must withdraw offending measures. As in NAFTA, [297] the 2004 U.S. Model BIT excludes awards of punitive damages even for the most egregious treaty violations. [298] Also as in NAFTA, the 2004 U.S. Model BIT affirms that the limitation on remedies does not affect the power of tribunals to award costs and fees in accordance with the applicable arbitration rules. [299]

Following a lengthy interagency process and public consultations that began in 2009, the United States adopted a new Model BIT in 2012. [300] While introducing new requirements with respect to transparency in the promulgation and application of regulations by host states, [301] and in the host state's enforcement of its own environmental and labor laws, [302] the 2012 U.S. Model BIT only provides for state-to-state dispute settlement of controversies regarding [*176] obligations with respect to transparency. [303] For disputes involving obligations with respect to the enforcement of environmental and labor laws, the 2012 U.S. Model BIT only provides for state-to-state consultations. [304] With respect to the definition of covered investments, the 2012 US. Model BIT clarifies that a

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[208] *See supra* notes 36, 60, 118, and accompanying text.

[209] 2004 U.S. Model BIT, *reprinted in* VANDEVELDE, *supra* note 17, at 826.

[210] *Id.*

[211] *See supra* notes 37, 60-61, 118, and accompanying text.

[212] 2004 U.S. Model BIT, *supra* note 209, Art. 1.

[213] *Id.*

[214] *Id.* n.3.

[215] *See supra* note 37 and accompanying text.

[216] VANDEVELDE, *supra* note 17, at 124.

[217] *See supra* notes 38, 62, 123-24 and accompanying text.

[218] 2004 U.S. Model BIT, *supra* note 209, Arts. 3(1)-(2), 4(1)-(2).

[219] *Id.* Art. 8(1).

[220] *See supra* notes 39, 136-37 and accompanying text.

[221] *See supra* note 69 and accompanying text.

[222] 2004 U.S. Model BIT, *supra* note 209, Art. 8(2).

state's territory includes its territorial sea, as well as areas of the high seas where it can exercise jurisdiction under customary international law. [305] Originally drawn from NAFTA, [306] the substance of this definition already appeared in several U.S. FTAs, [307] and may be particularly useful for protection of investments in offshore oil and gas projects. [308] With respect to substantive disciplines, the 2012 U.S. Model BIT adds almost no refinements, [309] except a slight expansion of the [*177] prohibition on performance requirements to include those that require the use of local technology. [310] The dispute-settlement provisions in the 2012 U.S. Model BIT do not include any substantial changes. [311] Given the exceedingly small number of changes, observers generally do not regard the 2012 U.S. Model BIT as representing a new or separate phase in the development of U.S. investment treaty practice. [312]

II. TRANS-PACIFIC PARTNERSHIP

In October 2015, the United States concluded negotiations on TPP with eleven other Pacific Rim states, namely Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. [313] Collectively, the twelve states parties to TPP account for one-third of global trade, [314] 40% of global GDP, [315] and over a trillion dollars in cross-border investment. [316] As of 2011, annual outward flows of foreign direct investment ("FDI") from the United States to other TPP states totaled $ 83 billion, whereas inward flows of FDI from [*178] other TPP states to the United States totaled $ 61 billion. [317] The total existing stock of outward FDI from the United States to other TPP states amounted to $ 843 billion, whereas the existing stock of inward FDI from other TPP states to the United States amounted to $ 596 billion. [318]

Upon ratification and entry into force, TPP will liberalize trade by removing barriers to trade in goods. [319] In addition to a chapter generally dealing with trade in goods, [320] TPP has separate chapters on rules of origin, [321] textiles and apparel, [322] customs administration, [323] and trade remedies (such as antidumping duties and countervailing duties). [324] TPP also has separate chapters on particular non-tariff barriers, including sanitary and phytosanitary measures, [325] as well as technical barriers to trade. [326] Looking beyond trade in goods, TPP has

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[223] *See* Vandevelde, *Comparison, supra* note 28, at 288 (identifying the reduction of tribunal discretion and the preservation of regulatory discretion for states parties as two of the main objectives served by most changes appearing in the 2004 U.S. Model BIT).

[224] *Compare* NAFTA Art. 1105(1), *with* 2004 U.S. Model BIT, *supra* note 209, Art. 5(1).

[225] 2004 U.S. Model BIT, *supra* note 209, Art. 5(2).

[226] *Id.*

[227] *Id.* Art. 5(3).

[228] *Id* Annex A.

[229] One tribunal candidly described the difficulties of proving changes in customary international law:

> 602. The Tribunal acknowledges that it is *difficult* to establish a change in customary international law. As Respondent explains, establishment of a rule of customary international law requires: (1) "a concordant practice of a number of States acquiesced in by others," and (2) "a conception that the practice is required by or consistent with the prevailing law (opinio juris)."
>
> 603. The evidence of such "concordant practice" undertaken out of a sense of legal obligation is exhibited in *very few authoritative sources*: treaty ratification language, statements of governments, treaty practice (e.g., Model BITs), and sometimes pleadings. Although one can readily identify the practice of States, it is usually *very difficult* to determine the intent behind those actions. Looking to a claimant to ascertain custom requires it to ascertain such intent, *a complicated and particularly difficult task*. In the context of arbitration, however, it is necessarily Claimant's place to establish a change in custom.

chapters relating to other forms of cross-border economic relations, including investment, [327] [*179] services, [328] financial services, [329] telecommunications, [330] and electronic commerce. [331]

TPP also includes separate chapters on cross-cutting topics like temporary entry for business persons, [332] government procurement, [333] regulation of state-owned enterprises, [334] and protection of intellectual property. [335] Likewise, TPP includes chapters on important social policies, including protection of labor and the environment, [336] as well as the promotion of regulatory transparency, [337] all of which impose binding obligations subject to enforcement through state-to-state dispute settlement. [338] TPP also addresses other social policies like anticorruption laws, [339] competition laws, [340] and principles of regulatory coherence, [341] but only contemplates state-to-state consultations for controversies regarding the implementation of those norms. [342]

Finally, TPP incorporates a number of chapters that seek to facilitate implementation by states parties in a diligent and cooperative manner that also show particular sensitivity to the interests of smaller stakeholders, including smaller states parties and commercial enterprises. Thus, one finds chapters on cooperation and capacity building, [343] development, [344] small and medium-sized businesses, [345] as well as chapters requiring periodic review of the effects of TPP on regional and national competitiveness, [346] periodic reporting on the implementation of norms during negotiated transition periods, [347] and binding dispute settlement through state-to-state arbitration for controversies regarding most undertakings other than TPP's investment chapter, [348] for which investor-state arbitration represents the primary mode of dispute settlement. [349] [*180] Focusing on TPP's investment chapter, one finds an exceedingly close resemblance to the 2004 U.S. Model BIT. In fact, the extent of the resemblance makes it possible to describe TPP's investment chapter by identifying the relatively minor ways in which it departs from the 2004 U.S. Model BIT. With respect to the definition of investment, TPP does not depart from the text of the 2004 U.S. Model BIT. [350]

Glamis Gold Ltd. v. United States, Award PP 602-03 (June 8, 2009) (emphasis added), *available at* http://www.state.gov/documents/organization/125798.pdf (last visited Mar. 22, 2016).

[230] *See* 2004 U.S. Model BIT, *supra* note 209, Art. 5(2)(a). As mentioned above, in adopting TPA, Congress made it a negotiating objective to tie fair and equitable treatment back to U.S. legal principles, including the constitutional requirement of due process. *See supra* note 199 and accompanying text; *see also* 19 U.S.C. § 3802(b)(3)(E) (calling on negotiators to "establish standards for fair and equitable treatment consistent with United States legal principles and practice, including the principle of due process").

[231] 2004 U.S. Model BIT, *supra* note 209, Art. 6; *see also supra* notes 72, 142-43 and accompanying text.

[232] 2004 U.S. Model BIT, *supra* note 209, Annex B.

[233] *Id.* Annex B(2).

[234] *See* VANDEVELDE, *supra* note 17, at 481 ("This language was inserted in reaction to *Pope & Talbot v. Canada, S.D. Myers v. Canada*, and *Methanex v. United State[s]*, where it had been argued that regulations reducing or eliminating market share could constitute an expropriation"); Vandevelde, *Comparison, supra* note 28, at 293 ("This language was intended to foreclose arguments that certain types of interests in which no property rights exist, such as market share, could be expropriated"). As also mentioned above, the United States has argued that NAFTA's investment chapter did not guard against expropriation of goodwill inasmuch as goodwill does not constitute a property interest. *See supra* note 61.

[235] 2004 U.S. Model BIT, *supra* note 209, Annex B(4)(b).

[236] *Id.* Annex B(4)(a); *see also* Penn. Central Transp. Co. v. N.Y. City, 438 U.S. 104, 124 (1978) (identifying three factors that have "particular significance" in U.S. constitutional jurisprudence on takings).

[237] *Id*

Turning to substantive disciplines, TPP includes only a handful of refinements. First, with respect to national treatment and MFN treatment, TPP clarifies that a determination of whether comparators are "in like circumstances" depends on "the totality of circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives." [351] While novel as an express treaty provision, this codifies views widely held by tribunals and observers. [352] "For greater certainty," TPP also declares that the guarantee of MFN treatment "does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B" of TPP's investment chapter. [353]

[*181] Second, with respect to the minimum standard of treatment, TPP clarifies that the application of measures inconsistent with investors' expectations does not by itself constitute a denial of fair and equitable treatment. [354] While not absolutely clear, this provision appears to suggest that states do not attract liability merely for disappointing the subjective expectations of investors. [355] Observers have opined that this provision may still hold open the possibility that states incur liability by violating expectations tied to specific assurances relied on by investors when making investments in the host state. [356] TPP also clarifies that the "mere fact" that a state fails to issue or renew a subsidy or grant does not violate the minimum standard of treatment. [357] Of course, the failure to issue or to renew a subsidy or grant in violation of positive assurances might support the opposite conclusion. [358]

Third, with respect to expropriation, TPP similarly clarifies that the decision not to issue or to renew a grant or subsidy does not constitute an expropriation, provided that the state has not made any specific commitment under law or contract to do so, or provided that the state acts in accordance with any terms or conditions attached to the subsidy or grant. [359] In addition, with respect to indirect takings, TPP clarifies that an assessment of interference with the investor's reasonable investment-backed expectations must take into account the extent to which the state has provided binding written assurances, as well as the general nature and extent of government regulation (or potential for government regulation) in the relevant industry. [360] Finally, when emphasizing the point that [*182] non-discriminatory public health regulations rarely constitute indirect expropriations, TPP clarifies that such measures include the regulation, pricing, supply of, and reimbursement for pharmaceuticals, diagnostics, vaccines,

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[238] *See* VANDEVELDE, *supra* note 17, at 482 (observing that the use of Supreme Court precedent helped to advance two negotiating objectives set forth in TPA, namely (1) ensuring that foreign investors in the United States would not receive greater substantive rights than U.S. investors in the United States; and (2) ensuring that U.S. investors abroad would enjoy the same sorts of substantive rights that they have under the U.S. Constitution).

[239] 2004 U.S. Model BIT, *supra* note 209, Art. 24(1), (3).

[240] *See supra* note 158 and accompanying text.

[241] 2004 U.S. Model BIT, *supra* note 209, Art. 1.

[242] *See* VANDEVELDE, *supra* note 17, at 595 ("The 2004 model features a massive revision of the investor-state disputes provision").

[243] *Compare* 1994 U.S. Model BIT, *supra* note 118 (encompassing 15 articles and eight pages of text), *with* 2004 U.S. Model BIT, *supra* note 209 (encompassing 37 articles and 30 pages of text); *see also* VANDEVELDE, *supra* note 17, at 112 (explaining that "[m]ost of the additional length. . . resulted from the inclusion of new language relating to investor-state dispute resolution").

[244] *See supra* notes 51, 168-73 and accompanying text.

[245] *See supra* notes 82-108 and accompanying text.

[246] *See supra* notes 201-06 and accompanying text.

[247] *See supra* notes 82-87 and accompanying text.

[248] 2004 U.S. Model BIT, *supra* note 209, Art. 23.

[249] *See supra* notes 82-83 and accompanying text.

medical devices, gene therapies and technologies, health-related aids and appliances, as well as blood and blood-related products. [361]

Fourth and finally, TPP prohibits two types of performance requirements not mentioned in the 2004 U.S. Model BIT: (1) those that require the use of local technologies or that prevent the purchase and use of particular technologies; [362] and (2) those that require the adoption of a given rate or amount of royalty under a license agreement, or that require a given duration for a license agreement. [363]

Turning to provisions on dispute settlement, TPP generally follows the 2004 U.S. Model BIT. Thus, investors have the right to seek arbitration of investment disputes under the ICSID Convention, the Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other arbitration rules agreed by the disputing parties. [364] Like the 2004 U.S. Model BIT, [365] TPP defines investment disputes to include claims alleging violations of certain TPP provisions, investment agreements, and investment authorizations. [366] However, TPP qualifies both the definition of investment agreements and the circumstances under which investors can demand arbitration of disputes arising under investment agreements. Like the 2004 U.S. Model BIT, [367] TPP limits the definition of investment agreements to three economic sectors: (1) exploitation of natural resources that a national authority controls; (2) supply of public utility services on behalf of a state party; and (3) implementation of public infrastructure projects. [368] But TPP refines the definition of relevant natural resources to include oil, gas, rare earth minerals, timber, gold, iron ore, and similar resources, but not land, water, or radio spectrum. [369] Also, TPP refines the definition of public services to exclude correctional services, healthcare services, education services, childcare services, welfare services, and other similar social services. [370]

For controversies arising under investment agreements, TPP excludes the possibility of arbitration under the treaty if investment agreements already provide for arbitration under the ICSID Convention, the Additional Facility Rules, the UNCITRAL Arbitration Rules, the ICC Arbitration Rules or the LCIA Arbitration Rules. [371] For the exclusion to apply to arbitrations not conducted under the IC SID Convention, however, the investment agreement must also

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[250] 2004 U.S. Model BIT, *supra* note 209, Art. 24(3).

[251] *Id.* Art. 24(2).

[252] *See supra* note 86 and accompanying text.

[253] 2004 U.S. Model BIT, *supra* note 209, Art. 26(2); *see also* VANDEVELDE, *supra* note 17, at 604-05 (emphasizing that the 2004 U.S. Model BIT seeks to remove disincentives to submit investment disputes to local remedies in the first instance); Vandevelde, *Comparison, supra* note 28, at 312 (describing this aspect of the 2004 U.S. Model BIT as something that "encourages investors to submit disputes to local courts").

[254] *Compare* NAFTA, *supra* note 55, Art. 1121(1)(b), (2)(b), *with* 2004 U.S. Model BIT, *supra* note 209, Art. 26(3).

[255] *Id.*

[256] 2004 U.S. Model BIT, *supra* note 209, Art. 26(3).

[257] *Id.* Art. 24(6)(a). This provision may have three virtues: (1) accelerating formation of the tribunal; (2) preventing gamesmanship by claimants who commence proceedings but wait to nominate their arbitrators until the deadline for tribunal formation, thereby denying the host state a reasonable time to make a responsive appointment; and (3) preventing gamesmanship by claimants who commence proceedings in order to toll statutes of limitations, but fail to designate an arbitrator, thereby avoiding the need to pursue the claim expeditiously. VANDEVELDE, *supra* note 17, at 602-03; *see also* Vandevelde, *Comparison, supra* note 28, at 308 (observing that the provision "was expected to expedite tribunal formation").

[258] *See supra* note 88 and accompanying text.

[259] 2004 U.S. Model BIT, *supra* note 209, Art. 27(2).

[260] *See supra* note 88 and accompanying text.

designate a state party [*183] to the New York Convention other than the host state as the legal place of arbitration. [372] Thus, if the investment agreement does not provide for arbitration, *or* provides for arbitration under a set of rules not mentioned above, *or* provides for arbitration on the territory of the host state, investors can arbitrate disputes involving investment agreements under TPP. [373] But if investors bring claims for violations of investment agreements or investment authorizations, TPP expressly authorizes states to bring counterclaims. [374]

With respect to provisions designed to encourage the pursuit of alternative dispute settlement and local remedies, TPP incorporates two departures from the 2004 U.S. Model BIT. Starting with alternative dispute settlement, TPP includes a provision that now *requires* investors to seek consultations with the respondent state and prevents the submission of claims to arbitration until six months after the host state has received a request for consultations. [375] Turning to the pursuit of local remedies, the 2004 U.S. Model BIT encouraged investors to pursue local remedies by allowing them to have first recourse to the host state's judicial and administrative tribunals, but still permitting them to change course and submit their claims to investor-state arbitration. [376] Under TPP, however, investors with treaty claims against Chile, Mexico, Peru and Vietnam will not have that option. [377] They will have to make a definitive and exclusive election between local remedies or investor-state arbitration for such claims. [378] Given that choice, TPP likely will have the effect of discouraging investors even from experimenting with local remedies for treaty claims against those four states. [379]

For provisions designed to streamline or improve the arbitration process, TPP includes only a couple of minor refinements. These include a requirement that, when exercising their powers to appoint arbitrators, disputing parties and the Secretary-General of ICSID take into account the expertise of potential candidates with respect to the governing law. [380] In addition, the states parties undertake to [*184] provide guidance on a code of conduct for arbitrators, as well as guidance on the application of rules and guidelines on conflicts of interest for arbitrators before TPP's entry into force. [381]

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[261] 2004 U.S. Model BIT, *supra* note 209, Art. 27(3).

[262] *See supra* note 89 and accompanying text.

[263] 2004 U.S. Model BIT, *supra* note 209, Art. 33(1).

[264] *Id.*

[265] *See supra* note 90 and accompanying text.

[266] 2004 U.S. Model BIT, *supra* note 209, Art. 33(2).

[267] *Id.* Art. 33(3).

[268] *See supra* note 91 and accompanying text.

[269] 2004 U.S. Model BIT, *supra* note 209, Art. 33(8).

[270] *See supra* note 91 and accompanying text.

[271] 2004 U.S. Model BIT, *supra* note 209, Art. 33(4).

[272] *See supra* note 202 and accompanying text

[273] 2004 U.S. Model BIT, *supra* note 209, Art. 28(4).

[274] *Id.* Art. 28(5).

[275] *Id.* Art. 28(4)(b), (5).

In its provisions on transparency, TPP departs from the 2004 U.S. Model BIT only by providing explicit standards for the consideration of amicus submissions. [382] Thus, amicus submissions should address a question of fact or law falling within the scope of the dispute, should assist the tribunal in evaluating the submissions of the disputing parties, and should come from a person or entity that has a "significant interest" in the arbitral proceedings. [383] In addition, TPP identifies certain formal requirements for amicus submissions, including identification of the author, disclosure of any affiliation with a disputing party, and identification of any source of assistance in preparing the submission. [384] Further, submissions must be in the language of the proceedings, and comply with any deadlines and page limits set by the tribunal. [385] Finally, the disputing parties must have an opportunity to respond to amicus submissions, and the tribunal must ensure that the submissions do not disrupt the proceedings, unduly burden the proceedings, or unfairly prejudice any disputing party. [386] While not mentioned in the 2004 U.S. Model BIT, [387] these requirements generally coincide with existing best practices. [388]

While TPP includes no new provisions designed to guide or assist tribunals in the elaboration of norms, it includes a number of new or substantially revised provisions designed to limit the liability of states parties. First, consistent with the 2004 U.S. Model BIT and other U.S. investment treaties, [389] TPP includes a statute of limitations. [390] However, TPP extends the time limit to three years and six months from the date on which the claimant acquired, or should have acquired, knowledge of breach and damage. [391] While the extended time seems calculated to ensure that TPP's introduction of a six-month consultations requirement does not [*185] prejudice claimants, [392] the provision also delays by six months the point at which states may close their books on liability.

In another subtle limitation on liability, TPP includes a provision emphasizing the burden of proof, particularly in regard to claims sounding in the minimum standard of treatment. [393] As mentioned above, the 2004 U.S. Model BIT yoked fair and equitable treatment to customary international law and, in an annex, further defined customary international law in terms of a consistent and generalized state practice performed out of a sense of legal obligation. [394] However, the 2004 U.S. Model BIT did not specify that claimants had to prove the existence of such elements

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[276] *Id.* Art. 28(5). If a disputing party requests a hearing on the application, the tribunal may take another 30 days to issue its decision. *Id.* Upon a showing of "extraordinary cause," a tribunal may extend the time for its decision by "an additional brief period" not to exceed 30 days. *Id.*

[277] *Id.* Art. 28(9)(a).

[278] *See supra* note 206 and accompanying text.

[279] 2004 U.S. Model BIT, *supra* note 209, Art. 28(3).

[280] *See supra* note 204 and accompanying text.

[281] 2004 U.S. Model BIT, *supra* note 209, Art. 29(1).

[282] *Id.*

[283] *Id.* Art. 29(2).

[284] *Id.* Art. 28(2).

[285] *Id*

[286] *See supra* notes 95-99 and accompanying text.

[287] 2004 U.S. Model BIT, *supra* note 209, Art. 30(3).

[288] *Compare supra* note 95 and accompanying text.

[289] 2004 U.S. Model BIT, *supra* note 209, Art. 30(3) (emphasis added).

as matters of *fact* in every case. Instead, claimants might arguably rely on the declarations of tribunals and courts to the effect that certain principles had gained the status of customary international law. [395]

By contrast, TPP includes a provision to the effect that investors who bring claims under TPP's investment chapter have "the burden of proving all elements of [their] claims, consistent with general principles of international law applicable to international arbitration." [396] In addition, TPP emphasizes that this burden applies to claims involving the minimum standard of treatment. [397] Evidently, the provision endorses the approach taken in *Glamis Gold v. United States*, where the tribunal demanded factual proof of consistent and generalized state practice, where the tribunal recognized that this placed a very high burden on investors to establish their claims for violation of the minimum standard, and where the tribunal held that the investor had not proven any decisive shift in state practice since the 1920s, when the minimum standard of treatment only forbade host states from subjecting aliens to egregious, outrageous or shocking government conduct. [398]

In addition, TPP includes two potentially significant limitations on damages. First, TPP provides that an investor "may recover only for loss or damage that it [*186] has incurred in its capacity as an investor of a Party." [399] This appears to represent the expansion of a concept introduced for expropriation claims in the 2004 U.S. Model BIT. As mentioned above, the 2004 U.S. Model BIT clarified that the host state's actions cannot constitute expropriations unless they interfere with a "tangible or intangible property right or other property interest in an investment." [400] Observers regard this provision as an effort to neutralize claims that states had expropriated things like export markets or export market share, which arguably did not constitute property rights and, in any case, involved "trade" losses as opposed to "investment" losses. [401] Likewise, TPP's new limitation on damages seems designed to neutralize claims for loss of export markets or other "trade" losses, even for claims not sounding in expropriation. Arguably, this provision could have changed the outcome in cases like *S.D. Myers, Inc. v. Canada*, where a U.S. investor prevailed on claims that Canada's ban on cross-border transportation of PCBs violated the guarantees of national treatment and MFN treatment because it operated in a discriminatory manner and impaired the value of

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[290] *See supra* note 100 and accompanying text.

[291] 2004 U.S. Model BIT, *supra* note 209, Art. 26(1).

[292] *Compare* NAFTA, *supra* note 55, Arts. 1116(2), 1117(2), *with* 2004 U.S. Model BIT, *supra* note 209, Art. 26(1).

[293] *See supra* notes 104-05 and accompanying text.

[294] 2004 U.S. Model BIT, *supra* note 209, Art. 34(1).

[295] *Id.* Art. 34(1)(b).

[296] *Id.* Art. 28(8).

[297] *See supra* note 108 and accompanying text.

[298] 2004 U.S. Model BIT, *supra* note 209, Art. 34(3).

[299] *Compare* NAFTA, *supra* note 55, Art. 1135(1), *with* 2004 U.S. Model BIT, *supra* note 209, Art. 34(1).

[300] *See* 2012 U.S. Model Bilateral Investment Treaty, *available at* http://www.state.gov/documents/organization/188371.pdf (last visited Mar. 25, 2016) [hereinafter 2012 U.S. Model BIT];*see also* Lee M. Caplan & Jeremy Sharpe, *United States, in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755, 755 (Chester Brown ed., 2013) ("The instrument is the product of extensive deliberations within the U.S. Government and outreach to Congress and civil society that began in 2009"); John R. Crook, *United States Adopts a New Bilateral Investment Treaty*, 106 AM. J. INT'L L. 662, 663 (2012) (quoting U.S. Dep't of State Press Release No. P2012/611, United States Concludes Review of Model Bilateral Investment Treaty (Apr. 20, 2012), *available at* http://www.state.gov/r/pa/prs/ps/2012/04/188198.htm) (indicating that the review process began in February 2009, and involved "extensive input from Congress, companies, business associations, labor groups, environmental

S.D. Myers' Canadian affiliate, whose sole business had been to solicit Canadian orders for export and destruction of PCBs at facilities in the United States. [402]

As a second limitation on damages, TPP formalizes the principle that claimants should only recover out-of-pocket costs for cases involving thwarted investments. [403] While tribunals have traditionally applied that limitation, [404] at least one recent award included compensation for lost profits amounting to nearly a billion dollars for a thwarted investment that had no operating history. [405] Under TPP, thwarted investors would have no opportunity even to argue for lost profits. [406]

Finally, TPP includes two provisions designed to eliminate investor-state dispute settlement (and thus liability) for certain categories of claims. First, TPP [*187] allows states to declare that they will deny the benefits of investor-state dispute arbitration to claims that challenge tobacco control measures. [407] If states have not previously elected to deny such benefits, they may do so even following the submission of claims challenging tobacco control measures. [408] In such cases, tribunals must terminate the proceedings. [409] Second, TPP includes an annex on the treatment of public debt. [410] In that annex, states parties emphasize that the purchase of public debt "entails commercial risk," and that tribunals should not issue awards for non-payment unless the particular default also rises to the level of a treaty violation, for example a violation of the prohibition on uncompensated takings. [411] Even in such cases, however, the annex provides that investors generally cannot pursue treaty claims relating to public debt if the situation involves a "negotiated restructuring," meaning that holders of 75% of the aggregate principal amount have consented to a debt exchange or other restructuring process. [412] In the event of negotiated restructurings, however, investors may still pursue treaty claims alleged to involve the denial of national treatment or MFN treatment. [413]

III. CONTINUITY

In marketing TPP to Congress and to the public, U.S. trade officials emphasize that TPP does not replicate NAFTA. [414] This message seems prudent, [*188] given widespread dissatisfaction with NAFTA, [415] and surprisingly

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and other non-governmental organizations, and academics"); Johnson, *supra* note 175, at 1 (explaining that the United States' formal review of its model BIT took three years due to a lengthy process of interagency review and public consultations).

[301] 2012 U.S. Model BIT, *supra* note 300, Art.11; Caplan & Sharpe, *supra* note 300, at 757, 803-04; Crook, *supra* note 300, at 662; Johnson, *supra* note 175, at 2-3.

[302] 2012 U.S. Model BIT, *supra* note 300, Arts. 12-13; Caplan & Sharpe, *supra* note 300, at 757, 804-07; Crook, *supra* note 300, at 662; Johnson, *supra* note 175, at 4.

[303] *See* 2012 U.S. Model BIT, *supra* note 300, Art. 24(1)(a)(1)(A), 24(1)(b)(i)(A) (permitting investor-state arbitration for breaches of Articles 3 through 10, which necessarily excludes the articles on transparency (Article 11), environment (Article 12), and labor (Article 13)); *see also id.*, Art. 37(1) (generally providing for state-to-state arbitration of disputes between the states parties regarding the interpretation or application of the treaty).

[304] *See id.* Art. 37(5) (excluding the articles on environment and labor from state-to-state dispute settlement); *see also* Caplan & Sharpe, *supra* note 300, at 848; Johnson, *supra* note 175, at 4.

[305] 2012 U.S. Model BIT, *supra* note 300, Art. 1; Caplan & Sharpe, *supra* note 300, at 771-72; Paolo Di Rosa, *The New 2012 US. Model BIT: Staying the Course*, KLUWER ARBITRATION BLOG (June 1, 2012), http://kluwerarbitrationblog.com/2012/06/01/the-new-2012-u-s-model-bit-staying-the-course (last visited Mar. 25, 2016). Although this definition of territory appears in a U.S. Model BIT for the first time, it has appeared in certain FTAs concluded by the United States. Caplan & Sharpe, *supra* note 300, at 771 n.71; *see also infra* notes 306-07 and accompanying text.

[306] NAFTA, *supra* note 55, Annex 201.1.

[307] U.S.-Panama Trade Promotion Agreement, Annex 2.1 (entered into force Oct. 31, 2012), *available at* https://ustr.gov/trade-agreements/free-trade-agreements/panamatpa/final-text (last visited Mar. 25, 2016): U.S.-Colombia Trade Promotion Agreement, Annex 1.3 (entered into force May 15, 2012), *available at* https://ustr.gov/trade-agreements/free-trade-

broad concerns about ISDS. [416] At the same time, it seems logical to include some emphasis on the reassuring themes of familiarity and continuity in treaty practice, as well as the United States' perfect record in deflecting investment treaty claims. Combining these two stands, U.S. Trade Representative Michael Froman, describes TPP as "a reform of the system." [417]

Fleshing out the theme of continuity, materials posted by the Office of the United States Trade Representative ("USTR") note that ISDS already appears in over 3,000 investment treaties concluded among 180 states, including 51 treaties concluded by the United States. [418] They also boast that the "United States has never lost an ISDS case." [419] Turning to the theme of reform, however, the materials underscore that TPP "upgrades and improves ISDS" by including "new ISDS safeguards that close loopholes and raise standards higher than any past agreements." [420] In addition, the materials indicate that TPP "serves to modernize and reform ISDS by including clearer language and stronger safeguards that *raise standards above virtually all other 3,000 plus investment agreements in force today*." [421] In other words, official pronouncements tend to depict TPP's [*189] investment chapter as a fulcrum that catapults the U.S. and other states parties to the global summit of investment treaty practice. [422]

Across the board, however, informed observers have described TPP's investment chapter as the perpetuation of long-established U.S. treaty practice with a handful of refinements unlikely to excite those who anticipated genuine reform. Thus, a well-known journalist in the professional press writes that TPP's investment chapter "looks familiar -- particularly in relation to recent U.S. investment treaties and FTAs." [423] Consistent with that assessment, his headline declares that TPP's investment chapter includes only "a few novel twists." [424] Likewise, a former USTR negotiator writes that TPP's investment chapter "reveals no major departures" from the 2012 U.S. Model BIT. [425] Consistent with that assessment, her headline indicates that TPP's investment chapter includes "few surprises." [426] Similarly, two policy advocates from Columbia University opine that "ISDS in TPP has not been improved as USTR suggests." [427] To the contrary, they conclude that the refinements found in TPP's investment chapter

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agreements/colombia-fta/fmal-text (last visited Mar. 25, 2016); U.S.-Korea Free Trade Agreement, Art. 1.4 (entered into force Mar. 15, 2012),*available at* https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (last visited Mar. 25, 2016); U.S.-Peru Trade Promotion Agreement, Annex 1.3 (entered into force Feb. 1, 2009),*available at* https://ustr.gov/trade-agreements/free-trade-agreements/perutpa/final-text (last visited Mar. 25, 2016); U.S.-Chile Free Trade Agreement, Annex 2.1 (entered into force Jan. 1, 2004),*available at* https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text (last visited Mar. 25, 2016); U.S.-Singapore Free Trade Agreement, Annex 1.A (entered into force Jan. 1, 2004),*available at* https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text (last visited Mar. 25, 2016).

308 Di Rosa, *supra* note 305.

309 *See* Crook, *supra* note 300, at 662 (observing that the "text does not alter core investment protections set out in the previous model adopted in 2004"); Karen Halverson Cross, *Converging Trends in Investment Treaty Practice*, 38 N.C. J. INT'L L. & COM. REG. 151, 189 (2012) ("With minor exceptions, the provisions of the 2004 BIT . . . were left virtually unchanged in the 2012 Model BIT"); David A. Gantz, *Challenges for the United States in Negotiating a BIT with China: Reconciling Reciprocal Investment Protection with Policy Concerns*, 31 ARIZ. J. INT'L & COMP. L. 203, 217 (2014) (stating that the 2012 U.S. Model BIT "in most respects . . . does not differ significantly from the 2004 version"); Di Rosa, *supra* note 305 ("The new model BIT made no changes to the substantive investment law protections"); Johnson, *supra* note 175, at 1 (opining that "the 2012 Model BIT is relatively unchanged from its previous form").

310 2012 U.S. Model BIT, *supra* note 300, Art. 8(1)(h); Caplan & Sharpe, *supra* note 300, at 799-800; Johnson, *supra* note 175, at 3.

311 *See* Di Rosa, *supra* note 305 ("The arbitration clauses were also kept largely untouched").

312 *See* Gantz, *supra* note 309, at 217 (describing the results of the 2009-2012 BIT review process as "largely anticlimactic"); Di Rosa, *supra* note 305 (describing the 2012 U.S. Model BIT as "anticlimactic" inasmuch as "the new model BIT did not diverge greatly from its 2004 predecessor"); Johnson, *supra* note 175, at 1 (indicating that "[t]hose looking for drastic change. . . are likely to be disappointed"). *But see* Caplan & Sharpe, *supra* note 300, at 850 (opining that the 2012 U.S. Model BIT "has secured its place on the leading edge of the next generation of model investment agreements").

"represent just small tweaks around the margins," [428] as opposed to the "novel features" that USTR promised to deliver in the final text. [429]

In the most comprehensive analysis published to date, two researchers from the Graduate Institute in Geneva describe TPP's investment chapter as "made in the USA," [430] as an instrument that "closely follows" existing U.S. treaty practice, [431] and as a text that "offers few truly novel features." [432] To back up their claims, they emphasize that TPP's investment chapter draws 82% of its text [*190] verbatim from the U.S.-Colombia FTA. [433] Under these circumstances, they repeatedly state that TPP renders the investment chapters of existing U.S. FTAs with six other TPP states parties "largely redundant." [434] Furthermore, given the extent of overlap, the authors express surprise and consternation at the decision of states parties to maintain those treaties in force following ratification of TPP. [435] In other words, one feels an overwhelming sense of continuity, at least for U.S. investors, for whom TPP's investment chapter both restates existing norms and makes no attempt to replace treaties already in force.

IV. BREAKTHROUGHS

TPP's investment chapter may seem unremarkable when viewed from the abstract perspective of recent U.S. treaty practice, in the sense that it repeats familiar patterns and includes few departures from the status quo. [436] However, when viewed from the concrete perspective of U.S. investors with investment claims against other states parties, the picture changes dramatically. In fact, TPP's investment chapter becomes a fascinating puzzle that alters the state of play dramatically, depending on the host state and the nature of the claims involved. Developing the points just made, Part IV(A) explains how TPP's investment chapter alters the state of play for U.S. investors in the five states with which the U.S. previously lacked investment treaties. [437] Likewise, Part IV(B) explains how TPP's investment chapter alters the state of play for certain U.S. investors in the six states with which the U.S. already has FTAs. [438] Finally, Part IV(C) describes how a familiar treaty provision seems likely to produce unexpected and unwelcome consequences in the multilateral context of TPP. [439]

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[313] *See supra* note 1 and accompanying text.

[314] Office of the United States Trade Representative, *Trans-Pacific Partnership: Summary of US. Objectives, available at* https://ustr.gov/tpp/Summary-of-US-objectives (last visited Feb, 27, 2016) [hereinafter*Summary of US Objectives*]; Joshua P. Melzer, *The Trans-Pacc Partnership Agreement, the Environment and Climate Change, in* TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 3 (Tania Voon ed., 2014), *available at* http://www.brookings.edutqmedia/research/files/papers/2013/09/trans-pacific-partnership-meltzer/meltzer-tpp-environment-chapter_version-2.pdf (last visited Feb. 27, 2016); Christopher Slijk, Understanding the 21st Century Trade Agreement: The Trans-Pacific Partnership at 2,*available at* https://www.dallasfed.org/assets/documents/educate/events/2015/15global_slijk.pdf (last visited Feb. 27, 2016).

[315] *Summary of US. Objectives, supra* note 314; Melzer, *supra* note 314, at 3; Slijk, *supra* note 314, at 2.

[316] Slijk, *supra* note 314, at 2.

[317] Brock R. Williams, *Trans-Pacific Partnership (TPP) Countries: Comparative Trade and Economic Analysis*, Congressional Research Service, June 10, 2013, at 4 [hereinafter Brock, *2013], available at* https://www.fas.org/sgp/crs/row/R42344.pdf (last visited Mar. 25, 2016); U.S. Dept. of State, Bureau of Public Affairs,*The Trans-Pacific Partnership: Building on US. Economic and Strategic Partnerships in the Asia-Pacific*, Sept. 5, 2013, *available at* http://www.state.gov/documents/organization/214378.pdf (last visited Mar. 25, 2016). By 2013, "the flow of U.S. FDI abroad to TPP countries was $ 86 billion. . . with inward FDI at $ 69 billion." Brock R. Williams,*Trans-Pacific Partnership (TPP) Countries: Comparative Trade and Economic Analysis*, Congressional Research Service, July 5, 2015, at 4 [hereinafter Brock, *2015], available at* http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R42344.pdf (last visited Mar. 25, 2016).

[318] Brock, *2013, supra* note 317, at 4; U.S. Dept. of State, Bureau of Public Affairs, *The Trans-Pacific Partnership: Building on US. Economic and Strategic Partnerships in the Asia-Pacific*, Sept. 5, 2013, *available at*

A. *Old Policies on New Frontiers*

Even if TPP seems like an unremarkable elaboration of longstanding trends in U.S. investment treaty practice, one must not forget that the United States currently lacks investment treaties with five TPP states, namely Brunei, Japan, Malaysia, New Zealand, and Vietnam. [440] For U.S. investors in those jurisdictions, TPP marks the advent of treaty protection and investor-state arbitration. As explained below, the extension of old policies to new frontiers represents no small thing.

[*191] Taking Malaysia as a first example, the United States represents the third largest source of inbound FDI in that country. [441] Concentrated in manufacturing, energy, and financial services, [442] the stock of U.S. investment in Malaysia totals somewhere between $ 12 billion and $ 30 billion, depending on the source of information and the inclusion of investments routed through foreign affiliates of U.S. companies. [443] While not known as a high-risk jurisdiction for expropriation, [444] Malaysia traditionally has tied the receipt of investment incentives to performance requirements, including export performance, local content requirements, and mandatory technology transfers. [445] Following TPP's [*192] entry into force, Malaysia will have somewhat less freedom to subject U.S. investors to such measures. [446]

In addition to performance requirements, Malaysia struggles with significant levels of official corruption, [447] and foreign investors frequently complain about a "lack of transparency in government decision making." [448] There is also a perception that the Malaysian government applies unwritten rules that favor local companies, particularly in the field of government procurement. [449] While TPP does not require national treatment in government procurement, [450] its investment chapter can afford a measure of protection against die types of concerns just described via application of the minimum standard of treatment, [451] which tribunals often recognize as incorporating basic principles of transparency, non-discrimination, and vindication of legitimate expectations. [452]

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http://www.state.govidocuments/organization/214378.pdf (last visited Mar. 25, 2016). By 2013, the stock of outward U.S. FDI in TPP countries reached $ 983 billion, and the stock of inward FDI from TPP countries reached $ 664 billion. Brock,*2015, supra* note 317, at 4.

[319] *See Summary of US. Objectives, supra* note 314 ("Specifically, in the TPP we are seeking: [1] Elimination of tariffs and commercially-meaningful market access for U.S. products exported to TPP countries; and [2] Provisions that address longstanding non-tariff barriers, including import licensing requirements and other restrictions"); *see also* Larry Cata Backer, *The Trans-Pacific Partnership: Japan, China, the US. and the Emerging Shape of a New World Trade Regulatory Order*, *13 WASH. U. GLOBAL STUD. L. REV. 49, 54 (2014)* (explaining that TPP's achievements will "include . . . the provision of comprehensive market access by eliminating tariffs and other barriers to trade").

[320] Trans-Pacific Partnership, ch. 2 [hereinafter TPP], *available at* *https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text* (last visited Mar. 25, 2016).

[321] *Id.* ch. 3.

[322] *Id.* ch. 4.

[323] *Id.* ch. 5.

[324] *Id.* ch. 6.

[325] *Id.* ch. 7.

[326] *Id.* ch. 8.

[327] *Id.* ch. 9.

[328] *Id.* ch. 10.

[329] *Id.* ch. 11.

Turning to Vietnam as a second example, the significance of extending old policies to new frontiers seems even more obvious. As with Malaysia, quantifications of U.S. investment stock in Vietnam occupy a surprisingly broad range. According to official U.S. sources, the stock of U.S. FDI in Vietnam amounts to less than $ 1.5 billion, but is growing rapidly. [453] By contrast, official [*193] Vietnamese sources place the stock of U.S. investment upwards of $ 10 billion, [454] though this may reflect pledged as opposed to disbursed FDI. [455]

Although Vietnam has distinguished itself as an "increasingly attractive" destination for FDI, [456] the country's political and legal environment still present a number of risks. Unlike Malaysia, for example, Vietnam remains a place where foreign investors still face a real possibility of expropriations, [457] as well as harassment by officials seeking to renegotiate the terms of investment licenses. [458] In addition, decentralization and a lack of transparency in the licensing process contribute to significant levels of official corruption, [459] with overwhelming majorities of U.S. investors identifying bribe-taking and kickbacks as a source of concern when operating in Vietnam. [460] In addition, Vietnam has a weak court [*194] system that operates slowly and seems ineffective at resolving disputes. [461] While TPP's investment chapter does not, of course eliminate such risks, the extension of traditional investment treaty norms and ISDS to this new frontier significantly increases the security of U.S. investors operating in Vietnam. Viewed from that perspective, TPP unquestionably changes the state of play.

Concluding with Japan as a third example, one must recognize that it presents few of the risks likely to affect U.S. investors in Malaysia and Vietnam. In the post-war period, Japan has no history of uncompensated takings. [462] The government does not impose performance requirements. [463] The country has an independent judicial system with vast experience in resolving commercial disputes. [464] And the "exchange of cash for favors by government officials in Japan is extremely rare." [465] However, even under broadly analogous conditions, U.S. investors have justifiably invoked NAFTA's investment chapter to secure remedies for breaches of investment norm s by federal and provincial governments in Canada. [466] In this regard, it bears emphasizing that Japan's regulatory system leaves room for improvement in terms of transparency, consistency, and responsiveness. [467] Also, while the most

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[330] *Id.* ch. 13.

[331] *Id.* ch. 14.

[332] *Id.* ch. 12.

[333] *Id.* ch. 15.

[334] *Id.* ch. 17.

[335] *Id.* ch. 18.

[336] *Id.* chs. 19-20.

[337] *Id.* ch. 26, § B.

[338] *Id.* Arts. 19.15(12), 20.23(1), 26.12(1).

[339] *Id.* ch. 26, § C.

[340] *Id.* ch. 16.

[341] *Id.* ch. 25.

[342] *Id.* Arts. 16.9,25.11, 26.12(3).

[343] *Id.* ch. 21.

obvious forms of official corruption may be rare, close webs of relations between government and business lead to a favoritism that "manifests itself most frequently and seriously in Japan through [*195] the rigging of bids on government public works projects." [468] Furthermore, while Japan has taken legislative action to combat such practices, "questions remain" as to whether it will result in greater accountability for "illegal bid-rigging." [469] As previously noted, while TPP's investment chapter does not require national treatment in government procurement, the international minimum standard offers some protection against serious encroachments on transparency, non-discrimination, and the legitimate expectations of foreign investors. [470]

Extension of TPP's investment chapter to Japan does not simply alter the state of play for U.S. investors. It also alters the state of play for the U.S. and Japanese governments. As is well known, Japan represents the third largest economy in the world, [471] the United States' fourth largest trading partner, [472] and the second largest source of FDI in the United States, [473] totaling some $ 344 billion. [474] Although Japanese companies have not been active in pursuing claims under investment treaties, [475] it may be only a matter of time before the United States government finds itself defending Japanese investment claims following ratification of TPP.

The reverse also holds true. Although U.S. companies account for only $ 123 billion of investment stock in Japan, [476] that still makes the United States by far and away the single largest source of inbound FDI in Japan. [477] Furthermore, [*196] because U.S. companies easily qualify as the most frequent users of investment treaty arbitration, [478] the Japanese public has become apprehensive that ratification of TPP will lead to recurring assertion of investment claims by U.S. companies and, possibly, frustration of the Japanese government's ability to maintain normal regulatory policies. [479] Concerns about an avalanche of U.S. investment claims may loom particularly large in the Japanese consciousness because Japan has never been the target of investment treaty claims. [480] In this sense, too, extension of traditional norms to new frontiers represents no small thing in relations between states.

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[344] *Id.* ch. 23.

[345] *Id.* ch. 24.

[346] *Id.* ch. 22.

[347] *Id.* ch. 27, Art. 27.7.

[348] *Id.* ch. 28.

[349] *Id.* Arts. 9.18-9.30.

[350] *Compare* 2004 U.S. Model BIT, *supra* note 209, Art. 1, *with* TPP, *supra* note 320, Art. 9.1.

[351] TPP, *supra* note 320, Art. 9.4 n.14.

[352] *See, e.g.*, GAMI Investments, Inc. v. Mexico, Final Award P 114 (Nov. 15, 2004) ("That measure was plausibly connected with a legitimate goal of policy . . . and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity"), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0353_0.pdf (last visited Mar. 25, 2016);*Pope & Talbot, Inc. v. Canada, Award on the Merits of Phase 2 P 78* (Apr. 10, 2001) ("Differences on treatment will presumptively violate Article 1102(2) unless they have a reasonable nexus to rational government policies that do not distinguish . . . between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA"), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/pope-phase-21.pdf (last visited Mar. 25, 2001); S.D. Myers, Inc. v. Canada, First Partial Award P 250 (Nov. 13, 2000) ("The assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest"),*available at* http://www.international.gc.ca/trade-agreements-accords-commerciaindassets/pdfs/disp-diff/myers-18.pdf (last visited Mar. 25, 2016); DOLZER & SCHREUER,*supra* note 23, at 200 ("In general, there seems to be agreement that the overall legal context in which a measure is placed will also have to be considered when 'like circumstances' are identified and when the identity or difference of treatment is examined"); NEWCOMBE & PARADELL, *supra* note 17, at 176 ("Whether two investors or investments are in like circumstances will necessarily change in

B. *New Policies on Old Frontiers*

As mentioned, the United States already has FTAs including investment chapters with six states parties to TPP, namely Australia, Canada, Mexico, Chile, Peru, and Singapore. [481] As also discussed, observers generally regard TPP as repeating familiar patterns drawn from recent U.S. investment treaty practice. [482] In the most comprehensive analysis published to date, two researchers described TPP as "largely redundant" when compared to the investment chapters of existing FTAs with other states parties. [483] While the overlap between the investment chapters of TPP and U.S. FTAs may be overwhelming in some cases, differences remain. For example, while the investment chapters of TPP and the U.S.-Peru TPA reflect a textual coincidence of roughly 80%, [484] that means the texts diverge roughly 20% of the time. Likewise, while the investment chapters of TPP and NAFTA enjoy a textual coincidence of roughly 60%, [485] that means the texts diverge roughly 40% of the time. Given these differences, it seems likely that [*197] U.S. investors will find material differences between TPP and existing FTAs on discrete topics, with the result that TPP could possibly change the state of play for U.S. investors, depending on (1) the relationship between TPP and existing treaties in the event of conflict, (2) the host state involved, and (3) the nature of the issues raised by the claim.

Starting with the question of the relationship between TPP and existing FTAs, the general rule is that subsequent treaties between the same parties prevail to the extent of inconsistencies with earlier treaties. [486] Starting from that premise, one observer has expressed the expectation that TPP's investment chapter would prevail over existing U.S. FTAs to the extent of inconsistency. [487] However, under TPP, the states parties expressly affirm their existing rights and obligations under international agreements with any other state party. [488] Thus, the better view seems to be that TPP's investment chapter has the potential to coexist alongside the investment chapters of FTAs already in force between states parties. [489]

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light of the regulatory purpose of the measure"); SALACUSE, *supra* note 35, at 250 ("Tribunals will often not find a breach of the national treatment standard . . . if there is a justified policy reason for the differential treatments").

[353] TPP, *supra* note 320, Art. 9.5(3). While the 2004 U.S. Model BIT had no provision specifically excluding dispute-settlement mechanisms from the scope of its MFN clause, negotiators had felt that the limitation of MFN treatment to the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" left no textual basis for applying the guarantee to arbitration of claims. VANDEVELDE, *supra* note 17, at 325; *see also id.* at 248; VANDEVELDE, *supra* note 18, at 364-65. However, "for greater certainty," the United States expressly excluded dispute settlement from MFN treatment starting with its FTAs with Peru and Colombia. U.S.-Colombia TPA, *supra* note 307, Art. 10.4 n.2; U.S.-Peru TPA, *supra* note 307, Art. 10.4 n.2; VANDEVELDE, *supra* note 17, at 248.

[354] TPP, *supra* note 320, Art. 9.6(4).

[355] *See* Luke Eric Peterson, *A First Glance at the Investment Chapter of the TPP Agreement: A Familiar US-style Structure with a Few Novel Twists*, INVESTMENT ARB. REP., Nov. 5, 2015, *available at* https://www.iareporter.com/articles/a-first-glance-at-the-investment-chapter-of-the-tpp-agreement-a-familar-us-style-structure-with-a-few-novel-twists (last visited Mar. 26, 2016);*see also* Azinian v. Mexico, ICSID Case No. ARB(AF)/97/2, Award P 83 (Nov. 1, 1999) ("It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. . . . NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides"), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0057.pdf (last visited Mar. 26, 2016).

[356] *See* Peterson, *supra* note 355 ("However, it's less clear . . . that the clause speaks to situations where so-called legitimate expectations . . . are at issue and have been thwarted by subsequent government action").

[357] TPP, *supra* note 320, Art. 9.6(5).

[358] *Compare id.* Art. 9.7(6) (clarifying that the decision not to issue, renew or maintain a subsidy or grant "standing alone" and "in the absence of any specific commitment" to do so, "does not constitute an expropriation").

[359] *Id.*

Of course, this does nor preclude states parties from choosing to suspend or terminate existing treaties on the same topics through side agreements. For example, Australia has confirmed through side letters that its BITs with Mexico, Peru and Vietnam will terminate upon TPP's entry into force, subject, however, to transitional provisions that contemplate continued application of the BITs for a period of years with respect to investments made, and measures adopted, before termination. [490] By contrast, side letters between Malaysia and New Zealand explicitly confirm that TPP's entry into force will not affect the existing FTA between the two states, and that investors may choose to pursue claims under the more favorable of the two instruments. [491] As of this writing, the United States has not concluded any side letters expressly addressing the status of existing FTAs between the United States and other states parties to TPP. Under these circumstances, some observers have opined that NAFTA will remain in force among Canada, Mexico and the United States. [492] However, at a recent conference, the author heard rumors that USTR may possibly consider the use of side agreements with Canada and Mexico to suspend or terminate operation of [*198] NAFTA upon TPP's entry into force. Even if the United States successfully concluded side agreements on the suspension or termination of NAFTA, transitional provisions presumably would contemplate continued application of NAFTA to existing investments and measures for some period of years. [493]

As a result, it seems likely that at least some U.S. investors will have the choice to assert investment claims under TPP or existing FTAs for at least some period of time, [494] meaning that those U.S. investors will likely have to pay counsel for analysis of their rights under each of the relevant instruments. As explained below, such investigations would show that TPP can change the state of play for particular U.S. investors.

For U.S. companies with investments in Australia, TPP will almost always seem more favorable because the investment chapter of the existing U.S.-Australia FTA does not provide for investor-state arbitration. [495] In other words, TPP literally opens the door to arbitration of investment claims, [496] which represents a vast improvement over the status quo. However, this observation does not apply to claims challenging tobacco control measures, which states parties can elect to remove from dispute settlement under TPP's investment chapter, even following submission of a claim to arbitration. [497]

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[360] *Id.* Annex 9-8 n.36.

[361] *Id.* Annex 9-B, P 3(b) & n.37.

[362] *Id.* Art. 9.9(1)(h).

[363] *Id.* Art. 9.9(1)(i).

[364] *Id.* Art. 9.18(4).

[365] *See supra* note 239 and accompanying text.

[366] TPP, *supra* note 320, Art. 9.18(1)(a)(i), (1)(b)(i).

[367] *See supra* note 241 and accompanying text.

[368] TPP, *supra* note 320, Art. 9.1.

[369] *Id.* Art. 9.1 & n.8.

[370] *Id.* Art. 9.1 n.9.

[371] *Id.* Annex 9-L, P A.1(a).

[372] *Id.* Annex 9-L, P A.1 (b).

[373] *See* Peterson, *supra* note 355 (observing that an arbitration clause in an investment agreement will not preclude arbitration under TPP if the investment agreement contemplates arbitration under the rules of the Stockholm Chamber of Commerce or provides for arbitration within the territory of the host state).

[*199] For U.S. investors with claims against Canada or Mexico, NAFTA's investment chapter generally represents a better choice than TPP. To begin with, NAFTA entered into force in 1994, [498] at a time before investment treaties excited the public consciousness, [499] before the backlash against investor-state arbitration gathered momentum, [500] and before the introduction of treaty refinements designed to tilt investment treaties back towards the regulatory interests of states. [501] In other words, NAFTA embodies a text that more consciously aims to protect foreign investment, as opposed to the regulatory interests of host states. [502]

When weighing the choice between NAFTA and TPP, one also has to consider the operation of MFN clauses, which grant claimants "the right to benefit from substantive guarantees contained in third treaties." [503] Like many U.S. investment treaties, NAFTA and TPP both contain reservations preventing the application of MFN clauses to treaties already signed or ratified before entry into force, [504] meaning that the MFN provisions only pull in the more favorable [*200] provisions of subsequent investment treaties. In other words, reliance on [*201] NAFTA's investment chapter allows U.S. investors to invoke any more favorable provisions of TPP or of the dozens of investment treaties ratified by Canada or Mexico since 1994. [505] By contrast, the MFN provisions of TPP do not reach backwards in time to incorporate the more favorable provisions of NAFTA or other investment treaties already concluded by Canada or Mexico. So, the prospective application of MFN treatment generally makes NAFTA's investment chapter a better choice than TPP for U.S. investors with claims against Canada or Mexico.

However, depending on the nature of their claims, certain U.S. investors might prefer TPP over NAFTA. For example, if TPP includes a more favorable provision that the MFN guarantee of NAFTA cannot reach, U.S. investors might prefer to rely on TPP. In this context, it seems relevant to note that TPP includes a broader definition of investments, [506] and that prevailing jurisprudence does not permit the use of MFN provisions to expand the definition of covered investments. [507] Therefore, if a U.S. national sought to assert an investment

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[374] TPP, *supra* note 320, Art. 9.18(2). This represents an important point because claims arising under investment treaties (as opposed to investment agreements) usually do not lend themselves to counterclaims. *See* Andrea K. Bjorklund, *Mandatory Rules of Law and Investment Arbitration*, 18 AM. REV. INT'L ARB. 175, 195 (2007) ("Investment treaty arbitrations do not usually involve counterclaims as such; the treaties are asymmetric in that they only permit claimants to challenge the measure of a host State. Yet narrowly drawn counterclaims are a possibility.").

[375] TPP, *supra* note 320, Arts. 9.17(2), 9.18(1).

[376] *See supra* note 253 and accompanying text.

[377] TPP, *supra* note 320, Annex 9-J, P 1.

[378] *Id.* P 2.

[379] *See* Vandevelde, *Comparison, supra* note 28, at 312 (indicating that "the effect of [such] provision[s] [is] to discourage resort to local courts, inasmuch as resort to local courts would extinguish the claimant's right to international arbitration of the same dispute").

[380] TPP, *supra* note 320, Art. 9.21(5).

[381] *Id.* Art. 9.21(6).

[382] *Id.* Art. 9.23(3).

[383] *Id.*

[384] *Id.*

[385] *Id.*

[386] *Id.*

claim [*202] against Canada or Mexico that depended on a particularly broad definition of investments, TPP could become the preferred vehicle for the claim.

As a second example of provisions on which TPP seems more favorable to investors than NAFTA, one may identify the scope of claims subject to investor-state arbitration under the respective treaties. While NAFTA only permits investor-state arbitration of treaty claims, [508] TPP also permits arbitration of certain claims under investment authorizations and investment agreements relating to natural resources, public utilities, and infrastructure projects. [509] In this respect, the relevant TPP provisions operate in a manner that resembles an umbrella clause. [510] However, it seems doubtful that NAFTA's guarantee of MFN treatment would reach such provisions for several reasons. First, tribunals have divided on the question of whether MFN treatment even applies to modalities for dispute settlement under investment treaties. [511] Second, the United States has long taken the view that the particular formulation of the MFN obligation in U.S. investment treaties does not reach the modalities for dispute settlement because it only applies to treatment of investors and investments in seven specified stages of investment activity, none of which includes dispute settlement. [512] Third, the states parties to TPP have expressly agreed that TPP's guarantee of MFN treatment does not apply to dispute settlement, [513] and the text of TPP's article on MFN treatment is identical to the corresponding provision in NAFTA. [514] Fourth, even assuming that MFN obligations provide some leeway for application to dispute settlement, tribunals have shown little enthusiasm for the use of MFN clauses to expand the scope of jurisdiction to embrace completely different sorts of claims. [515] In particular, one tribunal has rejected the use of MFN clauses to secure treaty arbitration of contractual claims not entitled to treaty arbitration in the basic [*203] agreement. [516] Therefore, if a U.S. investor sought to assert a claim against Canada or Mexico for the breach of investment authorizations or investment agreements, TPP's investment chapter would represent the only possible vehicle for the claim.

As a third example of provisions on which TPP may be more favorable to investors than NAFTA, TPP includes a statute of limitations six months longer than the one established by NAFTA's investment chapter. [517] While a substantial body of arbitral jurisprudence supports the use of MFN provisions to incorporate the more favorable

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[387] 2004 U.S. Model BIT, *supra* note 209, Art. 28(3).

[388] *See* UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION, Art. 4 (2014), *available at* *http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf* (last visited Mar. 26, 2016); ICSID ARBITRATION RULES, Art. 37(2) (2006); Statement of the [NAFTA] Free Trade Commission on Non-Disputing Party Participation, § B (Oct. 7, 2003),*available at* *http://www.state.gov/documents/organization/38791.pdf* (last visited Mar. 26, 2016).

[389] *See* 2004 U.S. Model BIT, *supra* note 209, Art. 26(1); *see also* U.S.-Peru TPA, *supra* note 307, Art. 10.18(1); U.S-Chile FTA, *supra* note 307, Art. 10.17(1); U.S.-Singapore FTA, *supra* note 307, Art. 15.17(1); NAFTA, *supra* note 55, Arts. 1116(2), 1117(2).

[390] TPP, *supra* note 320, Art. 9.20(1).

[391] *Id.*

[392] *See supra* note 375 and accompanying text.

[393] TPP, *supra* note 320, Art. 9.22(7).

[394] *See supra* notes 224, 228 and accompanying text.

[395] *See, e.g.*, Merrill & Ring Forestry L.P. v. Canada, Award P 199 (Mar. 31, 2010) (relying on Waste Mgmt v. Mexico, ICSID Case No. ARB(AF)/00/3, Award P 98 (Apr. 30, 2004), *available at* *http://www.italaw.com/documents/laudo_ingles.pdf*, for the proposition that fair and equitable treatment prohibits "conduct that is arbitrary, grossly unfair, unjust or idiosyncratic which, in so far as it also encompasses questions of due process, leads to an outcome which 'offends judicial propriety'"), *http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/merrill-09.pdf* (last visited Mar. 26, 2016); Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award P 133 (June 26, 2003) (relying on Mondev

provisions of other treaties regulating timing and sequencing of investment disputes, [518] decisions are not uniform, [519] and often draw well-framed dissents. [520] Also, as just mentioned, there are good reasons to doubt that the particular formulation of the MFN obligation in NAFTA's investment chapter encompasses the modalities for dispute settlement. [521] Therefore, if a U.S. investor could not quite meet the three-year limitations period set forth in NAFTA's investment chapter, it might prefer the certainty of relying on the six-month extension in TPP instead of proceeding under NAFTA, invoking NAFTA's MFN obligation in order to reach the extension, and hoping for the best.

Turning to other U.S. FTAs with states parties to TPP, one may take the agreements with Singapore and Chile as a pair. Both entered into force on January 1, 2004, [522] meaning that both emerged against the background of the [*204] negotiating objectives set by Congress in TPA, [523] as well as efforts by the Executive Branch to bring U.S. BIT practice into alignment with U.S. FTA practice. [524] Given these facts, the investment chapters of both FTAs more closely resemble TPP's investment chapter. Thus, according to two researchers from the Graduate Institute in Geneva, the investment chapter of the U.S.-Chile FTA represents the eighth of 20 international investment agreements that most closely resemble TPP's investment chapter (with a textual coincidence of 78%), [525] whereas the investment chapter of the U.S.-Singapore FTA represents the tenth of 20 international investment agreements that most closely resemble TPP's investment chapter (with a textual coincidence of 75%). [526]

Despite the high degree of textual overlap, U.S. investors with claims against Chile or Singapore generally should prefer to rely on the U.S.-Chile and U.S.-Singapore FTAs instead of TPP. While the U.S.-Chile FTA and the U.S.-Singapore FTA may aim to protect the regulatory interests of states far more than did NAFTA, reliance on existing FTAs would allow U.S. investors to invoke the MFN articles of those investment chapters, thereby gaining the benefit of more favorable provisions in TPP and in BITs or FTAs concluded by Chile and Singapore after 2004. [527] In addition, by relying on existing FTAs, U.S. investors would avoid the less favorable provisions of TPP, including its emphasis on the burden of proof for claims involving the minimum standard of treatment, [528] the limitation of damages to historical cost for thwarted investments, [529] the express limitation of damages to losses incurred in one's capacity as an investor, [530] and the exclusion of claims that challenge tobacco control measures. [531]

International Ltd v. United States of America, ICSID Case No. ARB (AF)/99/2, Award 127 (Oct 11, 2002),*available at* http://www.state.gov/documents/organization/14442.pdf, as a proper understanding of the international minimum standard of treatment),*available at* http://www.state.gov/documents/organization/22094.pdf (last visited Mar. 22, 2016).

[396] TPP, *supra* note 320, Art. 9.22(7).

[397] *Id.*

[398] Glamis Gold Ltd. v. United States, Award PP 602-07, 616 (June 8, 2009), *available at* http://www.state.gov/documents/organization/125798.pdf (last visited Mar. 22, 2016).

[399] TPP, *supra* note 320, Art. 9.28(2).

[400] *See supra* note 233 and accompanying text.

[401] *See supra* note 234 and accompanying text.

[402] S.D. Myers, Inc. v. Canada, First Partial Award PP 93, 123-27, 162, 193-95, 222, 236, 256, 268, 289-98 (Nov. 13, 2000), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/myers-18.pdf (last visited Mar. 25, 2016); S.D. Myers, Inc. v. Canada, Second Partial Award PP 126-27, 129-39 (Oct. 21, 2002),*available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/myers-review-02.pdf (last visited Mar. 25, 2016).

[403] TPP, *supra* note 320, Art. 9.28(4).

[404] *See, e.g.*, Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/l, Award PP 120-22 (Aug. 30, 2000), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf (last visited Mar. 27, 2016).

[*205] However, as with NAFTA, U.S. investors should prefer TPP to the extent that its investment chapter includes more favorable provisions that lie beyond the reach of MFN clauses in existing FTAs. [532] As with NAFTA, [533] the investment chapters of the U.S.-Chile and U.S.-Singapore FTAs include a three-year statute of limitations, [534] making TPP slightly more favorable for investors who cannot quite meet that deadline. [535] Unlike NAFTA, [536] the U.S.-Chile and U.S.-Singapore FTAs provide for arbitration of disputes under investment authorizations and investment agreements. [537] However, the U.S.-Chile and U.S.-Singapore FTAs narrowly define investment agreements only to include a written undertaking that "grants rights to natural resources or other assets that a national authority controls." [538] By contrast, TPP defines investment agreements to include written agreements with a national authority "with respect to natural resources that a national authority controls," *or* to supply utility services to the public on behalf of a party (such as power, water, or telecommunications), *or* to undertake public infrastructure projects (such as the construction of roads, bridges canals, dams, or pipelines). [539] Therefore, because the MFN clauses in the U.S.-Chile and U.S.-Singapore FTAs would probably not reach the broader definition of state contracts subject to treaty arbitration, [540] for U.S. investors with claims against Chile or Singapore based on agreements relating to utility services or infrastructure projects, TPP might become the preferred vehicle for the assertion of such claims.

In addition, while the same issue does not arise under the U.S.-Singapore FTA, it seems relevant to say that the U.S.-Chile FTA completely excludes public debt from the substantive disciplines of the FTA's investment chapter, [541] except claims sounding in national treatment or MFN treatment, [542] meaning that the U.S.-Chile FTA also excludes public debt claims from dispute settlement, except for claims sounding in national treatment or MFN treatment. By contrast, TPP does not exclude public debt from substantive disciplines of TPP's investment chapter. [543] However, to the extent that host states other than Singapore and the [*206] United States have entered into a negotiated restructuring with investors holding 75% of the aggregate principal amount under a debt instrument, [544] TPP's investment chapter prevents the submission of claims to arbitration (or the continuation of arbitration), [545] except for claims sounding in national treatment or MFN treatment. [546] Thus, to the extent that a U.S. investor has

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[405] Luke Eric Peterson, *Newly Obtained Award Confirms that Libya Must Pay $ 935 Million to Kuwaiti Investor for Hotel-Resort Complex that Never Got Built*, INVESTMENT ARB. REP., July 24, 2013, *available at* http://www.iareporter.com/articles/newly-obtained-award-confirms-that-libya-must-pay-935-million-to-kuwaiti-investor-for-hotel-resort-complex-that-never-got-built (last visited Mar. 27, 2016).

[406] Peterson, *supra* note 355 (indicating that TPP Art. 9.28(4) does not allow claimants to seek compensation for "projected losses arising out of the thwarted opportunity").

[407] TPP, *supra* note 320, Art. 29.5.

[408] *Id.*

[409] *Id.*

[410] *Id.* Annex 9-G.

[411] *Id.* P 1.

[412] *Id.* Art. 9.1 & Annex 9-G, P 2.

[413] *Id.* Annex 9-G, P 2.

[414] *See* Chris Kirkham, *"This Isn't NAFTA," U.S. Trade Representative Says About Trans-Pacific Partnership*, L.A. TTMES, Dec. 10, 2015 ("Whatever your position is on NAFTA, this isn't NAFTA"), *available at* http://www.latirnes.com/business/la-fi-qa-tpp-20151210-story.html; John Harwood,*The Politics of Trade: Top U.S. Negotiator Answers 10 Questions*, N.Y. TTMES, Feb. 6, 2015 ("When President Obama was running for president, he called for the renegotiation of Nafta. And that meant taking labor

a treaty claim against Chile based on non-payment of public debt, to the extent that the claim does not sound in national treatment or MFN treatment, and to the extent that Chile does not enter into a negotiated restructuring, TPP would represent the better vehicle for the assertion of that claim.

Turning to the last remaining U.S. FTA with a state party to TPP, one should observe that the U.S.-Peru TPA entered into force as of January 1, 2009. [547] Not surprisingly, the investment chapter of the U.S.-Peru TPA closely resembles TPP's investment chapter. In fact, two researchers from the Graduate Institute in Geneva list the investment chapter of the U.S.-Peru TPA as the second of twenty international investment agreements that most closely resemble TF'P's investment chapter (with a textual coincidence of 81%). [548]

Despite the overwhelming degree of textual overlap, U.S. investors with claims against Peru generally should prefer to rely on the U.S.-Peru TPA instead of TPP. While the U.S.-Peru TPA resembles TPP in almost all material aspects, reliance on the U.S.-Peru TPA would allow U.S. investors to invoke the MFN article of its investment chapter, thereby gaining the benefit of more favorable provisions in TPP and in FTAs concluded by Peru after 2009. [549] In addition, by relying on the U.S.-Peru TPA, U.S. investors would avoid the less favorable provisions of TPP already mentioned in connection with the U.S.-Chile and U.S.-Singapore FTAs. [550]

However, as with NAFTA, the U.S-Chile FTA, and the U.S. Singapore-FTA, U.S. investors should prefer TPP to the extent that its investment chapter includes more favorable provisions that lie beyond the reach of the MFN clause in the [*207] U.S.-Peru TPA. [551] As with the agreements just mentioned, [552] the investment chapter of the U.S.-Peru TPA includes a three-year statute of limitations, [553] making TPP slightly more favorable for investors who cannot quite meet that deadline. [554] Unlike the agreements just mentioned, [555] the U.S.-Peru TPA provides for arbitration of disputes under investment authorizations and investment agreements, and for arbitration of public debt claims, on exactly the same terms as TPP, thereby eliminating any advantage of proceeding under the U.S.-Peru TPA for such claims. [556]

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and environmental standards, putting them at the core of the agreement. That's exactly what we're doing through T.P.P. -- but not just with Mexico and Canada, with 40 percent of the global economy."), *available at* *http://www.nytirnes.com/2015/02/07/business/10-questions-for-president-obamas-trade-negotiator.html?_r=0*; U.S. Trade Rep.,*The Trans-Pacific Partnership: Upgrading the North American Free Trade Agreement (NAFTA)* [hereinafter *TPP: Upgrading the NAFTA*] (recognizing that "past trade deals -- including the North American Free Trade Agreement, or NAFTA -- haven't always lived up to the hype," but asserting that "TPP . . . improves substantially on NAFTA's shortcomings"), *available at* *https://ustr.gov/sites/default/files/TPP-Upgrading-the-North-American-Free-Trade-Agreement-NAFTA-Fact-Sheet.pdf* (last visited Mar. 27, 2016).

[415] *See* Cynthia English, Opinion Briefing: North American Free Trade Agreement, Gallup, Dec. 12, 2008 (indicating that 53% of Americans surveyed felt that "that the effect of NAFTA on the U.S. economy has been 'mainly negative'"), *available at* *http://www.gallup.com/poll/113200/opinion-briefing-north-american-free-trade-agreement.aspx?version=print*; Angus Reid Public Opinion, Americans and Canadians Feel They Have Lost Out with NAFTA, May 17, 2012, at 5 (indicating that 53% of American respondents felt that the United States should either renegotiate NAFTA or withdraw from NAFTA),*available at* *http://angusreidglobal.com/wp-content/uploads/2012/05/2012.05.17_NAFTA.pdf* (last visited Mar. 27, 2016).

[416] *See* Ambassador Miriam Sapiro, *Transatlantic Trade and Investment Negotiations: Reaching a Consensus on Investor-State Dispute Settlement*, GLOBAL VIEWS, Oct. 2015, at 1 ("Government officials, legislators, and progressive and conservative groups on both sides of the Atlantic have raised concerns about ISDS"), *available at* *http://www.brookings.edu/* /media/Research/Files/Papers/2015/10/transatlantic-trade-investment-negotiations-sapiro/GlobalViews5Oct2015_FINAL.pdf?la=en;*see also* Richard Allen, *TTIPping the Balance: The Crusade Against Investor-State Arbitration*, GLOBAL ARB. NEWS, June 3, 2015 (mentioning "the sudden uproar against ISDS, not only by civil society but also by prominent politicians and policy-makers in both the US and EU"), *available at* *http://globalarbitrationnews.com/ttipping-the-balance-the-crusade-against-investor-state-arbitration-20150602*.

However, TPP seems more favorable on one topic that lies beyond the reach of the MFN clause of the U.S.-Peru TPA. When it comes to the pursuit of local remedies, the U.S.-Peru TPA contains two fork-in-the-road provisions. According to the first, investors who initially pursue claims for *violations of investment authorizations and investment agreements* before the courts or the administrative tribunals of the respondent state cannot subsequently alter course and pursue investor-state arbitration under the FTA. According to the second, U.S. investors who who initially pursue *treaty* claims before Peruvian courts or administrative tribunals cannot subsequently alter course and pursue investor-state arbitration under the FTA. By contrast, TPP's investment chapter omits the first fork-in-the-road provision, but includes the second with respect to Chile, Mexico, Peru and Vietnam. Therefore, because the MFN clauses in the U.S.-Peru TPA probably would not reach the more favorable fork-in-the-road provisions of TPP, [557] TPP's investment chapter might become the preferred vehicle for the assertion of claims under investment authorizations and investment agreements that U.S. investors had initially pursued in proceedings before Peruvian courts or administrative tribunals.

Based on the foregoing discussion, one thing should be clear: while the introduction of TPP's investment chapter may support a general sense of continuity with recent trends in U.S. investment treaty practice, [558] TPP's investment chapter appears more remarkable and complex when viewed from the perspectives of individual U.S. investors trying to understand how TPP alters the state of play for them. For U.S. investors in states parties that do not yet have FTAs with the United States, TPP's investment chapter signals the advent of [*208] treaty protection and ISDS. [559] This represents no small thing, regardless of whether the host state has a corrupt government emerging from decades of communist rule (such as Vietnam), or a more ethical government grounded in several decades of democratic administration and market orientation (such as Japan). For U.S. investors in states parties that already have FTAs with the United States, the decision to keep those agreements in force alongside TPP creates a fascinating puzzle in which TPP dramatically alters the state of play for U.S. investors, depending on the host state and the nature of the claims. [560]

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[417] Shawn Donnan, *US Looks to TPP to Reform Arbitration System*, FIN. TIMES, NOV. 8, 2015, *available at* *https://next.ft.com/content/d7379996-862b-11e5-90de-f44762bf9896* (last visited Mar. 27, 2016);*see also TPP: Upgrading the NAFTA, supra* note 414 (describing TPP as "a renegotiation of NAFTA," in the sense that TPP will hold Mexico to "fully enforceable" provisions on labor).

[418] *TPP: Upgrading the NAFTA, supra* note 414.

[419] *Id.*

[420] *Id.*

[421] *Id.* (emphasis added).

[422] *Compare supra* note 2 and accompanying text.

[423] Peterson, *supra* note 355.

[424] *Id.*

[425] Melida Hodgson, *The Leaked TPP Investment Chapter Draft: Few Surprises . . . Is that a Surprise?*, TRANSNAT'L DISP. MGMT., NOV. 2015, at 1, *available at* *http://www.transnational-dispute-management.com/article.asp?key=2283* (last visited Mar. 27, 2016). The author is a former Associate General Counsel at USTR, participated in the development of the 2004 U.S. Model BIT, and was involved in negotiations of the investment chapters of four U.S. FTAs.*Id.* at 1, n. 1.

[426] *Id.* at 1.

[427] Lise Johnson & Lisa Sachs, *The TPP's Investment Chapter: Entrenching, Rather than Reforming, A Flawed System*, Colum. Ctr. on Sustainable Devel. Pol'y Paper, Nov. 2015, at 1, *available at* *http://ccsi.columbia.edu/files/2015/ll/TPP-entrenching-flaws-21-Nov-FINAL.pdf* (last visited Mar. 27, 2016).

[428] *Id.* at 19.

C. *Old Rules in New Contexts*

Based on the foregoing discussion, it seems clear that some U.S. investors will have to, or will prefer to, bring certain investment claims under TPP because (1) the relevant state does not have another investment treaty with the United States; [561] (2) the existing FTA does not provide for investor-state arbitration; [562] or (3) the particular claim raises issues dealt with more favorably under TPP, and that part of TPP lies beyond the reach of MFN obligations in existing FTAs. [563] While the decision to proceed under TPP will bring into play a number of familiar rules drawn from U.S. investment treaty practice, [564] investors may find that some of those rules operate in unexpected and unwelcome ways when applied in the context of TPP.

For example, NAFTA's investment chapter provides non-disputing states parties the right to make submissions to tribunals on questions involving treaty interpretation. [565] The 2004 Model BIT brought the same principle into U.S. BIT practice, and further clarified that non-disputing states parties have the right to make both written and oral submissions to tribunals on questions of treaty interpretation. [566] Similar provisions appear in the investment chapters of existing U.S. FTAs with Chile, [567] Singapore [568] and Peru. [569] With one exception, [570] [*209] administration of submissions by non-disputing parties has worked tolerably well and generated little controversy under bilateral or trilateral agreements where there can be no more than one or two non-disputing party submissions on any topic. [571]

In the context of TPP, however, eleven non-disputing parties will have the right to make written and oral submissions on every question of treaty interpretation in every case. [572] If one pauses to consider the logistics required to accommodate written and oral submissions by eleven non-disputing states parties, to provide the disputing parties opportunities to comment on those submissions, and to incorporate the submissions and comments into the decision-making process, it seems evident that application of this rule will substantially increase the cost and duration of arbitration proceedings under TPP's investment chapter. In cases where states parties express largely concordant views, [573] the piling-on effect may also have substantial effects on the decisions of

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[429] *Id.* at 1.

[430] Wolfgang Alschner & Dmitriy Skougarevskiy, *The New Gold Standard? Empirically Situating the TPP in the Investment Treaty Universe*, Nov. 23, 2015, at 10, *available at* *http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI%202015-8%20Alschner_Skougarevskiy_TPP.pdf* (last visited Mar. 27, 2016).

[431] *Id.* at 8.

[432] Id. at 2.

[433] *Id.* at 3, 10.

[434] *Id.* at 2, 4, 8, 20, 30.

[435] *Id.* at 23.

[436] *See supra* notes 423-35 and accompanying text.

[437] *See infra* notes 440-80 and accompanying text.

[438] *See infra* notes 481-560 and accompanying text.

[439] *See infra* notes 561-74 and accompanying text.

[440] *See* Ian F. Fergusson et al., *The Trans-Pacific Partnership (TPP) Negotiations and Issues for Congress*, Congressional Research Service, Mar. 20, 2015, at Summary and at 9, fig. 2 (indicating that the United States currently lacks FTAs with Brunei, Japan, Malaysia, New Zealand, and Vietnam), *available at* *https://www.fas.org/sgp/crs/row/R42694.pdf* (last visited Mar. 27, 2016).

tribunals. [574] In other words, non-disputing party submissions in the multilateral context of TPP can have far-reaching consequences. All things being equal, this may deter claimants from proceeding under TPP, as opposed to existing FTAs. At the margins, it may discourage investors from asserting claims that raise controversial or unsettled issues of treaty interpretation. In any case, what began as a sensible and workable right of intervention under bilateral and trilateral agreements seems likely to become a burdensome scheme likely to discourage (or at least penalize) the assertion of investment claims under TPP.

V. GEO-STRATEGY AND NORM DIFFUSION

It may seem puzzling, perhaps even "redundant," for the United States to conclude an FTA with eleven states when it already has FTAs with more than half those states, particularly when (1) attention falls on a set of obligations that exhibit a high degree of congruence across texts; and (2) the states parties agree to maintain their existing international agreements in force. [575] However, this perspective overlooks a larger context, in which the United States overtly describes TPP as a tool for enhancing its geo-strategic position in the Pacific region.

When the United States concluded NAFTA, public discourse emphasized economic considerations, [576] such as better integration of markets and the [*210] anticipated gains from unrestricted trade among 360 million people. [577] To the extent that NAFTA engaged broader themes, its ratification signaled that economic challenges would not force the United States into isolationism, [578] but would prompt the nation to enhance its prosperity through access to new customers in new markets. [579] Beyond that, NAFTA did not engage broader strategic themes because the United States already enjoyed a secure position as the hegemonic power in North America. [580]

[*211] The Pacific region presents an entirely different situation. The United States does not enjoy a secure position as the hegemonic power along the Pacific Rim. To the contrary, it is engaged in a contest with China for political and economic influence. [581] Sometimes, the President of the United States even has to remind listeners that the United States is a Pacific state. [582] Under these circumstances, senior officials often describe TPP as a

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[441] *See* U.S. Dept. of State, Bureau of Econ. and Bus. Affairs, *2015 Investment Climate Statement--Malaysia*, at 23, Table 3 (listing Singapore, Japan, and the United States as the top three sources of FDI in Malaysia), *available at* http://www.state.gov/documents/organization/241858.pdf (last visited Mar. 14, 2016).

[442] *See* Export.gov, *Doing Business in Malaysia* [hereinafter *Doing Business in Malaysia], available at* http://www.export.gov/malaysia/doingbusinessinmalaysia/index.asp (last visited Mar. 14, 2016) ("The U.S. has consistently been one of the largest foreign investors in Malaysia, with significant presence in the oil and gas sector, manufacturing, and financial services");*2015 Investment Climate Statement--Malaysia, supra* note 441, at 3 ("The largest U.S. investments are in the oil and gas sector, manufacturing, and financial services"); U.S. Trade Rep., *Malaysia, available at* https://ustr.gov/countries-regions/southeast-asia-pacific/malaysia (last visited Mar. 14, 2016) (reporting that "U.S. FDI in Malaysia is led by the manufacturing and mining sectors").

[443] See *Doing Business in Malaysia, supra* note 442 ("The stock of U.S. foreign direct investment (FDI) in the Malaysian manufacturing sector was nearly $ 15 billion in 2012, up from $ 13.9 billion in 2011. . . . Factoring in investments among foreign affiliated subsidiaries in the financial and oil and gas sectors would make U.S. FDI in Malaysia significantly higher (perhaps more than $ 30 billion)"); *2015 Investment Climate Statement--Malaysia, supra* note 441, at 22, Table 2 (listing official Malaysian statistics, which place inbound U.S. FDI at $ 11.6 billion, as well as official U.S. statistics, which place inbound U.S. FDI at $ 16.4 billion); U.S. Dept. of State, Bureau of Econ. and Bus. Affairs, *2013 Investment Climate Statement--Malaysia, available at* http://www.state.gov/e/eb/rls/othr/ics/2013/204686.htm (last visited Mar. 14, 2016) ("U.S. FDI in Malaysia is led by the manufacturing, oil and gas, financial services, and consumer products sectors. The total stock of U.S. manufacturing FDI in Malaysia was approximately $ 20 billion in 2011 as compared to $ 15 billion in 2010 according to MID A. Including FDI in the financial and oil and gas sectors, would make total U.S. FDI significantly higher (perhaps more than $ 30 billion)"); U.S. Trade Rep.,*Malaysia, supra* note 442 (reporting that "U.S. foreign direct investment (FDI) in Malaysia was $ 15.0 billion in 2012 (latest data available), a 21.1% increase from 2011").

tool designed to enhance the geo-strategic position of the United States by establishing a self-identified community of Pacific states bound together by a shared commitment to norms based on traditional U.S. values.

As evidence of the United States' conscious deployment of TPP to promote norm diffusion, [583] one may cite White House communications, which invite people to look beyond economic considerations: "Trade policy doesn't just support our country's economy, it can reflect our country's values too." [584] Building on that theme, the White House emphasizes that TPP will allow us to "rewrite the rules of trade to benefit America's middle class. Because if we don't, competitors who don't share our values, like China, will step in to fill that void." [585] Thus, the White House informs us, "the President's trade policy is the best tool we have to ensure [*212] that our workers, our businesses, and our values are shaping globalization and the 21st century economy, rather than getting left behind." [586]

Likewise, United States Trade Representative Michael Froman invites people to consider the strategic (as opposed to the purely economic) benefits of TPP. [587] In so doing, he reminds listeners that the Pacific region will be home to 3.2 billion middle-class consumers by 2030, [588] that it is "a region . . . very much in flux," [589] and that other states are seeking to organize the region along much more mercantilist lines. [590] Under these circumstances, he warns that the U.S. must "play a leading role in helping to define the rules of the road for the region and not leave that to others." [591] To that end, he describes TPP as "the most concrete manifestation" of the administration's strategy to lead the process of norm diffusion in Asia and, ultimately, the world:

> Well, you know, I think the agreement is, as I mentioned the most concrete manifestation of our rebalancing strategy towards Asia. But even more than that, it is a manifestation of U.S. leadership in the world. . . .
>
> The rest of the world is not standing still. Our competitors are not standing still. As we speak, other negotiations are going on for other approaches to the global trading system, more mercantilist approaches, more

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444 *See 2015 Investment Climate Statement--Malaysia, supra* note 441, at 10 ("The Embassy is not aware of any cases of uncompensated expropriation of U.S.-held assets by the Malaysian government").

445 *See id.* at 12 ("Fiscal incentives granted to both foreign and domestic investors historically have been subject to performance requirements, usually in the form of export targets, local content requirements and technology transfer requirements").

446 *See* TPP, *supra* note 320, Art. 9.9(2) (a)-(b) (prohibiting states from tying the receipt of advantages to certain local content requirements).

447 *See 2013 Investment Climate Statement--Malaysia, supra* note 443 (emphasizing that "Malaysia ranked in 54th place in Transparency International's Corruption Perception Index in 2012, and questioning whether domestic processes have the "ability to effectively address high-level corruption").

448 *2015 Investment Climate Statement--Malaysia, supra* note 441, at 15.

449 *Id.*

450 TPP, *supra* note 320, Art. 9.1 l(6)(a).

451 *Id.* Art. 9.6(1).

452 *See* DOLZER & SCHREUER, *supra* note 23, at 145-52 (describing transparency and the vindication of legitimate expectations as elements of fair and equitable treatment); NEWCOMBE & PARADELL, *supra* note 17, at 251-52, 279-94 (describing nondiscrimination in the application of national law, legitimate expectations, and transparency as elements of fair and equitable treatment); CAMPBELL McLACHLAN ET AL., *supra* note 35, at 235-36, 239-42 (describing legitimate expectations, transparency, and the absence of arbitrary discrimination as elements of fair and equitable treatment); SALACUSE, *supra* note 35, at 231-41 (describing legitimate expectations, transparency and the absence of arbitrary discrimination as elements of fair and equitable treatment); VANDEVELDE, *supra* note 18, at 234-43, 392-94, 402-04 (describing legitimate expectations, transparency, and the absence of unreasonable discrimination as elements of fair and equitable treatment). *But see supra* note 398 and accompanying text (indicating that TPP may seek to endorse the analytical approach of *Glamis Gold v. United States*,

> protectionist approaches, approaches that allow for the forced transfer of technology or forced transfer of intellectual property, agreements that don't have labor and environmental provisions or that don't put disciplines on state-owned enterprises or that don't maintain a free and open Internet.
>
> And, you know that--living in that world is much more to the advantage of American workers, farmers, ranches, firms of all sizes, if we're living in a world where TPP defines the rules of the road than if we're sitting on the sidelines and those rules of the road are set by somebody else. [592]

[*213] Viewed from this perspective, the layering of TPP on top of several existing FTAs makes sense, even if the existing texts substantially overlap and remain in force. The point is not to extend norms piecemeal to new partners through bilateral arrangements, but to draw allies and newcomers into a self-identified community that reflects U.S. values and functions as a center of gravity in a strategic region where our influence remains contested. [593]

In this sense, the strategic use of trade and investment agreements represents a significant shift in recent U.S. policy, [594] though it arguably represents less of a departure than a return to grand schemes like the Marshall Plan, [595] or the promotion of BITs as an antidote to the NIEO. [596]

[*214] The ambitiousness and potentially transformative character of TPP becomes apparent when one considers that it does not simply reiterate familiar rules on trade and investment. It ties those rules to a broader package that includes detailed and enforceable chapters on labor standards, environmental standards, Internet access, and transparency. [597] Thus, the White House emphasizes that TPP will require states to prohibit child labor, [598] set minimum wages, [599] allow labor unions, [600] combat illegal logging and wildlife trade, [601] permit open access to the Internet, [602] and to operate on the basis of regulatory transparency, [603] including requirements for notice, [604] comment, [605] and reasoned explanation in the adoption of new standards. [606]

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in which the tribunal required evidence of state practice to support claims for violation of the international minimum standards, thereby reducing the likelihood of success based on emerging principles of transparency and legitimate expectations).

[453] U.S. Dept. of State, *Vietnam: Investment Climate Statement--2015*, at 23 (Table 2), *available at* http://www.state.gov/documents/organization/242005.pdf (last visited Mar. 16, 2016) (indicating that U.S. investment stock in Vietnam reached $ 1,398 billion in 2013); U.S. Trade Rep.,*Vietnam, available at* https://ustr.gov/countries-regions/southeast-asia-pacific/vietnam (last visited Mar. 15, 2016) (opining that "U.S. foreign direct investment (FDI) in Vietnam (stock) was $ 1.1 billion in 2012 (latest data available), up 10.4 percent from 2011").

[454] *Vietnam: Investment Climate Statement--2015, supra* note 453, at 23 (Table 2) (citing the General Statistic Office of Vietnam for the proposition that U.S. investment in Vietnam reached $ 10,619 billion in 2014); Vietnamese Ministry of Planning & Investment, Foreign Investment Agency, *U.S. Investment in Vietnam, available at* http://fia.mpi.gov.vn/detail/3532/US-Investment-in-Vietnam (last visited Mar. 15, 2016) (stating that as "of June of 2015, U.S. investors ranked 7 among 103 foreign countries and territories in Vietnam with 742 existing projects worth [$]11.6 billion");*US Investment in Vietnam Tops $ 11 Billion with 735 Projects Countrywide*, Tuoi TRE NEWS, Apr. 16, 2015, *available at* http://tuoitrenews.vn/business/27504/us-investment-in-vietnam-tops-ll-billion-with-735-projects-countrywide (last visited Mar. 16, 2016) (reporting that "U.S. investors are now present in almost all industries in Vietnam and have so far pumped more than US$ 11 billion" into Vietnam, with some $ 4.68 billion in the hospitality sector alone).

[455] *Vietnam: Investment Climate Statement--2015, supra* note 453, at 23 (Table 2).

[456] *Id.* at 3.

The emergence of such a community in Asia under U.S. leadership would represent no small thing. It is a shame that the leading presidential candidates for both parties seem unable to support TPP's strategic vision for U.S.

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457 *See id.* at 8-9 (reporting that the "U.S. Mission is monitoring four foreign investment expropriation cases without just compensation").

458 *See id.* at 9 (indicating that "[s]everal foreign investors have reported that provincial or the national government pressured them to increase the pace of project development or to raise additional project capital or risk losing their investment license").

459 *See id.* at 6 (explaining that "[m]any U.S. firms have invested successfully, though a lack of transparency in the procedure for obtaining a business license at times makes participation in investment opportunities too risky for companies that comply with the U.S. Foreign Corrupt Practices Act"); *see also id.* at 19 ("Corruption is due in large part to a low level of transparency, accountability, and media freedom, as well as low pay for government officials and inadequate systems for holding officials accountable for their actions. Competition among agencies for control over business and investments has created overlapping jurisdictions and bureaucratic procedures that in turn create opportunities for corruption.").

460 Shibani Mahtani, *Vietnam Still Hot for American Investors*, WALL ST. J., Aug. 31, 2012, *available at* http://blogs.wsj.com/indonesiarealtime/2012/08/31/vietnam-still-hot-for-american-investors (last visited Mar. 16, 2016).

461 *Vietnam: Investment Climate Statement--2015, supra* note 453, at 9 (warning that "Vietnam's legal system remains underdeveloped and ineffective in settling disputes"); *see also id.* at 10 (observing that the "court system in Vietnam works slowly").

462 *See* U.S. Dept. of State, *Japan: Investment Climate Statement--2015*, at 9, *available at* http://www.state.gov/documents/organization/241821.pdf (last visited Mar. 16, 2016) ("In the post-war period, the Japanese Government has not expropriated any enterprises and the expropriation or nationalization of foreign investments in Japan is extremely unlikely").

463 *See id.* at 12 (observing that "Japan does not maintain performance requirements").

464 *See id.* at 10 (indicating that "Japan has a fully independent judiciary and a consistently applied body of commercial law").

465 *Id.* at 18.

466 U.S. investors have secured awards on the merits, or consent awards, against the Canadian government in five cases, two of them recently. *See* Clayton/Bilcon v. Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015), *available at* http://www.pcacases.com/web/sendAttach/1287; Mobil Inv. Can., Inc. v. Canada, ICSID Case No. ARB(AF)/07/4, Award (Feb. 20, 2015),*available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&dodd=DC6732_En&caseId=C262; AbitibiBowater, Inc. v. Canada, Consent Award (Dec. 15, 2010),*available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/abitibi-03.pdf; S.D. Myers, Inc. v. Canada, Second Partial Award (Oct. 21, 2002),*available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/myers-review-02.pdf; Pope & Talbot, Inc. v. Canada, Award in Respect of Damages (May 31, 2002),*available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/pope-phase-36.pdf.

467 *Japan: Investment Climate Statement--2015, supra* note 462, at 15.

468 *Id.* at 18.

469 *Id.*

470 *See supra* notes 450-52 and accompanying text.

471 *Japan: Investment Climate Statement--2015, supra* note 462, at 3.

472 *Id.* at 9; U.S. Dept. of Com., Off. of Pub. Affairs, *U.S. Secretary of Commerce Addresses the American Chamber of Commerce of Japan*, Oct. 21, 2014 [hereinafter *Pritzker Address*], at 4, *available at* https://www.commerce.gov/news/secretary-speeches/2014/10/us-secretary-commerce-penny-pritzker-addresses-american-chamber.

~~leadership in the region, and the world.~~

473 *Prizker Address, supra* note 472, at 4; Vinai Thummalapally, Exec. Dir., Select USA, U.S. Dept. of Com., *Trends Driving FDI in the United States*, LOCATION USA 2015, *available at* http://www.areadevelopment.com/LocationUSA/2015-US-inward-investment-guide/trends-driving-FDI-in-the-United-States-28201312.shtml.

474 *Id.*

475 *See* Yoshimi Ohara, *Japan, in* THE ASIA-PACIFIC ARB. REV. at 3 n.2 (2016), *available at* http://globalarbitrationreview.com/reviews/71/sections/238/chapters/2883/japan (explaining that "there is only one published treaty arbitration case in which an affiliate of a Japanese investor brought an investment treaty case against a [host] state") (citing Saluka Inv. BV v. Czech Rep, Partial Award (Mar 17, 2006),*available at* http://www.italaw.com/documents/Saluka-PartialawardFinal.pdf). In addition to cultural factors, it is possible that the relatively small number of Japanese investment treaties plays some role in the low incidence of investment treaty claims by Japanese companies.*See* Ohara, *supra*, at 1-2 (stating that China and South Korea both have more than 100 bilateral investment treaties, that "Japan has been far behind with only 21 BITs and 14 FTAs," and that eleven of those instruments were executed or entered into force after 2014).

476 *Japan: Investment Climate Statement--2015, supra* note 462, at 21; *Pritzker Address, supra* note 472, at 4.

477 Santander Trade Portal, *Japan: Foreign Investment* (reporting that, as of 2014, the United States counted for 30.7% of FDI inflows into Japan, and that the Netherlands represented the second largest source of FDI inflows into Japan, but that Dutch investment amounted to only 16.2% of FDI inflows into Japan), *available at* https://en.portal.santandertrade.com/establish-overseas/japan/foreign-investment (last visited Mar. 16, 2016).

478 Ohara, *supra* note 475, at 7 (indicating that U.S. companies "filed investment treaty claims in approximately 2130 cases . . . and are by far the most frequent users of the ISDS system").

479 *See id.* at 3, 7 (indicating that TPP negotiations have brought ISDS under attack for the first time in Japan, and attributing this to fears that U.S. investors will make promiscuous use of investment claims, thereby impeding the normal operation of the Japanese government).

480 *See Japan: Investment Climate Statement--2015, supra* note 462, at 10 (indicating that "[t]here have been no cases of international . . . arbitration of investment disputes between foreign investors and the Government of Japan since 1952"); Ohara, *supra* note 475, at 3 n.2 (observing that "Japan has never been a respondent state" in published investment treaty awards).

481 Fergusson et al., *supra* note 440, at 8.

482 *See supra* notes 423-35 and accompanying text.

483 *See supra* note 434 and accompanying text.

484 *See* Alschner & Skougarevskiy, *supra* note 430, at 11 (figure 1); Mapping BITs, TPP Chapter 9 Special [hereinafter Mapping], *available at* http://mappinginvestmenttreaties.com/specials/tpp.

485 See Alschner & Skougarevskiy, *supra* note 430, at 10, 11 (figure 1); Mapping, *supra* note 484.

486 Vienna Convention on the Law of Treaties, May 23, 1969, Art. 30(3), 1155 U.N.T.S 331.

487 *NAFTA ISDS and TPP ISDS*, INT'L. ECON. L. & POL'Y BLOG, comment by Julia Qin, Nov. 6, 2015, *available at* http://worldtradelaw.typepad.com/ielpblog/2015/ll/naflaisds-and-tpp-isds.html?cid=6a00d8341c90a753efrjlbb088c76c9970d#comment-6a00d8341c90a753ef01bb088c76c9970d (last visited Mar. 16, 2016) (opining that "unless NAFTA parties reach an agreement on how to reconcile its inconsistent provisions with TPP, TPP provisions would prevail if a dispute should arise over such inconsistencies").

488 TPP, *supra* note 320, Art. 1.2(1)(b).

489 Alschner & Skougarevskiy, *supra* note 430, at 21-22; *see also* Peterson, *supra* note 355 (observing tfiat TPP "does not purport to supplant, for Canada, Mexico and the United States, the existing North American Free Trade Agreement").

490 Alschner & Skougarevskiy, *supra* note 430, at 21-22.

491 *Id.*

492 *Id.*

493 *Compare supra* note 490 and accompanying text.

494 *See* Alschner & Skougarevskiy, *supra* note 430, at 23 (explaining that "investors can choose under which treaty to bring an investment claim"); *see also* Peterson, *supra* note 355, at 1 (concluding that the overlapping treaty obligations "leav[es] open the prospect of investor-claimants shopping between the two treaties for the most advantageous rights and dispute settlement mechanism").

495 *See* Alschner & Skougarevskiy, *supra* note 430, at 18 (recognizing that Australia's existing FTAs with Japan, Malaysia, New Zealand and the United States represent the only existing FTAs between TPP states parties that do not provide for investor-state arbitration); *see also* William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 22 (2006) ("What distinguishes AUSFTA from NAFTA is its lack of a provision for direct investor claims. Enforcement of AUSFTA Chapter 11 is limited to the state-to-state dispute settlement procedures set forth in Chapter 21.").

496 *See* Alschner & Skougarevskiy, *supra* note 430, at 18 (observing that Australia's FTAs with Japan, Malaysia and the United States "have now lost much of their practical significance, because investors can finally bring direct investment claims under the parallel TPP").

497 *See supra* notes 407-09 and accompanying text. Using a subsidiary located in a jurisdiction that has an investment treaty with Australia providing for investor-state arbitration, cigarette maker Philip Morris brought a high-profile claim challenging Australia's plain-packaging laws for cigarettes. Luke Eric Peterson, *Analysis: Australian Defense Strategy Puts Spotlight on Timing of Philip Morris's Corporate Structuring Moves, Claims "Abuse" of Investment Treaty*, INVESTMENT ARB. REP., Dec. 31, 2011, *available at* http://www.iareporter.com/articles/analysis-australian-defense-strategy-puts-spotlight-on-timing-of-philip-morriss-corporate-structuring-moves-claims-abuse-of-investment-treaty (last visited Apr. 2, 2016). The tribunal hearing that matter recently dismissed the case on jurisdictional grounds. Jarrod Hepburn & Luke Eric Peterson,*Australia Prevails in Arbitration with Philip Morris over Tobacco Plain Packaging Dispute*, INVESTMENT ARB. REP., Dec. 15, 2015, *available at* http://www.iareporter.com/articles/breaking-australia-prevails-in-arbitration-with-philip-morris-over-tobacco-plain-packaging-dispute (last visited Apr. 2, 2016).

498 Marc J. Goldstein & Andrea K. Bjorklund, *International Commercial Dispute Resolution*, 36 INT'L LAW. 401, 416 (2002).

499 *See* Brower, *Corporations, supra* note 184, at 205-06 & n.184 (indicating that claims brought under NAFTA Chapter 11 fueled NGO opposition to other international investment agreements, such as the draft Multilateral Agreement on Investment and the draft Free Trade Area for the Americas, for which negotiations ultimately failed).

500 *See* Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 895-96 (2011) (describing how NAFTA investment claims and NGO policy work quickly fueled a backlash in state practice against investor-state arbitration).

501 *See supra* notes 223-38, 272-76, 286-89, 291-99 and accompanying text; *see also* Brower, *Corporations, supra* note 184, at 192 (indicating that investment treaty practice following 2004 "emphatically signals a trend towards the rebalancing of investment treaties to protect the regulatory space of host states"); Stephen M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, TRANSNAT'L DISP. MGMT, Apr. 2006, http://www.transnational-dispute-management.com (describing the same refinements as the "regressive development of international law").

502 *See* Jose E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AMERICAN L. REV. 303, 304 (1997) (describing NAFTA's investment chapter as "a U.S. bilateral investment treaty on steroids - a dream come true for the U.S. foreign investor").

503 DOLZER & SCHREUER, *supra* note 23, at 211; *see also* NEWCOMBE & PARADELL, *supra* note 17, at 197 (explaining that "the MFN clause multilateralizes investment protections" by creating a network of treaty obligations in which everyone benefits from higher standards granted in other treaties).

504 *See* NAFTA, *supra* note 55, Annex IV: Exceptions from Most-Favored-Nation Treatment, Schedule of Canada ("Canada takes an exception to Article 1103 for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement"); Schedule of Mexico ("Mexico takes an exception to Article 1103 for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement"); Schedule of the United States ("The United States takes an exception to Article 1103 for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement"), *available at* https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=1&secid=bb771460-967f-4458-8243-d3137e3290ec (last visited Mar. 17, 2016).*See also* TPP, *supra* note 320, Annex II: Non-Conforming Measures, Schedule of Australia ("Australia reserves the right to adopt or maintain any measure that accords more favorable treatment to any service supplier or investor under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement"); Schedule of Brunei ("Brunei Darussalam reserves the right to adopt or maintain any measure that accords differential treatment: (a) to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement . . . ."); Schedule of Canada ("Canada reserves the right to adopt or maintain a measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement"); Schedule of Chile ("Chile reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force on, or signed prior to, the date of entry into force of this Agreement"); Schedule of Japan ("Japan reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral agreement in force on, or signed prior to, the date of entry into force of this Agreement"); Schedule of Malaysia ("Malaysia reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement"); Schedule of Mexico ("Mexico reserves the right to adopt or maintain any measure granting different treatment to countries accorded under all bilateral or multilateral international agreements in force prior to the date of the entry into force of this Agreement"); Schedule of New Zealand ("New Zealand reserves the right to adopt or maintain any measure that accords differential treatment to a Party or a non-Party under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement"); Schedule of Peru ("Peru reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement"); Schedule of Singapore ("Singapore reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement"); Schedule of United States ("The United States reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement"); Schedule of Vietnam ("Viet Nam reserves the right to adopt or maintain any measure that accords differential treatment: (a) to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement . . . ."), *available at* https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (last visited Mar. 17, 2016).

505 Since 1994, ten FTAs and 27 Foreign Investment Promotion and Protection Agreements have entered into force for Canada. *See* Global Affairs Canada, Canada's Free Trade Agreements, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng (last visited Mar. 17, 2016);*see also* Global Affairs Canada, Foreign Investment Promotion and Protection (FIPAs), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng (last visited Mar. 17, 2016).

Since 1994, eleven FTAs and 29 BITs have entered into force for Mexico. See United Nations Conference on Trade and Development, International Investment Agreements Navigator, Mexico: Other Investment Agreements, *available at* http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/136#iiaInnerMenu (last visited Mar. 17, 2016);*see also* United Nations Conference on Trade and Development, International Investment Agreements Navigator, Mexico: Bilateral Investment Agreements, http://investmentpolicyhub.unctad.org/II A/CountryBits/136#iiaInnerMenu (last visited Mar. 17, 2016).

506 *See supra* notes 58-61 and accompanying text (describing the unusually narrow definition of "investment" under NAFTA's Chapter 11); *see also* VANDELVELDE, *supra* note 18, at 125-26 (indicating that NAFTA's investment chapter adopts an enterprise-based definition of "investment" based on an exhaustive list of qualifying assets, and opining that only a "few" investment treaties "limit the definition of investment to assets identified in the list").

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507 *See* Vanessa Ventures, Ltd. v. Venezuela, ICSID Case No. ARB(AF)/04/6, Award P 133 (Jan. 16, 2013) ("The benefit of the MFN provision in Article III of the Canada-Venezuela BIT can only be asserted in respect of investments that are within the scope of Article 1(f) of the Canada-Venezuela BIT to begin with. The MFN clause cannot be used to expand the category of investments to which the Canada-Venezuela BIT applies."); Metal-Tech v. Uzbekistan, ICSID Case No. ARB/10/3, Award P 144 (Oct. 4, 2013) ("The question that must be resolved here is whether this MFN obligation extends to the definition of investment in Article 1(1) of the BIT. . . . For the reasons given below, the Tribunal finds that this is not the case."); Societe Generale v. Dominican Republic, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction P 40 (Sept. 19, 2008) ("Each treaty defines what it considers a protected investment and who is entitled to that protection, and definitions can change from treaty to treaty. In this situation, resort to the specific text of the MFN Clause is unnecessary because it applies only to the treatment accorded to such defined investment, but not to the definition of 'investment' itself.").

508 *See supra* notes 101-03 and accompanying text.

509 *See supra* notes 366-70 and accompanying text.

510 *See supra* notes 42-43 and accompanying text (indicating that umbrella clauses have the effect of bringing certain contractual undertakings within the scope of treaty protection).

511 DOLZER & SCHREUER, *supra* note 23, at 270-75; NEWCOMBE & PARADELL, *supra* note 17, at 205-24; MCLACHLAN ET AL., *supra* note 35, at 254-57.

512 *See supra* note 353 and accompanying text; *see also* VANDEVELDE, *supra* note 18, at 345 (indicating that these express limitations on the scope of MFN treatment may have the effect "to exclude dispute resolution provisions from the scope of the MFN treatment provision"); *id.* at 365 (opining that such language "is understood in [U.S.] BITs not to apply to dispute resolution").

513 *See supra* note 353 and accompanying text.

514 *Compare* NAFTA, *supra* note 55, Art. 1103(1)-(2); *with* TPP, *supra* note 320, Art. 9.5(1)-(2).

515 DOLZER & SCHREUER, *supra* note 23, at 272-74; NEWCOMBE & PARADELL, *supra* note 17, at 210.

516 Salini Costruttori S.p.A. v. Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction PP 118-19 (Nov. 15, 2004).

517 *See supra* notes 100, 391 and accompanying text.

518 In a number of awards, tribunals have held that claimants can avoid a requirement to pursue litigation in the courts of the host state for 18 months by using the basic treaty's MFN clause to tap into other treaties that have no such condition precedent for submission of claims to investor-state arbitration. *See, e.g.*, Hochtief AG v. Argentina, ICSID Case No. ARB/07/31, Decision on Jurisdiction PP 59-76 (Oct. 24, 2011); National Grid PLC v. Argentina, Decision on Jurisdiction P 93 (June 20, 2006); Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina, ICSID Case No. ARB/03/17, Decision on Jurisdiction P 63 (May 16, 2006); Gas Natural SDG v. Argentina, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction P 49 (June 17, 2005); Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction PP 94-110 (Aug. 3, 2004); Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction P 64 (Jan. 25, 2000).

519 In other cases, tribunals have held that claimants cannot use MFN clauses to avoid procedural conditions precedent to arbitration set forth in the basic treaty. Kiliç inşaat ithalat Ihracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/01, Award PP 3.1.1, 7.9.1 (July 2, 2013); Daimler Fin. Servs. AG v. Argentina, ICSID Case No. ARB/05/1, Award on Jurisdiction P 281 (Aug. 22, 2012); ICS Inspection and Control Servs. Ltd (United Kingdom) v. Argentina, PCA Case No. 2010-9, Award on Jurisdiction PP 274-317 (Feb. 10, 2012); Wintershall A.G. v. Argentina, ICSID Case No. ARB/04/14, Award P 197 (Dec. 8, 2008).

520 DOLZER & SCHREUER, *supra* note 23, at 274.

521 *See supra* notes 511-14 and accompanying text.

522 U.S. Trade Rep., Chile Free Trade Agreement, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta (last visited Mar. 17, 2016); U.S. Trade Rep., Singapore FTA,*available at* https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta (last visited Mar. 17, 2016).

523 *See supra* notes 197-206 and accompanying text.

524 *See supra* notes 188-96 and accompanying text.

525 *See* Alschner & Skougarevskiy, *supra* note 430, at 11 (figure 1); Mapping, *supra* note 484.

526 *Id.*

527 Ten FTAs have entered into force for Chile since 2004. *See* United Nations Conference on Trade and Development, International Investment Agreements Navigator, Chile: Other Investment Agreements, *available at* http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/41#iiaInnerMenu (last visited Mar. 17, 2016). Twelve BITs have entered into force for Singapore since 2004. United Nations Conference on Trade and Development, International Investment Agreements Navigator, Singapore: Bilateral Investment Treaties,*available at* http://investmentpolicyhub.unctad.org/IIA/CountryBits/190 (last visited Mar. 17, 2016). Nine FTAs have entered into force for Singapore since 2004. United Nations Conference on Trade and Development, International Investment Agreements Navigator, Singapore: Other Investment Agreements,*available at* http://investmentpolicyhub.unctad.Org/IIA/CountryOtherIias/190#iiaInnerMenu (last visited Mar. 17, 2016).

528 *See supra* notes 396-98 and accompanying text.

529 *See supra* notes 403-06 and accompanying text.

530 *See supra* notes 399-402 and accompanying text.

531 *See supra* notes 407-09 and accompanying text.

532 *See supra* notes 506-21 and accompanying text.

533 *See supra* notes 100 and accompanying text.

534 U.S.-Chile FTA, *supra* note 307, Art. 10.17(1); U.S.-Singapore FTA, *supra* note 307, Art. 15.17(1).

535 *See supra* note 517-21 and accompanying text.

536 *See supra* note 101 and accompanying text.

537 U.S.-Chile FTA, *supra* note 307, Art. 10.15(1)(a)(i); U.S.-Singapore FTA, *supra* note 307, Art. 15.15(1)(a)(i).

538 U.S.-Chile FTA, *supra* note 307, Art. 10.27; U.S.-Singapore FTA, *supra* note 307, Art. 15.1.

539 TPP, *supra* note 320, Art. 9.1.

540 *See supra* notes 511-16 and accompanying text.

541 U.S.-Chile FTA, *supra* note 307, Annex 10-B. The U.S.-Singapore FTA does not include a similar annex.

542 *id.*

543 *See* TPP, *supra* note 320, Annex 9-G, P 1 (recognizing that the purchase of public debt "entails commercial risk," and emphasizing that tribunals may not issue awards for treaty violations based on non-payment "unless the claimant meets its burden of proving that such default or non-payment constitutes a breach of an obligations under Section A, including an uncompensated expropriation pursuant to Article 9.7").

544 *See id.* Art. 9. 1 (defining a "negotiated restructuring").

[545] *See id.* Annex 9-G, P 2 (excluding from arbitration treaty claims related to public debt if the host state has entered into a negotiated restructuring). This exclusion does not apply to claims against Singapore or the United States. *Id.* P 2, n.43.

[546] *Id.* P 2.

[547] U.S. Trade Rep., *Peru Trade Promotion Agreement, available at* https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa (last visited Mar. 27, 2016).

[548] *See* Alschner & Skougarevskiy, *supra* note 430, at 11 (figure 1); Mapping, *supra* note 484.

[549] Eight FTAs were signed and entered into force for Peru since 2009. *See* United Nations Conference on Trade and Development, International Investment Agreements Navigator, Peru: Other Investment Agreements, *available at* http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/165#iiaInnerMenu (last visited Mar. 17, 2016).

[550] *See supra* notes 528-31 and accompanying text.

[551] *See supra* notes 506-21, 532-46 and accompanying text.

[552] *See supra* notes 100, 534 and accompanying text.

[553] U.S.-Peru TPA, *supra* note 307, Art. 10.18(1).

[554] *See supra* notes 517-21, 535 and accompanying text.

[555] *See supra* notes 101, 536-46 and accompanying text.

[556] U.S.-Chile FTA, *supra* note 307, Art. 10.15(1)(a)(i); U.S.-Singapore FTA, *supra* note 307, Art. 15.15(1)(a)(i).

[557] *See* text accompanying notes 511-14, 540, *supra* (generally opining that the MFN provisions set forth in the NAFTA, the U.S.-Chile FTA, and the U.S.-Singapore FTA are unlikely to reach more favorable dispute-settlement mechanisms adopted by subsequent investment treaties).

[558] *See supra* notes 423-35 and accompanying text.

[559] *See supra* notes 440-80 and accompanying text.

[560] *See supra* notes 481-557 and accompanying text.

[561] *See supra* notes 440-80 and accompanying text.

[562] *See supra* notes 495-97 and accompanying text.

[563] *See supra* notes 506-21, 532-46, 551-57 and accompanying text.

[564] *See supra* notes 523-35 and accompanying text.

[565] *See supra* notes 92-94 and accompanying text.

[566] *See supra* notes 284-85 and accompanying text.

[567] U.S.-Chile FTA, *supra* note 307, Art. 10.19(2).

[568] U.S.-Singapore FTA, *supra* note 307, Art. 15.19(2).

[569] U.S.-Peru TPA, *supra* note 307, Art. 10.20(2).

[570] *See* Charles H. Brower II, *Who Are the Protagonists in Investment Treaty Arbitration*?, KLUWER ARBITRATION BLOG, Oct. 1, 2014 (recounting a case in which the tribunal decided to exclude non-disputing states parties from attending hearings

conducted under NAFTA's investment chapter, as well as the controversy to which that decision led), *available at* http://kluwerarbitrationblog.com/2014/10/01/who-are-the-protagonists-in-investment-treaty-arbitration (last visited Mar. 27, 2016).

571 *See* Bjorklund, *supra* note 94, at 517-18 (suggesting that the non-disputing Party provision of NAFTA's investment chapter, while sparse, has worked fairly smoothly).

572 TPP, *supra* note 320, Art. 9.22(2).

573 Observers have noted that states making non-disputing Party submissions are not likely to support the investor's position because that would also "enlarge their own exposure to claims." *See* Bjorklund, *supra* note 94, at 517 (quoting J.C. Thomas, *Investor-State Arbitration Under NAFTA Chapter 11*, 1999 CAN. Y.B. INT'L. 99, 108).

574 *See supra* note 93 and accompanying text (discussing the weight sometimes given to concordant submissions by all states parties).

575 *See supra* notes 313, 423-35, 481-89 and accompanying text.

576 *See* George H.W. Bush, *Remarks on Signing the North American Free Trade Agreement*, Dec. 17, 1992 ("[B]y signing the North American Free Trade Agreement, we've committed ourselves to a better future for our children and for generations yet unborn. This agreement will remove barriers to trade and investment across the two largest undefended borders of the globe and link the United States in a permanent partnership of growth with our first and third largest trading partners.") [hereinafter *Bush Signing Remarks], available at* http://www.presidency.ucsb.edu/ws/?pid=21784 (last visited Mar. 27, 2016); George H.W. Bush,*Remarks Announcing the Completion of Negotiations on the North American Free Trade Agreement*, Aug. 12, 1992 ("The Cold War is over. The principal challenge now facing the United States is to compete in a rapidly changing, expanding global marketplace. This agreement will level the North American playing field, allowing American companies to increase sales from Alaska to the Yucatan. By sweeping aside barriers, NAFTA will make our companies more competitive everywhere in the world."), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=21317 (last visited Mar. 28, 2016).

This mirrors a more general shift in U.S. investment treaty practice. While the United States launched its BIT program during the late 1970s for the strategic purpose of reinforcing international law on the protection of foreign investment, by the turn of the century U.S. officials had abandoned that strategic vision due to geo-political changes that occurred during the 1990s and, instead, came to emphasize the role of BITs in promoting U.S. export performance. VANDEVELDE, *supra* note 17, at 68.

577 *See Bush Signing Remarks, supra* note 576 (predicting an "explosion of growth and trade let loose by the combined energies of our 360 million citizens trading freely across our borders").

578 *See* William J. Clinton, *Remarks on the Signing of NAFTA*, Dec. 8, 1993 [hereinafter *Clinton Signing Remarks*] (describing NAFTA as "a symbolic struggle for the spirit of our country and how we would approach this very difficult and rapidly changing world dealing with our own considerable challenges here at home," and indicating that ratification of the NAFTA signals a decision that "we would compete, not retreat"), *available at* http://millercenter.org/president/speeches/speech-3927 (last visited Mar. 28, 2016); William J. Clinton,*Statement on the North American Free Trade Agreement Supplemental Accords*, Aug. 13, 1993 ("NAFTA is part of my broad economic strategy to gear the American economy for a changing world . . . ."), *available at* http://www.presidency.ucsb.edu/ws/?pid=46987 (last visited Mar. 28, 2016).

579 *See Clinton Signing Remarks, supra* note 578 ("Now we must recognize that the only way for a wealthy nation to grow richer is to export, to simply find new customers for the products and services it makes"); William J. Clinton, *Remarks on NAFTA to Small Business Leaders*, Nov. 15, 1993 ("There is no way any wealthy country in this world can increase jobs without increasing the number of people who buy that nation's products and services"), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=46118 (last visited Mar. 28, 2016).

580 *See* Guy Poitras, *The Potential for U.S. Economic Dominance*, 6 NAFTA: L. & BUS. REV. AM. 389, 392 (2000) ("As a unipolar region, North America had unique advantages; its hegemonic structure made NAFTA an obvious first step for a free trade area"); *see also* Daniel Abebe, *The Global Determinants of U.S. Foreign Relations Law*, 49 STAN. J. INT'L L. 1, 46-47 (2013) (explaining that "in the late nineteenth century, the United States became the regional hegemon in North America, the regional unipolar power" after Spain ceased to function as a serious presence in the region following the Spanish-American War).

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581 *See* Christopher J. Borgen, *Whose Public, Whose Order? Imperium, Region, and Normative Friction*, 32 YALE J. INV', L. 331, 336 (2007) (Table 1) (identifying China and the United States as "competing powers" in the Pacific region).

582 *See* The White House, Office of the Press Sec'y, *Remarks by the President in Meeting on the Trans-Pacific Partnership*, Nov. 13, 2015 ("We've been working hard to increase the U.S. presence and focus in the Asia Pacific region. We are a Pacific power."), *available at* https://www.whitehouse.gov/the-press-office/2015/11/13/remarks-president-meeting-trans-pacific-partnership (last visited Mar. 28, 2016); The White House, Office of the Press Sec'y,*Remarks by the President in State of the Union Address*, Jan. 20, 2015 ("But as we speak, China wants to write the rules for the world's fastest-growing region. That would put our workers and our businesses at a disadvantage. Why would we let that happen? We should write those rules."), *available at* https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015 (last visited Mar. 28, 2016);*see also* Meghan Bartlett, *Obama's Top Trade Adviser Mum on Date for Asia Deal Debate*, WASH. TIMES, Oct. 15, 2015 ("'The U.S. is a Pacific power, always has been, always will be,' [USTR] Mr. Froman said, emphasizing that the TPP is a 'part of the rebalancing strategy towards Asia.'"), *available at* http://www.washingtontimes.com/news/2015/oct/15/michael-froman-obama-aide-mum-date-pacific-trade-d (last visited Mar. 28, 2016).

583 Ardevan Yaghoubi, *Norm Diffusion in the Transpacific Partnership*, OPTINIIO JURIS BLOG, Oct. 28, 2015, *available at* http://opiniojuris.org/2015/10/28/guest-post-norm-diffusion-in-the-transpacific-partnership (last visited Mar. 28, 2016).

584 *What You Need to Know, supra* note 2.

585 *Id.*

586 *Id.*

587 *See* Council on Foreign Relations, *Conference Call: The U.S. Trade Agenda and the Trans-Pacific Partnership*, Oct. 15, 2015 (statement by Michael Fromm) [hereinafter *Froman CFR Remarks*] ("Trade agreements should be evaluated on their economic benefits, but the area I want to focus on today are really its strategic--its strategic merits"), *available at* http://www.cfr.org/trade/us-trade-agenda-trans-pacific-partnership/p37117 (last visited Mar. 31, 2015).

588 *See* Kirkham, *supra* note 414 (quoting USTR Michael Froman).

589 *Id.*

590 *Id.; see also* Michael Fromm, *The Strategic Logic of Trade*, FOREIGN AFFAIRS, Nov./Dec. 2014 (warning that the "United States is not alone in working to define the rules of the road in the Asia-Pacific," and that "[i]ncreasingly, the rules-based, open trading system is competing with state-directed, mercantilist models"), *available at* https://www.foreignaffairs.com/articles/americas/strategic-logic-trade.

591 Kirkham, *supra* note 414 (quoting USTR Michael Froman).

592 *Froman CFR Remarks, supra* note 587.

593 As one journalist put it:

> The TPP is as much about geopolitics as it is about trade. Often called the "economic backbone" of U.S. President Barack Obama's "pivot" to Asia, the goal for the U.S. and Japan is to get ahead of China, which is not included in the TPP, and to create an economic zone in the Pacific Rim that might balance Beijing's economic heft in the region. It is also about writing the rules of the 21st-century global economy for everything from cross-border data flows to how state-owned enterprises are allowed to compete internationally.

Shawn Donnan, *TPP: Seven Things Worth Knowing*, FIN. TIMES, Oct. 12, 2015, *available at* https://next.ft.com/content/df9ce46c-6aea-11e5-8171-bal968cf791a (last visited Mar. 31, 2016).

594 Yaghoubi, *supra* note 583.

[595] During a June 1947 commencement address to Harvard University, Secretary of State George Marshall drew attention to "the dislocation of the entire fabric of European economy" and expressed the view that the "modern system of the division of labor upon which the exchange of products is based is in danger of breaking down." George C. Marshall Found., The Marshall Plan Speech, June 4, 1947, *available at* http://marshallfoundation.org/marshall/the-marshall-plan/marshall-plan-speech (last visited Mar. 1, 2016).

Without "substantial additional help," European states would face "economic, social and political deterioration of a very grave character." *Id.* Given these facts, it seemed "logical that the United States should do whatever it is able to do to assist in the return of normal economic health in the world, without which there can be no political stability and no assured peace." *Id.* In so doing, its "purpose [w]ould be the revival of a working economy . . . so as to permit the emergence of political and social conditions in which free institutions can exist." *Id.* Towards the end of his remarks, Marshall apologized for "entering into a 'technical discussion' that had likely bored his listeners." Henry A. Kissinger, *Reflections on the Marshall Plan*, HARV. GAZ., May 22, 2015, *available at* http://news.harvard.edu/gazette/story/2015/05/reflections-on-the-marshall-plan (last visited Mar. 31, 2016).

According to former Secretary of State Henry Kissinger, "subsequent generations occasionally took too literally Marshall's description of the plan as 'technical,' emphasizing its economic aspects above all else." *Id.* In Kissinger's view, the Marshall Plan represented a strategic reorientation of U.S. foreign policy that ultimately secured a "permanent role for America in the construction of international order." *Id.*

[596] *See supra* notes 18-31 and accompanying text.

[597] *See supra* notes 331, 336-37 and accompanying text.

[598] *See What You Need to Know, supra* note 2; *see also* U.S. Trade Rep., *TPP Fact Sheet on Protecting Workers, available at* https://ustr.gov/sites/default/files/TPP-Protecting-Workers-Fact-Sheet.pdf (last visited Mar. 31, 2016).

[599] *Id.*

[600] *Id.*

[601] *See What You Need to Know, supra* note 2; *see also* U.S. Trade Rep., *TPP Fact Sheet on Preserving the Environment, available at* https://ustr.gov/sites/default/files/TPP-Preserving-the-Environment-Fact-Sheet.pdf (last visited Mar. 31, 2016).

[602] *See What You Need to Know, supra* note 2; *see also* U.S. Trade Rep., *TPP Fact Sheet on Ensuring a Free and Open Internet, available at* https://ustr.gov/sites/default/files/TPP-Ensuring-a-Free-and-Open-Internet-Fact-Sheet.pdf (last visited Mar. 31, 2016).

[603] *See What You Need to Know, supra* note 2; *see also* U.S. Trade Rep., *TPP Fact Sheet on Strengthening Good Governance, available at* https://ustr.gov/sites/default/files/TPP-Strengthening-Good-Governance-Fact-Sheet.pdf (last visited Mar. 31, 2016).

[604] TPP, *supra* note 320, Art. 26.2(4)(a)-(c).

[605] *Id*. Art. 26.2(4)(d).

[606] *Id.* Art. 26.2(5)(b).