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How did investor-state dispute settlement get a bad rap? Blame it on NAFTA, of course

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1 | INTRODUCTION

One of the central issues plaguing international commercial relations is that the private interests at the heart of flows of goods, services and capital have traditionally lacked any "personality" within the customary international law.

Without international "personality," private investors or exporters have had difficulties binding themselves contractually to sovereign hosts in ways that secure their market access or private investments, as would be the case in their home markets. Without standing or "personality" in the context of international law, private foreign commercial interests, much like individuals, have had few avenues through which to pursue their international legal claims. The absence of such rules has long been thought to be an important disincentive on capital flows from developed to developing countries and a partial explanation for the historical tendency for foreign direct investment (FDI) to flow so predominantly between developed economies.

One popular mechanism for mitigating these problems with respect to foreign direct investment has been the emergence and use of bilateral investment treaties (BITs) in the post-war era. The use of BITs between state parties to define the treatment of private investment, including rules for dispute settlement and compensation, has offered private interests a form of "personality" within international law through which they can defend their interests.

For the United States in particular, efforts to support US nationals investing abroad have historically taken the form of treaties of Friendship, Commerce and Navigation (FCN), which governed trade in goods. With the growth of international capital flows following World War I, the United States began expanding the use of these commercial treaties to deal with the treatment of US nationals investing in foreign countries. In comparison with European countries, the United States was slow to adopt a formal BIT programme, doing so in 1981 and completing only 46 BITs by the end of 2000. The core provisions of US BITs have remained consistent in this short time and were effectively trilateralised within Chapter 11 of the North American Free Trade Agreement (NAFTA) in 1994.

The short history of the global expansion of BITs was, until recently, relatively uncontroversial. However, for Germany, Australia, Canada, the United States and others, the so-called investor-state dispute settlement (ISDS) provisions of those same BITs have become the source of considerable controversy and concern. In Europe, a Swedish power company, Vattenfall, is suing Berlin under the investment terms of European Energy Charter Treaty because of Germany's 2012 decision to

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accelerate closure of most of the country's nuclear facilities.[1] In Australia, the tobacco giant Phillip Morris used the investment provisions of the Australia–Hong Kong Free Trade Agreement to sue Canberra over its cigarette packaging rules.[2] And Canada and the United States have together been the defendants in nearly three-quarters of the suits filed under the investment chapter of the North American Free Trade Agreement.

In 2006, the United States and Australia concluded a Free Trade Agreement without investment provisions (Dodge, 2006). In 2011, Australia went further and made it blanket policy to eschew them in all future agreements.[3] Germany is balking at ISDS provisions in the Canada-EU Trade Agreement (CETA) completed in August of 2014 and is resisting their inclusion in the EU's ongoing negotiations with the United States (the Trans-Atlantic Trade and Investment Partnership, or TTIP);[4] ironic since Germany was an originator of investment rules in the 1950s.

Given the long, and relatively uncontroversial, history of ISDS, how can we account for the sudden fuss these rules have kicked up? Contemporary anxieties about ISDS provisions are fuelled, in part, by the two-decades-long experience of the United States with NAFTA. The US BIT programme was employed to protect the investments of US nationals from expropriation, almost exclusively in developing countries. Until 2012, there had not been a single instance of dispute settlement cases initiated against the United States by firms from BIT countries.[5] Yet, in the short history of NAFTA Chapter 11 jurisprudence, there have been 50 claims, 36 of which have been filed against developed states; 18 against the United States, 18 against Canada and just 14 against Mexico.[6]

NAFTA has, of course, been controversial from the start, in part because of the exaggerated claims about the Agreement's impact by both proponents and critics alike (Hufbauer & Schott, 2005, pp. 5–8). Virtually, none of the sales pitch for or critiques of NAFTA centred on ISDS. Yet, NAFTA was pivotal in transforming a set of obscure, and until then, an uncontroversial set of bilateral investment treaties worldwide into controversies roiling contemporary international trade and investment agreements like the Trans-Pacific Partnership (TPP), the CETA and the proposed TTIP.

This paper is generally about the experience with investment rules in NAFTA's Chapter 11; how ISDS found its way into NAFTA, the controversy those rules initiated, and the ripple effects that controversy is having elsewhere. When Chapter 11 ISDS became part of the NAFTA text, it was presumed that Mexico would be the principal target of most suits; it was still a developing

[1] Nathalie Bernasconi-Osterwalder and Martin Dietrich Brach, "The state of Play in Vattenfall v. Germany II: Leaving the German Public in the Dark," International Institute for Sustainable Development Briefing Note December 2014: 1–8.

[2] See Philip Morris Asia Limited, Notice of claim under the agreement between the Government of Hong Kong and the Government of Australia for the promotion and protection of investments, 27 June 2011.

[3] Government of Australia, "Gillard government trade policy statement: Trading our way to more jobs and prosperity," April 2011: 14.

[4] "Transatlantic trade talks hit German snag," *Financial Times*, 14 March 2014; "EU quietly asks Canada to rework trade deal's thorny investment clause," CBC News, 21 January 2016; Regulation No 1219/2012 of the European Parliament and of the Council, Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries, 12 December 2012; European Union's proposal for Investment Protection and Resolution of Investment Disputes, Transatlantic Trade and Investment Partnership, 12 November 2015. http://trade.ec.europa.eu/doclib/docs/2015/November/tradoc_153955.pdf. Accessed on 29 March 2016.

[5] In 2012, four separate cases were launched in connection with the Allen Sanford financial services ponzi scheme fraud, one each using the investment protection provisions of, respectively, the US–Uruguay BIT, US–Peru FTA, US–Chile FTA and the CAFTA-DR.

[6] As compiled by the US Department of State, Office of the Legal Adviser, https://www.state.gov/s/l/c3439.htm, accessed on 13 April 2017.

country and had a twentieth-century track record of expropriation, and had spent much of the previous decade clawing its way out of debt. Yet, as the case history suggests, things have turned out differently. Indeed, Chapter 11 was the first real experiment in ISDS incorporating advanced developed countries under the same rules.

This paper makes three claims, parts of which have been suggested elsewhere, but never put forth in a single piece. First, NAFTA's rules emerged at the onset of shifting patterns of global FDI and, for the first time, made developed states far more susceptible to BIT provisions. Second, the mere presence of those rules in the context of developed states incentivised the legal testing of what was, in effect, a new legal regime. Third, whereas the decades-long linguistic ambiguity within BITs was uncontroversial so long as the Parties were restricted to traditional developed–developing country dyads, NAFTA brought to a head the need for greater clarity international investment protections with salutary effects on the public debate over what those protections should be.

Section 2 reviews some of the rationale for investment protections, their evolution and the US experience with investment protection. Section 3 examines the rationale for investment provisions in NAFTA. And Section 4 examines both the nervousness over ISDS generated by NAFTA cases and the important changes they prompted.

2 | HAVES, HAVE-NOTS AND FDI

An obvious place to begin understanding the dispute differential between BITs and NAFTA Chapter 11 is in the nature of US flows of foreign direct investment. While there is some debate about how to fully maximise the benefits of FDI (Graham, 2000, pp. 3–7; Salacuse & Sullivan, 2005; Swenson, 2005–2006). one of the historical challenges for developing states is actually getting FDI to flow their direction at all. Prior to the Financial Crisis of 2008, the Organization for Economic Cooperation and Development (OECD) reported that FDI outflows from OECD countries reached a record US$1.82 trillion in value, with outflows from the United States alone amounting to US$333 billion in 2007.[7] And while patterns of FDI had been changing, the OECD noted there remained a strong correlation between FDI outflows from rich countries and FDI inflows to poor countries. In 2007, developing countries matched the record growth in FDI outflows from the OECD by attracting record inflows amounting to US$471 billion. Yet, in many ways, the disparity in flows of FDI between rich and poor countries was as stark as ever. Indeed, the distribution of those inflows among developing states was unbalanced with BRIC countries (Brazil, Russia, India and China) accounting for 50%–60% of all inflows.[8] In 2015, OECD countries accounted for over 50 per cent of global FDI inflows and more than 70% of all outflows.[9] In other words, in spite of the financial crises in the United States and a debt crisis in the Euro Area, developed states were still the primary targets and main sources of foreign direct investment.[10]

Moreover, the top five targets and sources of US investment flows are exclusively members of the OECD. Table 1 lists the top sources and targets of FDI for the United States according to the Bureau of Labor Statistics. The most significant sources and targets of FDI are all members of the OECD. While Mexico is a member of the OECD, and one of America's NAFTA partners, Mexico

[7] *OECD Investment News*, Issue 7, June 2008.

[8] Ibid.; The World Bank, "FDI trends," *Public policy for the private sector*, Note Number 273, September 2004.

[9] Source: United Nations Conference on Trade and Development, UNCTADStat, April 2017.

[10] Organization for Economic Cooperation and Development, "FDI in figures," April 2015.

TABLE 1 US flows of foreign direct investment, 2015 (millions of US dollars)

Incoming FDI			FDI outflows		
United Kingdom	483,841	OECD	Netherlands	858,102	OECD
Japan	411,201	OECD	United Kingdom	593,028	OECD
Luxembourg	328,400	OECD	Luxembourg	502,998	OECD
Netherlands	282,525	OECD	Canada	352,928	OECD
Canada	268,972	OECD	Ireland	343,382	OECD
Switzerland	257,859	OECD	Bermuda	269,329	
Germany	255,471	OECD	Singapore	228,666	
France	233,844	OECD	Australia	167,401	OECD
Belgium	80,134	OECD	Switzerland	155,221	OECD
Spain	61,947	OECD	Japan	108,535	OECD
Sweden	46,928	OECD	Germany	108,094	OECD
Australia	42,301	OECD	Mexico	92,812	OECD
S. Korea	40,130	OECD	France	78,282	OECD
Italy	28,648	OECD	China	74,560	
Norway	20,771	OECD	Brazil	65,272	
Singapore	19,423		Hong Kong	64,049	
Mexico	16,597	OECD	Gibraltar	50,233	
China	14,838		Belgium	45,087	OECD
Denmark	14,274	OECD	Spain	35,794	OECD
Ireland	13,255	OECD	S. Korea	34,564	OECD
Hungary	13,190	OECD	Norway	33,588	OECD
Hong Kong	11,102		Bahamas	29,289	
Finland	9,833	OECD	India	28,355	
India	9,250		Chile	27,331	OECD
Gibraltar	7,475		Sweden	24,981	OECD
Israel	7,448	OECD	Egypt	23,326	
Austria	7,116	OECD	Italy	22,499	OECD
Taiwan	6,968		Austria	17,275	OECD
Russia	4,561		UAE	15,622	
Venezuela	4,182		Taiwan	15,005	
UAE	3,008		Barbados	14,894	
			Denmark	14,398	OECD

Source: US Bureau of Economic Analysis.

is also relatively poor with a per capita income of just $16,110 (2013) and ranks well behind the likes of the United Kingdom, Japan, the Netherlands and Canada as a source (Mexico is 17th) and target (Mexico ranks 12th) for US investment flows.

However, when contrast with the more than 40 countries[11] with whom the United States has BITs in force, Mexico is a relatively significant source and target. Moreover, the disparity among US BIT partners between flows into and from the developing country partner is stark. Table 2 lists the top sources and targets of US FDI among BIT partner countries. Turkey, for example, concluded its BIT with the United States in 1990, and in 2015 was the target of $3,662 million in US investment. However, as a source of FDI into the United States, Turkey sent a paltry $625 million.

Moreover, flows of FDI to BIT partners are so small in many instances that Bureau of Economic Analysis statistics for many countries are suppressed to protect the identities of the individual firms making the investment.[12]

Therein resides an important factor contributing to why disputes against the United States have emerged from NAFTA Chapter 11, but not from the US BIT programme. The United States has been host to so little investment from BIT partner countries that there is little prospect of a BIT partner firm availing themselves of the arbitration rules. Most US BIT partners are not deeply integrated into the US economic sphere and have little on-the-ground presence in the United States. In some cases, a single US firm has driven the negotiation and conclusion of a BIT.

Tables 3 and 4 unambiguously depict the growth of cross-border FDI flows among NAFTA countries after 1993; both the NAFTA area as a regional target for FDI (Table 3), as well as cross-border flows into or out of the United States to NAFTA partner countries (Table 4). Unlike the host country targets under the US BIT programme, the NAFTA area represented an entirely new investment environment for the application of dispute settlement. In short, there was a substantial, and growing, pool of investment flowing among all three countries, but especially between Canada and the United States, to which Chapter 11 could be applied.

As economies become more economically interdependent, the scope for investment disputes grows as well (Mearsheimer, 1994/95; Waltz, 2000; Yarbrough & Yarbrough, 1987). This is borne out in studies on the incidence of trade disputes wherein the volume of trade between countries is correlated with the incidence of disputes within the World Trade Organization (Grinols & Perrelli, 2006). Moreover, changing patterns of contemporary global FDI flows, more and more of which involve rapidly developing countries like the BRICs, are generating disputes between developing country firms and their developed country hosts (UNCTAD 2014).

TABLE 2 US Flows of Foreign Direct Investment, 2015

BIT countries (millions of US dollars)			
Incoming FDI		**FDI outflows**	
Panama	2,653	Egypt	23,326
Poland	1,456	Argentina	13,323
Turkey	625	Trinidad and Tobago	7,916
Uruguay	391	Panama	4,075
Trinidad and Tobago	175	Turkey	3,661

Source: US Bureau of Economic Analysis.

[11]See Appendix 1.

[12]Among those for which data have been surprised are Azerbaijan and Kazakhstan. See Bureau of Economic Analysis, US direct investment abroad and foreign direct investment in the US at http://www.bea.gov/international/

TABLE 3 NAFTA area incoming foreign direct investment (IFDI) and foreign direct investment outflows (OFDI) 1993–2015

Year	NAFTA Area IFDI	NAFTA Area OFDI
1993	59,783.38	82,838.96
1994	64,271.61	83,603.50
1995	77,553.07	103,272.60
1996	103,274.21	97,560.21
1997	127,752.73	119,942.53
1998	209,994.20	166,717.10
1999	322,059.77	228,539.01
2000	399,105.16	187,667.27
2001	217,156.42	165,305.78
2002	120,648.44	162,609.53
2003	79,518.83	153,529.69
2004	160,510.94	342,683.66
2005	155,199.00	49,381.45
2006	318,412.16	276,192.20
2007	365,093.25	466,401.46
2008	396,528.68	388,730.39
2009	183,982.49	337,105.73
2010	252,532.42	327,551.31
2011	292,907.22	461,353.15
2012	227,896.64	387,754.80
2013	345,959.85	392,017.39
2014	190,795.90	380,540.70
2015	458,821.40	375,223.00

Note: IFDI and OFDI in US Dollars at current prices and current exchange rates in millions.
Source: US Bureau of Economic Analysis.

However, the puzzle of Chapter 11 disputes is more complicated than relative capital flows or the lack of an investment presence in the United States over which a dispute could be fought. The NAFTA experience is equally about the rule of law—or historical lack thereof—governing North American FDI flows prior to 1994.

2.1 | The rise of the BIT

2.1.1 | Origins

The origins of the investor-state dispute settlement mechanisms of NAFTA (Chapter 11) are part of a much larger history of the institutionalisation of international economic activity in the post-war period. More narrowly still, the evolution of NAFTA, and especially Chapter 11, is the product of decades of efforts to situate private, international commercial activity within an international legal and political system dominated by relations between states. In looking at the United

TABLE 4 Inflows of FDI to USA from NAFTA partners (IFDI) and outflows of FDI from USA to NAFTA Partners (OFDI), 1993–2015 (all industries in US Dollars in millions)

Year	US–Canada IFDI	US–Mexico IFDI	US–Canada OFDI	US–Mexico OFDI
1993	40,373	1,244	69,922	15,221
1994	41,219	2,069	74,221	16,968
1995	45,618	1,850	83,498	16,873
1996	54,836	1,641	89,592	19,351
1997	65,175	3,100	96,626	24,050
1998	72,696	2,055	98,200	26,657
1999	90,559	1,999	119,590	37,151
2000	114,309	7,462	132,472	39,352
2001	92,420	6,645	152,601	52,544
2002	92,529	7,829	166,473	56,303
2003	95,707	9,022	187,953	56,851
2004	125,276	7,592	214,931	63,384
2005	165,667	3,595	231,836	73,687
2006	165,281	5,310	205,134	82,965
2007	201,924	8,478	250,642	91,046
2008	168,746	8,420	246,483	87,443
2009	188,943	11,111	274,807	84,047
2010	192,463	10,970	295,206	85,751
2011	205,225	12,500	330,041	85,599
2012	219,822	13,618	366,709	104,388
2013	235,247	17,036	390,172	102,418
2014	257,142	16,567	358,452	89,650
2015	268,972	16,597	352,928	92,812

Source: UNCTADstat Database.

States' three main negotiating challenges through Chapter 11, we see that the historical development of international investment law and institutions become inherently useful in the management of asymmetries among states and between states and firms in a global context (mainly between developed and developing countries) that then flows directly and easily into the North American setting. However, in the years after Congressional approval of NAFTA, doubts about Chapter 11's utility begin to mount as mechanisms that were once used mainly by American firms to defend their interests in foreign jurisdictions were increasingly, although as yet unsuccessfully, used against US targets.

2.1.2 | The individual and international law

The 1648 Treaty of Westphalia is broadly accepted as the starting point of the modern state system. Scholars have since debated the dominance of the state within that system and the difficulty incorporating a range of non-state actors – such as firms – into the system's formal structure. This challenge has largely been mirrored in the post-World War II development of international law

and international trade law in particular (Salacuse, 2007). While the role of individuals as the subject of international law has grown considerably in the post-war period thanks to the emergence of human rights law, the debate over the role of private commercial entities has been raging since at least the eighteenth century.[13] Customary international law is based on the search for legal principles flowing from norms of state behaviour, some of which have then been codified into treaties and agreements like NAFTA. Yet, because customary law relies so heavily on historic interpretation of state practice, pinning those legal principles down continues to be the subject of considerable debate (Goldsmith & Posner, 2005, pp. 23–43; Koh, 1997, pp. 2608–2609). In 1900, the *Paquete Habana* case was among the first to engage in a lengthy historical recitation of state practice regarding the seizure of private foreign vessels.[14] In addition to trying to define traditional state practice, *Paquete Habana* also tackled the problem of the role of individuals (the owners of the *Paquete Habana*) within customary international law. In the post-war period, but particularly since the 1970s, the rise of international human rights law has firmly entrenched individuals as subjects in international law, particularly as states have increasingly try to insert themselves on behalf of the individual.[15] Nevertheless, the role of private and individual interests in international law and international relations remains controversial,[16] and surprisingly unsettled.

2.1.3 | Non-state actors in international commerce

A similar pattern has developed in the area of private international finance. One of the central issues plaguing international commercial relations is that the private interests at the heart of international flows of goods, services and capital have traditionally lacked any "personality" within customary international law. Without standing or "personality" in the context of international law, private foreign commercial interests, like individuals, have had few avenues through which to pursue their international legal claims (Graham, 2000, pp. 20–24; Reif, 2004; Salacuse, 1990). In the case of foreign direct investment, this typically meant seeking compensation for expropriation through host country court systems with no guarantee of national treatment (treatment equivalent to that enjoyed by local firms). In the event of nationalisation or expropriation of private property, private foreign commercial interests had little recourse. They could pursue their claims through the domestic legal systems of host countries, but the act of expropriation made this moot. Private entities could also petition their home governments to "espouse" their case diplomatically; in essence, take up their cause. Even where international agreements were part of the governing structure of commercial activity, provisions often required exhaustion of host country legal avenues, and then,

[13]Herein, I refer to the role of the individual in international law as debated by William Blackstone and Jeremy Bentham. For Blackstone, legal principles which applied to the state were equally applicable to individuals living within the state. Bentham, on the other hand, assumed international law was about the rights and obligations of states alone (Bentham, 2000; Blackstone, 1765–1769; Janis, 1984).

[14]See United States Supreme Court, *Paquete Habana*, 175 US 677 (1900); Goldsmith and Posner (2005, pp. 66–78).

[15]Koh, 2614, 2624–2629. Goldsmith and Posner, *Limits of international law*, 107–134. Goldsmith and Posner put forward a realist perspective on the emergence of human rights law rooted in self-interest and the coincidence of interests among states rather than the growing power of non-state actors and international regimes in the post-war era.

[16]Koh, "Why do nations obey international law," 2603–2634. Although human rights law has developed rapidly over the past several decades, the debate over the proper status of individuals within international law continues with respect to US reservations to the International Criminal Court, as well as the uproar over "enemy combatants" in the War on Terror and whether they should be given the same protections as uniformed soldiers under international law. See US Supreme Court, *Hamdan v. Rumsfeld, Secretary of Defense,* et al., certiorari to the United States court of appeals for the District of Columbia circuit, June 2006. See also Ruth Wedgewood (1999); Rivkin, Jr., & Casey (2000/2001).

"espousal" before third party legal process could be invoked (Vandevelde, 2005–2006, pp. 160–65).

The challenge within international commercial law has been to develop institutions and practices to deal with essentially private and commercial law issues in an international context. Without international "personality," private investors or exporters have had difficulties binding themselves contractually to sovereign hosts in ways that secure their market access or private investments, as would be the case in their home markets. One popular mechanism for mitigating these problems with respect to foreign direct investment has been the emergence and use of bilateral investment treaties (BITs) in the post-war era.[17] The use of BITs between state parties to define the treatment of private investment, including rules for dispute settlement and compensation, has offered private interests a form of "personality" within international law through which they can defend their interests. Similarly, the provisions of Chapter 11 of NAFTA did on a regional basis what BITs have done for the international personality of private investors on a bilateral basis by allowing disputes to be submitted to existing international arbitration bodies within the World Bank (ICSID) or United Nations (UNCITRAL) systems.[18]

2.1.4 | The United States and BITs

Bilateral investment treaties have been a large part of the search for ways to fill the void in international law governing commercial activity and facilitating the management of asymmetry between host sovereigns and the holders of private capital, historically firms in developed countries like the United States. For the United States in particular, these usually took the form of treaties of Friendship, Commerce and Navigation (FCN), and primarily covered trade in goods, but also dealt with the treatment of private property held by US nationals.[19] However, with the expansion of international capital flows following World War I, the United States began expanding the use of these treaties to deal with the treatment of US nationals investing in foreign countries.[20] After World War II, innovation in FCNs included property protections for American firms (in addition to individuals) and required consent to arbitration through the International Court of Justice (ICJ).[21]

In comparison with European countries, the United States was slow to adopt a formal BIT programme, doing so only in 1981. Indeed, there is some irony in the contemporary controversy over ISDS in Europe since the post-war development of BITs was spearheaded there, the very first concluded between Germany and Pakistan in 1959.[22] Indeed, Germany is currently party to 186 investment protection agreements, either through BITs or their incorporation into regional integration arrangements.[23] The United States incorporated investment provisions

[17]Salacuse, "BIT by BIT," 664–673.

[18]Respectively, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL).

[19]Vandevelde, 162.

[20]Salacuse, "BIT by BIT," 656.

[21]Vandevelde, 164–165.

[22]Salacuse, "BIT by BIT," 657.

[23]UNCTAD, Investment policy hub, international investment agreements, Germany, http://investmentpolicyhub.unctad.org/IIA, accessed on 13 April 2017.

into just twenty-two bilateral commercial treaties (mostly FCNs) concluded between 1946 and 1966.[24] Moreover, at the end of 2014, the United States had negotiated and implemented just 41 BITs.[25] One reason for the lower number of US BITs, apart from the programme's short history, is that US-style BITs tend to be much more rigorous in spelling out the terms of the treaty, and they are more demanding of host country investment protections than are those concluded by Europe.[26]

In general, BITs have three basic objectives: investment protection, promotion and liberalisation.[27] But it has been over standards of treatment, the definition of expropriation and the terms of dispute resolution around which controversy has stirred.

2.1.5 | Multilateral rules and bilateral problems

Numerous proposals for regional or multilateral investment rules or conventions, as well as schemes for investment security funds to guard against nationalisation or expropriation of private capital, have been hatched, among them the failed Havana Charter of 1948 that would have created the International Trade Organization (ITO) and the disastrous Multilateral Agreement on Investment (MAI) in 1998 (Canner, 1998; Dattu, 2000; Kurtz, 2002). Among the most successful mechanisms to emerge from the struggle to find international investment rules was the creation of centres for arbitration of disputes between consenting parties (states and private investors). In 1965, the International Centre for the Settlement of Investment Disputes (ICSID) was created as part of the World Bank, followed a year later by the United Nations Commission on International Trade Law (UNCITRAL).[28] It was thought that ICSID and UNCITRAL mechanisms would facilitate the satisfactory resolution of conflicts between foreign investors and sovereign hosts. However, up to 1970, few states had been willing to submit to the jurisdiction of these bodies and the first ICSID arbitration case was not filed until 1972.

In fact, ICSID and UNCITRAL were created just prior to organised resistance to developed country dominance of global governance as embodied by the Declaration of the New International Economic Order (NIEO), passed by the United Nations General Assembly in 1974.[29] Among the provisions of the NIEO was the reassertion of the sovereign right to transfer ownership of assets to host country nationals. Coupled with assertion of sovereign supremacy under the Calvo Doctrine, particularly in Latin America, the creation of ICSID and UNCITRAL seemed awkwardly timed. ICSID and UNCITRAL have, nonetheless, become important mechanisms for the resolution of investment disputes. Yet, in the wake of growing controversies over investment cases flowing from NAFTA and elsewhere, some argued that Calvo Doctrine, in particular, was poised to make a comeback in the early 2000s (Cremades, 2004, pp. 79–85; Shan, 2006–2007).

In reaction to the NIEO movement, developed countries, particularly in Europe, responded through the pursuit of even more BITs.[30] At the end of 2001, the United Nations Conference on

[24]Salacuse, "BIT by BIT," 656; Vandevelde, 162.

[25]See US Department of State, Bureau of Economic and Business Affairs, for a listing of current US BITs at www.state.gov; US Department of Commerce, Trade Compliance Centre, Bilateral Investment Treaties, at http://ttc.export.gov.

[26]Salacuse, "BIT by BIT," 657; Salacuse, "Toward a global treaty on foreign investment," 8.

[27]Salacuse and Sullivan, "Do BITs really work," 79; Swenson, "Why do developing countries sign BITs?," 131–155.

[28]Broches (1995), especially chapters 5–8.

[29]Vandevelde, 167.

[30]Vandevelde, 168–169.

Trade and Development (UNCTAD) tallied nearly 2,900 BITs in-force or under negotiation, the overwhelming majority of which continued to be concluded between developed and developing countries.[31] In 2017, UNCTAD counts 3,300 negotiated and more than 2,600 in force.[32] The dramatic rise in BIT activity since World War II (37 BITs in 2016 alone) has reflected the desire on the part of capital exporting countries, and more specifically the private investors within them, to bring additional certainty to the process of investing in foreign countries with weak legal protections or a history of expropriation. For developing countries in need of development capital, particularly in the wake of the 1980s debt crisis, BITs have become an attractive way to solidify confidence in potential foreign investors regarding nationalisation, expropriation, creeping confiscation through regulatory changes or performance requirements like local content rules (Swenson, 2005–2006).

3 | MUCH ADO ABOUT NAFTA?

The rhetoric of the earliest days of NAFTA was all about the distributional consequences of trade liberalisation on manufacturing and employment. It was a difficult, yet foreseeable, set of politics since both economic theory and hundreds of years of experience with liberalisation have always suggested the presence of "winners" and "losers." (Irwin, 1996). Yet, where investment was concerned, no such theory or wealth of experience suggested the controversies that followed. The argument developed here is that the rationale for introducing investment rules to North American economic governance was that same as it had been in the context of BITs—protection, promotion, liberalisation and governance. When ISDS became part of NAFTA, Mexico was poised to play the traditional role of a developing country party to a BIT. Yet, the United States had issues with Canada as well. For a while, things worked as they always had; developed country firms using ISDS against their developing country hosts. Yet, for the first time, NAFTA had instilled ISDS rules between dyads of developed countries and the cases began to pile up. It should have come as no great surprise since the mere application of ISDS to jurisdictions with large volumes of cross-border capital flows paved the way for investment disputes where none could have been launched before.

3.1 | Trilateralising the BIT

In September 1978, the Additional Facility Rules were approved by the ICSID Administrative Council, and defined additional rules by which ICSID could administer proceedings outside its original jurisdiction. In most cases, this meant that either the State party or the State whose national is a party to the dispute is not an ICSID Contracting State or that the dispute itself did not arise as a direct result of an investment. Oddly enough, this described the situation of Canada and Mexico. Only in 2013 did Canada finally ratify the ICSID Convention, having signed in 2006. Mexico has yet to sign or ratify.[33]

[31] United Nations Conference on Trade and Development, World investment report, 2014, 114. In 2001, only 8% of all BITs concluded were between developing countries, reflecting the relative lack of FDI flowing between them.

[32] See http://investmentpolicyhub.unctad.org/IIA, accessed 13 April 2017.

[33] See ICSID member states database, http://icsid.worldbank.org. All three NAFTA parties have been more consistent members of the UNCITRAL Commission: United States, 1968–2022; Canada, 1989–95, 2001–19; Mexico, 1968–80, 1983–2019.

NAFTA put in place a common set of investment rules where none existed before. Particularly with Mexico, the rationale for doing so was exactly the same as had been the case under both the old Friendship, Commerce and Navigation (FCN) Treaties as well as the short history of the BIT programme; put in place some form of rule of law that would bind the private sources of capital to their sovereign hosts—protection, promotion and liberalisation of investment flows (Brower & Steven, 2001).

NAFTA's negotiators assumed that Mexico was the major concern where investment was concerned. Indeed, as a developing country with a twentieth-century history of expropriation, Mexico fit the mould that BITs were largely created for. Nothing in the US experience with its FCN treaties or its BIT programme after 1981 suggested the need for reforms. Hence, trilateralising the US BIT inserting it into NAFTA seemed straight forward. Indeed, a side-by-side comparison of NAFTA Chapter 11 and a US BIT reveals far more similarities than differences. The same three objectives outlined in a BIT (investment protection, promotion and liberalisation) are also outlined in Chapter 11. Yet, again, unlike US BIT provisions with dozens of countries, Chapter 11 generated unexpected criticism and concern on the part of a number of stakeholders, including the NAFTA governments themselves (Public Citizen, 2014; De Pencier, 1999–2000).

On several dimensions, the application of the US BIT model to Canada and Mexico in the NAFTA negotiations made sense. Although Canada and Mexico were already important sources and targets of US investment flows, neither were parties to international arbitration bodies ICSID or UNCITRAL. Moreover, Canada and Mexico had just emerged from important periods of economic nationalism and sought new sources of investment capital, especially from the United States (Graham & Wilkie, 1994). Hence, the rationale for pursuing investment protection was not dissimilar to that used in pursuit of BITs with a number of developing countries. Canada and Mexico sought new inflows of capital and were ultimately willing to adopt American-style investment protections in an effort to secure it (Cameron & Tomlin, 2000, pp. 40–42, 62–63; Fry, 1983, pp. 80–90; Glover, 1974; Hart, Dymond, & Robertson, 1994, pp. 16, 221–24; Salinas de Gortari, 2002, pp. 37–47, 394–491).

4 | CHAPTER 11'S LINGUISTIC CAN OF WORMS

The NAFTA's path to implantation was shrouded in controversy. Throughout much of 1992 it was a political piñata in the US presidential campaign. The debate over US ratification in 1993 consumed most of President Clinton's early political capital. And on 1 January 1994, the Zapatista Rebellion exploded out of the Mexican State of Chiapas, timed, in part, specifically to coincide with the NAFTA's implementation that same day. In most respects, complaints about NAFTA were about the standard distributional consequences of liberalisation; in other words, "winners" and "losers." Investment rules in trade agreements were new, but obscure and uncontroversial.

Then, in July 1998, Loewen Group, a Canadian funeral services firm, filed a "notice of intent" to initiate arbitration proceedings under NAFTA Chapter 11. At issue was an adverse Mississippi state court decision wherein Loewen argued it had not received "fair and equitable treatment" as a foreign investor and that, in effect, its investment in Mississippi had been "expropriated" by the state.[34] Something was different.

[34]See *The Loewen Group and Raymond L Loewen versus United States of America*, Statement of Claim, 30 October 1998.

When American negotiators pushed for insertion of the US BIT model to serve as the text of Chapter 11, most had Mexico's twentieth-century history of expropriation in mind (Levy, 1995). In the short history of America's BIT programme, disputes had followed the traditional pattern of rich country private investors having their property expropriated by a poor country government—in some cases by force of arms. Hence, when the Clinton White House sent NAFTA implementing legislation to Capitol Hill, the accompanying Statement of Administrative Action (an interpretive document) confidently claimed that "No change in statute will be required to implement the provisions of Chapter Eleven."[35] Then, just 4 years later, Loewen.

Indeed, starting with Loewen, Chapter 11 opened a can of legal and political worms that heightened the controversy already swirling around NAFTA. Loewen and others began exploiting linguistic ambiguities in Chapter 11 that did not much matter when the US BIT model was applied to the more traditional developed–developing country dyads. Instead, Chapter 11 seemed to have turned the tables, prompting multiple filings against the two developed states; As of April 2017, 18 each against Canada and the United States, and just 14 for Mexico.

Was a culture of litigiousness in Canada and the United States bringing a culture of "injury law" to international investment disputes? Was it that Canada and the United States actually had a poor record of property rights protections? Had patterns of FDI flows changed so much, flipping the traditional roles of home and host countries, that concepts, terminology and standards of investment protection needed far more clarity?

This Section is about some of the previously ill-defined ambiguities in the US BIT model that never been challenged, and ended up in Chapter 11. Yet, the same linguistic ambiguities, the law suits they spawned, and the alarm within government also prompted important reforms that are arguably better suited to changing patterns of foreign direct investment in the twenty-first century.

Chapter 11 jurisprudence seemingly began the exploitation of definitional ambiguities in three main areas specific to the text itself. First, foreign firms alleged they were being denied "national treatment" (Article 1102) under NAFTA, the long-standing norm in global trade and finance that prohibits discrimination on the basis of national origin. Second, firms alleged that they were being denied "fair and equitable treatment" (Article 1105) as required by customary practices of international law (Kirkman, 2002–2003). And third, firms were alleging a number of state measures were "tantamount to expropriation" (Article 1110); nationalisation of property not at the point of a bayonet, but through the state's arbitrary application of its regulatory power.

That same jurisprudence raised three broader issues. First, in spite of the fact that one party to ISDS arbitration proceedings was always the state, proceedings were held in private. The lack of transparency (some said accountability) in these proceedings was troublesome given the public's inherent interest in the outcome. Second, arbitration proceedings had no provision for *amicus* (friend of the court) submissions from third parties with an interest in the outcome (Gomez, 2012). And third, Chapter 11 spawned criticism that ISDS provisions had created a parallel, quasi-supranational and preferential, legal system available only to foreign firms and that it was a process being exploited by foreigners to challenge the state's sovereign capacity to govern in the public interest (Alvarez-Jimenez, 2006; De Pencier, 1999–2000).

[35] White House, *North American Free Trade Agreement Implementation Act, Statement of Administrative Action*, 4 November 1993, 152.

4.1 | NAFTA's aftermath: Something has changed

The *Loewen Group* case accelerated a broad reconsideration of ISDS rules. While this case was eventually dismissed in its entirety in June 2003, 5 years of litigation generated considerable angst in the three NAFTA governments, their legislatures and civil society. Moreover, the controversy over Chapter 11 dovetailed with growing doubts about efforts to reach a common set of multilateral investment rules. Under the auspices of the Organization for Economic Cooperation and Development (OECD), a club of high-income developed countries, the Multilateral Agreement on Investment (MAI) was to have applied common investment rules all members, but fell apart in 1998 over a range of issues, including dispute settlement (Canner, 1998; Clarke and Barlow 1997).

Chapter 11 inadvertently provided a mechanism for foreigners to challenge domestic court rulings—ISDS as a supranational legal body, but one none of the three governments envisioned would be used in quite this way. Critics have alleged that the application of national treatment within NAFTA has conferred legal rights to foreign companies that are not accorded to domestic companies; the subsequent distribution of Chapter 11 cases (most against the United States and Canada) seemed to support that argument (Clarke and Barlow 1997, pp. 30–54; Public Citizen, 2014, pp. 1–35). Many North American firms have legal presences (incorporation and representation) in each of the countries in which they operate and could pursue their property claims through respective domestic court systems. Doing so falls within the long-standing tradition within older US Treaties of Freedom, Commerce and Navigation (FCN) where firms sought recourse with host governments prior to pursuing "espousal" of their claim through home government diplomacy.[36] Like BITs, Chapter 11 established a legal process (culminating in arbitration) that was thought to fill a hole in customary international law between states and private interests in North America. National treatment is a general principle within NAFTA (Article 301), but where domestic court systems could conceivably discriminate against a foreign entity, Chapter 11 reiterated this prohibition (Article 1102).

Chapter 11's arbitration process provided essentially a "one-shot" opportunity (no U-turn to some alternate forum) to seek redress under arbitration rules with limited scope for appeal.[37] Private parties have as long as 3 years to resolve their claims through domestic avenues before NAFTA's statute of limitations runs out (Article 1116.2). But, once a notice of intent is filed, NAFTA Article 1121.1(b) requires private parties waive the pursuit of future legal claims in the wake of any tribunal decision. Australia and parts of civil society have pushed for so-called "local exhaustion" provisions wherein domestic proceedings be exhausted prior to filing any ISDS claims.[38]

Yet, whereas the old FCN treaties were characterised first by domestic and diplomatic efforts prior to arbitration (as under BITs), Chapter 11 Loewen started the anxiety over prospects that ISDS could be used as a kind of extra-judicial first option unavailable to domestic firms.

[36] Vandevelde, 160; Egli (2006–2007, pp. 1050–1051).

[37] See NAFTA Article 1136 (b) and ICSID Additional Facility Rules, Article 57. In October 2000, *Metalclad v. United Mexican States*, Metalclad petitioned the Supreme Court of British Columbia to have the arbitration decision against it overturned on the grounds that the tribunal had exceeded its jurisdiction under the Convention and that enforcing the award would be a violation of public policy. On 8 February 2001, Canada made a similar claim before a federal court in Ottawa over an arbitral award in its case with S.D. Myers Inc. See also, Clodfelter, "US State Department," 1279.

[38] See Trakman (2014, pp. 4–7); Government of Australia, "Gillard government trade policy statement: Trading our way to more jobs and prosperity," April 2011: 14; see US Department of State, *The New US model bilateral investment treaty: A public interest critique*, Advisory Committee on International Economic Policy (ACIEP), 9 May 2012.

Curiously, rather than depoliticising investment disputes by subjecting them more directly to the rule of law, as BITs were thought to do, direct access to Chapter 11 rules arguably had the opposite effect as public anxiety over sovereignty grew.[39]

NAFTA's negotiators did not intend for Chapter 11 to confer more legal rights to foreign investors than already afforded to domestic investors making investments "in like circumstances."[40] The Agreement was intended to fill a hole in international law and level the playing field between firms and host states. However, Chapter 11 has generated a range of creative suits alleging firms have been denied the "minimum standard," or a "fair and equitable standard" of treatment (Article 1105) as required under customary international law (i.e., customary state practice).[41] Others have claimed that the state has imposed forms of performance requirements (Article 1106) on their investments as a condition of their investment.[42] And, of course, the cases of many investors have claimed that the intervention of the state has been tantamount to expropriation (Article 1110).[43]

Interestingly, virtually none of them allege that there was an outright nationalisation or expropriation of property as we think about it historically, or as NAFTA's negotiators envisioned.[44] Instead, most suits allege forms of discriminatory treatment in the application of regulatory measures imposed by states that have the effect of expropriating (taking) private property.[45] While the NAFTA case history has continued to grow during the nearly quarter-century Chapter 11 has been in force, it was not until 2012 that a traditional US BIT generated a suit—an odd set of suits, actually, connected to a financial services Ponzi scheme.[46] Even more perplexing, the majority of NAFTA suits are against countries (Canada and the United States) with established legal systems and stable systems of property protections.

Some of the most contentious cases have been decided in favour of the state,[47] and only a few have resulted in arbitral awards.[48] However, with almost every new case, public interest and

[39]Vandevelde, 175; Egli, 1057.

[40]See Free Trade Commission clarifications related to Chapter 11, 31 July 2001.

[41]*ADF Group v. United States, Methanex Corp. v. United States, S.D. Meyers versus Government of Canada, Waste Management v. United Mexican States, Metalclad v. United Mexican States*.

[42]*ADF Group v. United States, Ethyl Corp v. Government of Canada, S.D. Meyers v. Government of Canada, Metalclad v. United Mexican States*.

[43]*Methanex Corp. v. United States, Ethyl Corp. v. Government of Canada, S.D. Meyers v. Government of Canada, Waste Management v. United Mexican States, Metalclad v. United Mexican States*.

[44]An exception here is *AbitibiBowater Inc. v. Government of Canada*, launched in April 2009. Abitibi, a US forest products company, alleged that the Province of Newfoundland and Labrador directly expropriated the firm's assets via provincial legislation. In 2010, Ottawa settled with AbitibiBowater for $C130 million. See also, Levy, "NAFTA's provision for compensation," 423–453.

[45]One possible exception to this is *Metalclad v. United Mexican States* in which Metalclad was forced to abandon an investment to operate a hazardous waste facility in Mexico. The divestiture of the facility was largely the result of a bureaucratic dispute between Mexican local and federal officials over permits for operation that the tribunal ruled was *tantamount to* expropriation, but not outright expropriation. The tribunal awarded Metalclad $16.7 million on 30 August 2000 only to have the award set aside by a British Columbia court.

[46]In 2012, four separate cases were launched in connection with the Allen Sanford financial services Ponzi scheme fraud, one each using the investment protection provisions of, respectively, the US–Uruguay BIT, US–Peru FTA, US–Chile FTA and the CAFTA-DR.

[47]For example, *ADF Group versus United States, Loewen Group Inc. versus United States, Mondev International Ltd. versus United States, Azinian et al. versus United Mexican States, Marvin Roy Feldman Karper (CEMSA) versus United Mexican States (partial dismissal); Methanex versus United States*.

[48]Thus far, *Metalclad v. United Mexican States* ($16 million); *Pope & Talbot v. Government of Canada* ($461,000); *S.D. Meyers v. Government of Canada* ($6 million). A couple of others have been settled outside arbitral proceedings; *Ethyl Corporation v. Government of Canada*; *AbitibiBowater v. Government of Canada*.

environmental organisations grew more concerned with the potential for the provisions of Chapter 11 to be used to challenge state regulatory control over safety and the environment; this in spite of explicit language within the Agreement to the contrary (Articles 1101 and 1114). Several cases became lightning rods for such criticism as private investors take advantage of the choice set created by Chapter 11's provisions to test limits of new rules governing private property rights.

Cases such as *Ethyl v. Government of Canada*, *S.D. Myers v. Government of Canada* or *Metalclad v. United Mexican States* are all derided by environmentalists and others as a subversion of the state's ability to regulate in the public interest. The most watched of these cases to date, *Methanex Corp. v. United States*, was a case in point. Methanex Corporation, a Canadian marketer and distributor of methanol, claimed damages of $1 billion for alleged injuries resulting from a California ban on the use or sale of the gasoline additive MTBE that contains methanol as a key ingredient. Methanex contends that a California Executive Order and the regulations banning MTBE expropriated parts of its investments in the United States in violation of Article 1110, denied it fair and equitable treatment in accordance with international law in violation of Article 1105 and denied it national treatment in violation of Article 1102.[49]

4.2 | NAFTA, u-turns and forks in the road?

In the absence of Chapter 11, Methanex would have little recourse but to pursue its claim through the US court system or via "espousal." The key question is why Methanex chose to pursue its Article 1110, 1105 and 1102 claims through the Chapter 11 rather than the domestic courts? Part of the answer rests in the differences in each of the NAFTA party's legal systems in defining terms such as property and expropriation, and in the absence of a precise definition of these and others such as "tantamount to expropriation" within NAFTA itself.[50] United States jurisprudence on expropriation rests primarily on a body of case law derived from interpretations of the Fifth Amendment of the US Constitution and the eminent domain clause, therein.[51] Until the early twentieth century, the Fifth Amendment's protection against direct takings (outright expropriation) was understood to apply only to circumstances of outright expropriation of property (i.e., the government acquired title to the land). However, starting with the 1922 *Pennsylvania Coal Co. v. Mahon* case, the Supreme Court introduced the idea of a form of taking that was more regulatory in nature.[52] Eventually, US courts arrived at a kind of three-pronged test to determine whether regulatory changes rose to the level of expropriation as protected by the Fifth Amendment: (i) what was the government's intent in setting the regulation? (ii) what was the extent of the economic impact? and (iii) was the investor's expectation for his/her investment reasonable given the nature of the property?. In practice, then, U.S. domestic standards regarding regulatory expropriation have held that regulatory taking in the public interest does not rise to the level of compensable expropriation, that the impact of a regulatory change needs to be substantial and that the mere loss of opportunity by an investor because of a regulatory change can and should often be anticipated and therefore

[49]See *Methanex Corporation v. United States*, Notice of Claim, 3 December 1999.

[50]See NAFTA, Article 1110.

[51]Stanley (2001, pp. 353–354); Note that the legal battle over the 5th Amendment's property protections and takings remains unsettled as a result of the US Supreme Court decision in *Kelo v. City of New London* on 23 June 2005; See *The Economist*, "An American's home is still her castle," 23 November 2006.

[52]*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 1922. Prior to this, the US Supreme Court had taken a de jure approach to the definition of takings (see *Mulger v Kansas*, 123 US 623, 1887). With *Pennsylvania Coal v. Mahon*, the Court introduced the concept of de facto, or regulatory takings.

does not amount to regulatory expropriation.[53] Hence, because US legal practice has a long, well-defined history whereas Chapter 11 standards did not, the incentives for firms to test those ill-defined standards have been high.

Unfortunately, Chapter 11 of NAFTA has no clear definitions or criteria for determining which measures rise to the level of expropriation, no deep body of jurisprudence through which definitions have emerged, and explicit language (Article 1136 (1)) separating the cases from one another limiting the scope for the creation of precedent. Some of the most important international case law providing guidance on these issues emerged out of the Iran–United States Claims Tribunal, which adopted a fairly liberal approach to the meaning of takings, including regulations.[54] For instance, the Tribunal ruled "liability exists whenever acts attributable to a state have deprived an alien owner of property rights of value to him, regardless of whether the state has thereby obtained anything of value to it." (Aldrich, 1994, p. 609). In addition, the Tribunal has ruled, "liability is not affected by the fact that the state has acted for legitimate economic or social reasons and in accordance with its law." (Aldrich, 1994, p. 590). Yet, while tribunals such as this have developed a set of liberal standards for expropriation, most of which go beyond US domestic law, international law continues to be broadly biased in favour of the state rather than private investors.[55] Critics of NAFTA worry that within Chapter 11 proceedings, a similarly liberal definition of takings is emerging that threatens to go beyond domestic law in all three NAFTA countries. If NAFTA somehow provided established new legal grounds for property rights claims beyond their traditional conception, and the institutional mechanisms to pursue them, the implications for governing, including regulation in the public interest, could be profound (De Pencier, 1999–2000; Yee, 2002). Private foreign actors would have recourse to a set of legal mechanisms and standards of expropriation unavailable to domestic firms (Yee, 2002).

Two Chapter 11 cases, *Pope & Talbot v. Government of Canada* and *Metalclad v. United Mexican States*, offer some sense of where jurisprudence on Chapter 11 was headed that explains the subsequent nervousness regarding the *Methanex* case.[56] The *Pope & Talbot* decision acknowledged "the exercise of police power needed to be analyzed with special care," and it also concluded that "regulations can indeed be exercised in a way that would constitute creeping expropriation."[57] Further, the tribunal argued "much creeping expropriation could be done by regulation, and a blanket exception for regulatory measures would create a gaping hole in international protections against expropriation."[58] Although the panel went on to reject Pope & Talbot's claim because the regulatory change imposed upon it was not substantial enough, the decision inserted the notion of creeping expropriation due to regulatory changes squarely into Chapter 11's body of jurisprudence, thus placing the standards for expropriation under NAFTA near those of the United States.

[53]Stanley, "Keeping big brother out," 365–370. Note again the uncertainty over takings in the public interest that has been generated by *Kelo v. United States* (2005).

[54]Formally named the *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims of the Government of the United States of America and the Government of the Islamic Republic of Iran* (Claims Settlement Declaration), 19 January, 1981. See also, Clodfelter, "US State Department," 1273–1283.

[55]Stanley, "Keeping big brother out," 385–389. Chapter 11 jurisprudence has followed this same pattern to now with numerous tribunals ruling in favour of governments.

[56]I would like to thank Danny Calhoun of Keating Muething & Klekamp PLL in Cincinnati, Ohio for his helpful insights into the *Methanex* case; see also Kirkman (2002), Alvarez-Jimenez (2006).

[57]See *Interim award by Arbitral Tribunal in the matter of an arbitration under Chapter Eleven of the North American Free Trade Agreement between Pope & Talbot and the Government of Canada,* 26 June 2000, 35. Available at http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc7.pdf.

[58]*Interim Award, Pope & Talbot v. Government of Canada*, 34.

In *Metalclad v. United Mexican States*, the Chapter 11 tribunal went even further in expanding the definition of expropriation under Article 1110 saying that:

> Expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure of formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[59]

Using the phrase "in whole or significant part," the *Metalclad* tribunal seemed to go one step beyond the "substantial" economic test put forward in *Pope & Talbot* and introduced a more expansive and subjective standard for expropriation, thus opening the door for a range of regulatory measures that even slightly infringe upon investment performance to be considered a form of expropriation, including the possibility of lost opportunity.[60] This definition reaches beyond the standards for takings in any of the three NAFTA Party's domestic legal systems, but not out of line with the approach taken by Iran-United States Claims Tribunal rulings.[61]

If the *Methanex* tribunal had adopted this expansive definition of expropriation, it would have the practical effect of extending the protection from expropriation afforded to foreign investors beyond that offered to domestic investors by the US legal system, which currently offers the strongest private property protections of the three NAFTA Parties (Alvarez-Jimenez, 2006; Kirkman, 2002; Yee, 2002). The Methanex case was closely watched because of the impact a win for Methanex may have had on NAFTA, international law, and on domestic legal systems should foreign investors be accorded greater protection than that currently provided domestically (Yee, 2002). Methanex attempted to take advantage of the relative lack of definition in NAFTA jurisprudence to push its claim that California should be liable for opportunity costs due to regulatory changes; a claim that, if pursued through the US court system, seemed likely to fail.

4.3 | Governments to the rescue: The reforms begin

Cases like *Metalclad* and *Methanex* had become lightning rods for public criticism, but, among the NAFTA governments, had also become worrisome precedents for challenging the state. In July 2001, the state began to push back with a NAFTA Free Trade Commission (FTC) "interpretation" of Article 1105 (minimum standard and fair and equitable treatment).[62] The FTC's interpretation probably struck many as arcane and something only investment lawyers could appreciate. But it turned out to be an important shot across the bow for future NAFTA tribunals, and a starting point for limiting and defining the scope of ISDS in the context of changing patterns of global investment flows.

The FTC's interpretation said that the terms "fair and equitable" and "full protection and security" were only applicable to private litigants to the extent that those terms were recognised under

[59] *Award between Metalclad Corporation and The United Mexican States*, ICSID Additional Facility, Case No. ARB(AF)/97/1 (30 August 2000). Available at http://www.worldbank.org/icsid/cases/awards.htm.

[60] See Fietta (2006). Fietta argues that NAFTA tribunals have been inconsistent in their interpretation of "fair and equitable treatment" under Article 1131 and have not dealt with the link between "fair and equitable" treatment and "expropriation," particularly where the legitimate expectations of the investor are concerned.

[61] See Aldrich, "What constitutes compensable taking," 585–610.

[62] See NAFTA Free Trade Commission clarifications related to NAFTA Chapter 11, 31 July 2001 at www.ustr.gov. NAFTA Article 1131 explicitly provides for the three governments to issue binding interpretations of the Chapter 11 text.

customary international law.[63] Further, the concept of a minimum standard of treatment was only to rise to the level accorded under international law and, as written in NAFTA, did not constitute a newly created standard to which foreign investors could appeal in Chapter 11 cases.[64] In the context of US BITs, the concepts of "minimum standard" and "fair and equitable" treatment were designed to raise expectations about the treatment of American FDI in BIT partner countries (Kirkman, 2002, p. 346; Schwebel, 2009). However, the absence of defining standards for these concepts in NAFTA was raising those expectations beyond levels envisioned by NAFTA's negotiators (Clodfelter, 2001, p. 1278; Fietta 2006, p. 399; Kirkman 2002, pp. 364–365, 389–390). Fietta worries that NAFTA tribunals have interpreted "fair and equitable" and a firm's reasonable expectations too broadly, but does not address the impact of the NAFTA Commission's interpretation of "fair and equitable."

Although the FTC interpretation was arcane, its timing was pivotal as it was issued at nearly the same time as Methanex's notice of intent to file suit under Chapter 11. Indeed, Methanex Corporation argued with the three governments over the impact of the FTC's interpretation of Article 1105 in the context of the *Methanex* case itself (Kirkman, 2002, pp. 372–379). Methanex argued "any reading (of the Interpretation) that narrows the scope of the investment protection would be contrary to the purpose of the Treaty (NAFTA), and would constitute an impermissible amendment of the Treaty." (Kirkman, 2002, p. 376).

However, the FTC's binding interpretation significantly narrowed the scope for "fair and equitable" by arguing NAFTA never intended to create some new, higher standard of treatment for investment than that commonly accepted under international law.[65] Critics like Judge Stephen Schwebel, said the FTC went too far:

> The three Parties to NAFTA issued an interpretation of the NAFTA which was not easily reconciled with some of its terms and apparent intent, a binding interpretation that was expressly designed to reign in what they regarded as errant interpretations of NAFTA by NAFTA arbitrators. The three Governments found it appropriate to shift the goal posts (Schwebel, 2009, p. 4).

Schwebel (2009, p. 10) went further, claiming that the FTC's interpretation amounted to a reactionary effort to turn what had historically been a floor-level standard of treatment for American investment abroad into a ceiling under which foreign investors may not be accorded high levels of investor protections.

4.4 | Postinterpretation reforms

4.4.1 | Trade promotion authority 2002

The Methanex tribunal ultimately decided in favour of the United States, but government actions there and with respect to the FTC interpretation reverberated. In late 2001, the Bush Administration began laying the groundwork for its trade promotion authority (TPA) request from Congress. Originally known as fast track when it was first introduced in 1974, TPA represents a

[63]Recall that customary international Law, like international law, generally is difficult to define since it all it really refers to is the ever-changing customary practice of states.

[64]See NAFTA Free Trade Commission clarifications related to NAFTA Chapter 11, 31 July, 2001 at www.ustr.gov.

[65]Kirkman (2002, p. 377). Kirkman (2002, pp. 374, 378) notes that Methanex lawyers submitted testimony by a Mexican official who claimed NAFTA negotiators had intended to create a new standard; Ibid., 381–392; Alvarez-Jimenez, "The Methanex final award," 433.

constitutional delegation of authority over trade policy from the legislative to executive branches in the United States that has become progressively more contentious and restrictive as Congress sought to reign in each administration's perceived latitude over trade and investment policy (Anderson, 2012). The Methanex case had already heightened specific Congressional concerns about the investment provisions of US trade agreements, in part, prompting the intervention of the FTC with its interpretation. In approving the Bush Administration's TPA request in August 2002, Congress went even further in laying down a series of linguistic benchmarks.[66] Specifically, Section 2102(b)(3) required more precision in new agreements over terms like "expropriation," (D) "fair and equitable treatment," (E) the inclusion of amicus submissions to dispute tribunals (G)(iii) (H)(iii), and procedures to eliminate frivolous claims (G)(i) (Kantor, 2004).

Both the FTC's language and the Congressional mandate under TPA quickly found their way into new US trade agreements, notably those with Chile (2002), Singapore (2003) and five Central American states (2004)—Costa Rica, Honduras, Nicaragua, Guatemala and El Salvador (Mann, 2005, pp. 1–15). The investment chapters of each of these agreements go to great lengths, as per TPA, and much further than NAFTA, to more precisely define terms such as "fair and equitable" and "full protection and security."[67] Moreover, unlike the July 2001 NAFTA Commission interpretation which could come to no agreement among all three Parties on an interpretation of "expropriation," each of these new U.S. investment agreements went some distance to bring extra precision there as well.

4.4.2 | US model BIT 2004

The reaction to NAFTA Chapter 11 jurisprudence did not end with the FTC's interpretation or TPA. In fact, United States further reacted by suspending all BIT negotiations and initiating a formal review of its entire BIT model in late 2002; the first since 1994 when that model BIT was essentially inserted into NAFTA (Kantor, 2004, p. 383; Vandevelde, 2011, p. 309). The result was a new US BIT model unveiled in 2004, which, according to Kenneth Vandevelde, broadly "sought to reserve host state regulatory discretion by creating new exceptions to host state BIT obligations." (Vandevelde, 2011, 310). The 2004 BIT did this in three main ways:

1. Reducing the discretion that investor-state arbitral tribunals could exercise; clarifying the meaning of key concepts such as "minimum standard of treatment,"[68] "fair and equitable treatment,"[69] and the scope of indirect expropriation.[70]
2. By taking issues away from the tribunals entirely; language that provides for a retroactive intervention by state Parties to short-circuit cases beyond the intended scope of the BIT.[71]

[66]"Bipartisan Trade Promotion Authority Act of 2002" (PL 107-210), Division B, Title XXI, Sec. 2102 (b)(3) (A-H).

[67]See Article 10.4 of the United States-Chile Free Trade Agreement, Article 10.5 of the US–Central American FTA, and Article 15.5 of the US–Singapore FTA, all available at www.ustr.gov. Each of these agreements also contains a provision regarding the Parties shared understanding regarding the definition of the "minimum standard of treatment" under customary international law which reads "the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens." See also Clodfelter, "US State Department," 1278.

[68]See Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement of and Reciprocal Protection of Investment, Art 5 (2004).

[69]Ibid., Art. 5(2)(a)(b), and Annex A.

[70]Ibid., Art. 6 and Annex B.

[71]Ibid., Art. 30(3) and Art. 31.

3. Discouraging the use of investor-state arbitration; language insisting upon local remedy exhaustion before being eligible for arbitration,[72] a three-year statute of limitations,[73] and far greater transparency, including the allowance of amicus submissions.[74]

Moreover, the 2004 BIT provided for the prompt dismissal of frivolous claims,[75] and the prospect for an appellate mechanism to review arbitral decisions.[76]

In many ways, the 2004 Model BIT changes conformed to the thrust and intent of congressional TPA legislation. Yet, it was not without controversy. Indeed, the final report of the Subcommittee of the Advisory Committee on International Economic Policy (ACIEP) admitted they were divided into two groups: business- or finance-related organisations that favoured strong BIT protections, and labour and environmental organisations who wanted them weakened, including the scrapping of ISDS provisions altogether.[77]

The business community membership on ACIEP was unhappy with the changes that were made, regarding them as a substantial weakening of standards in prior US BITs.[78] Indeed, the 1994 US Model BIT as inserted into NAFTA was a mere 20 pages in length. The 2004 Model BIT ballooned to 40 pages containing lengthier definitions of everything from "customary international law," to "expropriation," to what an investment actually is, and included, for the first time, the willingness to negotiate a bilateral appellate process.[79] Judge Schwebel saw what he termed a "profound, and startling, deficiency" in the limitations introduced to the "minimum standard of treatment" since, in his view, there was no agreed minimum standard of treatment within customary international law.[80] Indeed, Schwebel accused the United States of essentially adopting a form of the Calvo Doctrine the United States had been resisting as a norm in international investment law for much of the previous three decades—what had been a floor in terms of minimum standards of treatment in 1994 was by 2004 a ceiling.[81]

4.5 | 2009 review and 2012 US model BIT

The 2004 changes to the US Model BIT generated little controversy outside the ACIEP subcommittee, in part because TPA had already gone some distance towards satisfying the perceived weaknesses with NAFTA Chapter 11. Yet, the newly inaugurated Obama Administration launched another formal review of the US BIT Model in June 2009.[82] The Department of State and the United States Trade Representative (USTR) once again asked a subcommittee of the ACIEP—again

[72]Ibid., Art. 26(2).

[73]Ibid., Art. 26(1).

[74]Ibid., Art. 29.

[75]Ibid., Art. 28 (4)-(6).

[76]Ibid., Annex D.

[77]See, Department of State, *Report of the Advisory Committee on International Economic Policy regarding the draft model Bilateral Investment Treaty*, 11 February 2004.

[78]Ibid.

[79]See US 2004 Model BIT, 37, 38, 3, 40.

[80]Schwebel, "A critical assessment," 10.

[81]Ibid., 1–14; See also Miller and Hicks (2015, p. 21).

[82]See *Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy (ACIEP) regarding the model Bilateral Investment Treaty*, September 2009.

comprised of investment experts in business, academia, labour, environment and law—to focus its work on three main areas: dispute settlement, state-owned enterprises and financial services.[83]

Interestingly, the scope of the subcommittee's deliberations went well beyond these three areas, ultimately recommending the creation of a transparency council and the insertion of new language on amicus submissions.[84] However, on a range of key issues, including arbitration procedures, the ACIEP subcommittee reached no consensus on significant modifications to the 2004 BIT Model language.

For example, subcommittee members were divided over what definitional changes should be introduced to terms like "minimum standard of treatment," and "fair and equitable treatment"; definitions that have been in dispute since 1994.[85] In particular, several members of the subcommittee wanted parts of the State Department's legal position in *Glamis Gold v. United States* (interestingly, a NAFTA Chapter 11 case)[86] formalised in new model BIT language. Specifically, that "fair and equitable treatment" and "minimum standard of treatment" be limited to the international law (rather than the weaker customary international law) standard and that the standard does not encompass some new standard for foreigners.[87] However, subcommittee member Judge Stephen Schwebel, echoing his critique of the 2004 BIT model, offered a vigorous dissent saying:

> The standards for protection of foreign investment found in the 1994 U.S. Model BIT are substantially those found in some 2800 BITs concluded the world over. The salient—and profoundly misguided—change in those standards embodied in the 2004 BIT is its substitution of customary international law for those standards.[88]

There was also significant discussion among ACIEP subcommittee members on the connection between investment, labour, the environment—including whether such connections existed and whether BITs were the right forum to deal with them. Would prospective BIT countries acquiesce to stronger labour and environmental terms contained in a BIT? Would such language effectively kill the entire BIT programme.[89]

On one of the main issues the ACIEP subcommittee was asked to address, dispute settlement, divisions among the members were deep enough that no new language made its way into the 2012 Model BIT. Debate swirled around whether dispute settlement should continue as litigation between a host state and private foreign investors, or perhaps move to a more statist form of dispute settlement between the state parties themselves—in other words, espousal by the home state of the aggrieved investor—as many civil society critics of investor-state dispute settlement wanted. Divisions broke down over whether, in fact, a state-to-state process would indeed be less political, resulting in only the most egregious cases being heard or actually discourage the private investment decades of BITs had incentivised.[90] Moreover, some argued moving away from an investor-state dispute settlement mechanism could backfire, making disputes inherently more political.[91]

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[83]Ibid., 1.

[84]Ibid., 3–4.

[85]Ibid., 4; see also Annex B: Particular viewpoints of ACIEP subcommittee members, collective statement From Sarah Anderson et al., 5.

[86]See *Glamis Gold v. United States*, Statement of defense of respondent United States of America, 8 April 2005, esp. p. 16–18.

[87]ACIEP Report, 2009, 4–5.

[88]AECIP Report, 2009, Annex B, 20.

[89]ACIEP Report, 2009, 5–6; ACIEP Report, 2009, Annex B, 3–12.

[90]Ibid., 7–8.

[91]Ibid., 7–8.

4.5.1 | Investor-state dispute settlement

As with the 2004 BIT review, the 2009 review included yet another reconsideration of the merits of the investor-state dispute settlement mechanisms themselves. NAFTA generated concerns that ISDS had created a parallel legal system for challenging state regulatory power that was only available to private foreign interests. By contrast, some worried, domestic firms subject to the same regulatory measures could only avail themselves of domestic court mechanisms while foreign firms had access to a powerful new legal mechanism in ISDS. There was still considerable debate over the introduction of the "customary international law" standard in 2004, some believing it went too far in weakening investment protections, others believing that standard should be further weakened to give more latitude to the state.[92]

As the ACIEP review progressed, two high-profile non-US cases brought additional scrutiny about the merits of ISDS; *Phillip-Morris v. Australia* and *Vattenfall v. Germany*. In mid-2011, Phillip-Morris Asia, a Hong Kong-based subsidiary of the American tobacco giant, challenged new Australian tobacco labelling requirements under the terms of the 1993 Hong Kong–Australian BIT.[93] Australians were alarmed that a private firm could use provisions of an investment agreement to challenge a measure so obviously put in place for public health reasons (Easton, 2015). Indeed, in August of that same year, the Australian Government formalised its alarm over the Phillip Morris suit by formally discontinuing the inclusion of ISDS provisions in any new trade agreements.[94] Many, including Australian scholars examining the free trade negotiations between the United States and Australia, completed in 2005, were advocating a shift towards a more state-centric form of dispute settlement that would only take effect after domestic legal avenues had been exhausted (Dodge, 2006). Interestingly, the investment chapter of the US–Australian FTA has no automatic ISDS provisions and heavily skews decisions over disputes, including investment, to the state-to-state consultative procedures outlined in Chapter 21; specifically, the Joint Committee comprised of government officials from each country.[95]

None of this was lost on the members of the ACIEP reviewing the US BIT model. Indeed, one of the subcommittee's strongest recommendations was that the Obama "administration replace investor-state dispute settlement with a state-to-state mechanism."[96] However, they continued, if "the administration continues to include an investor-state dispute settlement mechanism, investors should be required to exhaust domestic remedies before filing a claim before an international tribunal."[97] Neither happened. Indeed, the 2012 BIT made no changes to the basic structure of ISDS in US investment agreements in existence since prior to NAFTA.[98] In spite of the recommendations of the ACIEP, the Obama Administration determined that "ISDS should remain a cornerstone

[92]See ACIEP 2009 Report, Annex B.

[93]Technically, the Agreement between the Government of Hong Kong and the Government of Australia for the Protection of Investments, 15 September 1993.

[94]Australian Government, Department of Foreign Affairs and Trade, *Gillard government policy statement: Trading our way to more jobs and prosperity*, April 2011, 14

[95]See US-Australia Free Trade Agreement Chapter 21 and Chapter 11 (esp. Article 11.16).

[96]Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy (ACIEP) regarding the Model Bilateral Investment Treaty Annex B: Particular viewpoints of ACIEP subcommittee members, collective statement From Sarah Anderson et al., 4.

[97]Ibid., 5.

[98]See 2012 US Model Bilateral Investment Treaty, Article 24: Submission of a claim to arbitration; See also Miller and Hicks, "Investor-state dispute settlement," 23.

feature of the US BIT model."[99] Defenders of investor-state arbitration continue to argue that the overarching principle behind these mechanisms is the strengthening of the rule of law as "mutual commitments of good governance," but "do not and should not preclude host states from pursuing a wide range of legitimate policy objectives." (Vandevelde, 2011, pp. 313–314).

As the Obama Administration's review of the US BIT model was coming to a conclusion, the controversy over ISDS festered elsewhere, and for reasons similar to those under which it emerged under NAFTA. Vattenfall, a Swedish power conglomerate, has twice filed suit against Germany under the terms of the 1994 Energy Charter Treaty over legislated measures governing electricity generation; the first in 2009 over new coal-fired electricity regulations, known as *Vattenfall v. Germany I*, and the second, known as *Vattenfall v. Germany II* in 2012 over Germany's decision to shutter all of its nuclear power facilities in the wake of the Fukushima nuclear disaster in March 2011 (Bernasconi-Osterwalder & Hoffmann, 2013; Bernasconi-Osterwalder & Brauch, 2014). Much as NAFTA generated the first-ever ISDS suits against the United States, the Vattenfall cases similarly generated the first investment disputes by a private investor against Germany, the originator of the BIT back in 1959.

Several German firms also pondered legal action, but, to the surprise of many, the Energy Charter Treaty had seemingly given Sweden's Vattenfall access to a legal mechanism not available to German firms confronting the same altered policy landscape.

4.5.2 | Debate unabated

In spite of growing global concerns about the implications of ISDS, and the recommendations of its own review of US BIT language, the Obama Administration made virtually no changes to the way in which it pursued investment provisions in trade agreements; the most important of which has become the Trans-Pacific Partnership (TPP).

When the text of the 12-nation TPP was released, in late 2015, Chapter 9 covering investment reads much like the 2004 BIT model; commitment to transparency (Art 9.23), amicus curiae submissions (Art 9.22.3), an admonition to seek a negotiated settlement (Art 9.17) a commitment on the part of state Parties to intervene to prevent frivolous ISDS suits (Art 9.22.4), and the explicit assertion of the state right to legislate in the public interest (Art 9.9.3 and 9.15).[100]

That there were no significant changes to the investment provisions of the TPP did not go unnoticed by critics.[101] Yet the Obama White House defended the inclusion of ISDS along very traditional lines as critical to establishing and protecting the rule of law for American investment abroad.[102] Moreover, the White House argued, the United States had never lost an ISDS suit that had been filed against it and the concerns flowing from other suits raised by critics—Phillip Morris and Vattenfall in particular—were not cause for concern.[103]

While the United States is evidently comfortable with ISDS for now, the same cannot be said for Europe. Indeed, the EU demanded retroactive changes to the ISDS provisions of the text of

[99]Ibid. See also, Jeffrey Zients, Director of the National Economic Council, "Investor-state dispute settlement questions and answers," White House Blog, February 2015.

[100]Trans Pacific Partnership, Chapter 9, Investment (https://ustr.gov/tpp/#text, accessed on 27 March 2016).

[101]Elizabeth Warren, "The TransPacific Partnership clause everyone should oppose," *The Washington Post*, 25 February, 2015; Simon Lester, "Responding to the White House response on ISDS," *Cato at Liberty*, 27 February 2015.

[102]Jeffrey Zients, Director of the National Economic Council, "Investor-state dispute settlement questions and answers," White House Blog, February 2015; Chris Evans, Office of the United States Trade Representative, Investor state dispute settlement, Fact Sheet, March 2015.

[103]Zeints, "Investor-state," February 2015.

their trade and investment agreement with Canada (CETA).[104] Specifically, CETA replaces investor-state arbitration with a state-centric form of dispute settlement anchored in an investment Tribunal to be appointed by the CETA Joint Committee (government officials) and charged with hearing and resolving investment disputes.[105] Moreover, CETA creates a provision for a state-to-state appellate process to review tribunal decisions and entrenches a commitment to establish a multilateral institution for the resolution of investment disputes.[106]

The changes to CETA have made their way into EU investment proposals within the Trans-Atlantic Trade and Investment Partnership (TTIP) with the United States. Specifically, Sub-Section 4, Article 9 of the EU's investment proposal, posits the creation of an "investment court system" that includes a "tribunal of first instances" comprised of state-appointed judges that would hear claims and an appellate system (Art 10).[107]

Hence, the United States and Europe have very different views on dispute settlement in the context of investment protections as they make progress on TTIP. Although the United States accepted a state-to-state process in its 2005 agreement with Australia, subsequent reviews have reasserted traditional investor-state modes, including within the recently concluded TPP. Europe, however, has a clear preference for institutionalising state-to-state adjudication.

The outcome of those negotiations will shape the direction of global investment rules for decades to come. And it all began with NAFTA.

5 | CONCLUSION

This paper has sought to recast some of the contemporary controversy over investment protections in a debate rooted in the experience with NAFTA's investment provisions. The utility of foreign direct investment in a variety of contexts brought about the innovation of legal regimes—bilateral investment treaties—to bind the private holders of capital to their sovereign hosts. NAFTA was the first agreement to incorporate the provisions of a BIT into a regional integration scheme, and the first to apply them to both developed and developing states.

As a consequence of NAFTA, developed states were unexpectedly the targets of investor claims in ways they had never been in the past. This paper has argued that the controversy erupted because of three interrelated aspects of foreign direct investment and its governance that had, prior to NAFTA, never been put to the test, but should not have been surprising in an increasingly interdependent global economy.

First, growing levels of cross-border foreign direct investment in North America and elsewhere virtually ensured that growing levels of investment between developed states, and increasingly between source developing states and their developed country hosts, would be subject to disputes the moment it was subject to new protection regimes.

[104] CBCNews Politics, "EU Quietly Asks Canada to Rework Trade Deal's Thorny Investment Clause," 21 January 2016. http://www.cbc.ca/news/politics/canada-europe-trade-isds-ceta-1.3412943. Accessed on 29 March 2016. Formally, the Comprehensive Economic and Trade Agreement (CETA) between Canada of the One Part, and the European Union, text released on 29 February 2016.

[105] CETA Articles 8.23, 8.27.

[106] CETA Articles 8.28, 8.29.

[107] European Union's proposal for Investment Protection and Resolution of Investment Disputes, Transatlantic Trade and Investment Partnership, 12 November, 2015. http://trade.ec.europa.eu/doclib/docs/2015/November/tradoc_153955.pdf. Accessed on 29 March 2016.

Second, the very presence of investment protection rules between developed states incentivises the initiation of disputes to test those legal regimes. Regrettably, there was little controversy over these provisions provided they involved developed country firms and host country governments.

Thirdly, whereas linguistic ambiguities within investment protections seldom raised alarm bells under the thousands of BITs leading up to NAFTA, NAFTA changed all of that as Canada and the United States became the targets of investor claims.

The consequence of that controversy has been an overdue reconsideration of global investment protection regimes to bring them more in line with foreign direct investment flows that reflect the interdependence of the global economy and the changing nature of how we conceptualise developed and developing states.

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APPENDIX 1

US BIT PARTNER COUNTRIES (DATE OF ENTRY INTO FORCE)

Albania 1998	Jamaica 1997
Argentina 1994	Jordan 2003
Armenia 1996	Kazakhstan 1994
Azerbaijan 2001	Kyrgyzstan 1994
Bahrain 2001	Latvia 1996, Revised 2004
Bangladesh 1989	Lithuania 2001, Revised 2004
Bolivia 2001	Laos 2005
Bulgaria 1994, Revised 2007	Moldova 1994
Cameroon 1989	Mongolia 1997
Congo (Brazzaville) 1989	Morocco 1991

(Continues)

Congo (Kinshasa) 1994	Mozambique 2005
Croatia 2001	Panama 1991
Czech Republic 1992, Revised 2004	Romania 1994, Revised 2007
Ecuador 1997	Rwanda 2012
Egypt 1992	Senegal 1990
Estonia 1997, Revised 2004	Slovakia 1992, Revised 2004
Georgia 1997	Sri Lanka 1993
Grenada 1989	Trinidad and Tobago 1996
Honduras 2001	Tunisia 1993
	Turkey 1990
	Ukraine 1996
	Uruguay 2006

Agreements signed, but not yet entered into force since 1984 (BITs)	
Belarus	1994
El Salvador	1999
Nicaragua	1995
Russia	1992
Uzbekistan	1994

Source: United States Trade Representative, Annual Report to Congress 2014, Appendix III.