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THE EVOLVING AMERICAN POLICY ON INVESTMENT PROTECTION: EVIDENCE FROM RECENT FTAs AND THE 2004 MODEL BIT

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ABSTRACT

Twelve years after the inception of the North American Free Trade Agreement (NAFTA), the US policy on the protection of foreign investment is evolving. This article compares the provisions on investment in the recent US free trade agreements (FTAs) and the 2004 model bilateral investment treaty (BIT) with NAFTA's. While most of the provisions are similar, some differences can be identified, both in substantive and procedural forms. We explain this evolution by a learning process of the US administration from the NAFTA experience. We argue that the new features of the FTAs and of the revised model BIT result from the US interest in reaching a better balance between the protection of investment and the protection of state sovereignty. This American concern stems from a reaction to the claims filed by foreign investors under NAFTA Chapter 11, at least some of which were perceived as 'frivolous' by the US government. However, the recent US FTAs and model BIT do not reveal a thorough policy reorientation but rather adjustments to the policy at the basis of NAFTA's investment chapter.

INTRODUCTION

For decades, the US government has consistently promoted an international regulatory framework governing the treatment of foreign investment, insisting on strong protection for investors. One of its main achievements was the conclusion in 1994 of the North American Free Trade Agreement (NAFTA) and its Chapter 11 on investment.[1] This chapter was subsequently used as a model for 13 bilateral investment treaties (BITs) concluded by the United States with developing countries. Both NAFTA and the BITs concluded after

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[1] North American Free Trade Agreement (NAFTA), 17 December 1992.

1994 prohibit discrimination, actions tantamount to expropriation, money transfer bans, performance requirements and violations of the minimum standard of treatment. To ensure compliance with these substantive obligations, they entitle investors of signatory nations to binding arbitration actions against a host government (investor–state provisions).

The collapse of the negotiations on a Multilateral Agreement on Investment (MAI) in 1998 and the lack of a firm commitment to negotiate an agreement on investment in the Doha Round of the World Trade Organization (WTO) have not lessened the US determination to promote an international regulatory framework on investment. Thus, the recently concluded free trade agreements (FTAs) with Singapore (SFTA),[2] Chile (CFTA),[3] Australia (AFTA),[4] the Central American countries, the Dominican Republic (CAFTA)[5] and Morocco (MFTA)[6] include rules on the treatment and protection of foreign investment.

However, thirteen years after the conclusion of the NAFTA, the US policy regarding international investment law is evolving. Indeed, the United States released, in February 2004, a revised version of the template it uses to negotiate BITs.[7] The first US BIT under the revised model was concluded with Uruguay in September 2004.[8] However, the recent US FTAs had already put into effect the provisions of this revised model BIT that differ from previous BITs and NAFTA. Yet, as we will see in this article, these new provisions are mainly safeguards to ensure that the protection of investors from states' egregious measures does not threaten the ability of governments to regulate in the public interest.

The turning point of this policy, if one has to be identified, appears to be the adoption by the US Congress in 2002 of the Trade Promotion Authority (TPA),[9] which delineates US negotiating objectives on foreign investment. While Section 2101 of the TPA reaffirms that the United States should seek to 'reduce or eliminate artificial or trade-distorting barriers to foreign investment', it emphasizes that 'foreign investors [should not be] accorded greater substantive rights with respect to investment protections than United States

[2] United States–Singapore Free Trade Agreement (SFTA), 6 May 2003.

[3] United States–Chile Free Trade Agreement (CFTA), 6 June 2003.

[4] United States–Australia Free Trade Agreement (AFTA), 18 May 2004.

[5] Dominican Republic–Central America–United States Free Trade Agreement (CAFTA), 5 August 2004.

[6] United States–Morocco Free Trade Agreement (MFTA), 14 June 2004.

[7] United States, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (2004 Model BIT), 15 September 2004.

[8] Treaty Between the United States of America and the Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, 25 October 2004.

[9] Formally known as the fast-track authority. Bipartisan Trade Promotion Authority (TPA), Trade Act of 2002, 19 USC s 3801 ff.

investors in the United States',[10] a long-held criticism against investor–state provisions.[11]

The revised US policy is also concomitant with significant changes in world investment flows. According to the US Department of Commerce, the value of foreign investments in the United States exceeded the value of US investments abroad by the unprecedented peak of US$2,430 billion in 2003.[12] One would expect that being a net importer of capital, the US government would be more concerned about foreign investors' claims against the United States than with the protection of US investments abroad. However, the increase of inward flows is mainly due to large net foreign purchases of US securities such as corporate bonds and treasury securities, less likely to be the subject of an investor claim than foreign direct investment (FDI). In addition, the US FDI outflows rose by 15% in 2002, while the European and Japanese FDI outflows decreased by 13 and 18%, respectively.[13] Therefore, even if the investment inflows to the United States have increased during the last couple of years, the protection of US FDI abroad is becoming increasingly relevant.

While the political context and economical factors have to be considered, this article explains the revised US policy in the light of the NAFTA investor–state cases against the American government. The changes must be seen as the result of a learning process from the US administration, rather than the consequences of new political powers or economic interests. It is as a reaction to claims filed by foreign investors under NAFTA Chapter 11, several of these perceived as 'frivolous' by the American government, that the new features of the recent US FTAs and the revised model BIT aim to reach a better balance between the protection of investment and the protection of state sovereignty. Nevertheless, we can argue that the recent FTAs and the 2004 model BIT do not reveal a thorough policy reorientation but rather adjustments to the policy at the basis of NAFTA Chapter 11.

This article is organized as follows. The next section reviews the cases raised against the US government to identify their common grounds and tendencies. In the light of the claims and rulings made under the NAFTA's investment regime, the second section outlines the differences between the substantive investment provisions in NAFTA and in the recent FTAs and the 2004 model BIT. The third section discusses how the procedural provisions on investor–state dispute settlement included in the recent US FTAs and the

[10] Ibid.

[11] Yet, can this TPA objective of not giving more rights to foreigners than to US investors really be achieved? To the extent that an investor–state dispute mechanism provides an extra layer of protection to foreign investors that Americans cannot claim, it automatically gives more rights to foreigners, irrespective of how the substantive treaty rights are phrased.

[12] Bureau of Economic Analysis (BEA), 'U.S. International Investment Position at Yearend', 2004, http://www.bea.gov/bea/newsrel/intinvnewsrelease.htm.

[13] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report*, Sales no.: E.03.II.D.8., 2003, 72.

model BIT aim to prevent frivolous claims. This will lead to concluding remarks on the American policy on investment protection.

I. LEARNING FROM THE NAFTA EXPERIENCE

Before analyzing the substantive and procedural provisions of the recent FTAs and the 2004 model BIT, we need to consider the litigation history that motivates the evolution of these provisions. The implementation of the NAFTA's chapter on investment, and particularly tribunals' awards, has been anticipated to bring about a body of case law[14] to supplement and give more precise meaning to the scope and application of the substantive obligations of Chapter 11. Yet, as soon as they began to be implemented, towards the late 1990s, these provisions raised controversy and were perceived to be implemented in ways not envisioned by the parties, namely to protect US and Canadian investments from a historically unpredictable Mexican regulatory environment.[15] Most of the criticism, thus far, has centred on 'frivolous' claims that threaten the ability of governments to regulate in the public interest and that confer more rights on foreign, as against national, investors.

A. NAFTA investor–state cases involving the United States: key features and trends

There have been 41 notices of intent filed under Chapter 11 from the implementation of NAFTA in January 1994 to February 2006. Canada has been subject to 12, Mexico to 15 and the United States to 14.[16] As many authors already provide instructive summaries of these cases,[17] we will not consider each of them in detail. Instead, we will try to identify their common grounds and tendencies that are relevant to consider as we study new trends in the recent US FTAs and model BIT. For that purpose, we will pay particular attention to the NAFTA investor–state cases filed against the United States (Table 1).

[14] It must be remembered that one cannot talk of case law or jurisprudence, *per se*, as arbitration tribunals cannot 'create' law and their rulings do not have precedential value.

[15] Noah Rubins, 'The Arbitral Innovations of Recent US Free Trade Agreements: Two Steps Forward, One Step Back', 8 International Business Law Journal 865 (2003), at 866.

[16] The 107 very similar claims filed by the members of the Canadian Cattlemen for Fair Trade may be considered as one case, because they will most likely be consolidated. Until further development and for sake of brevity, this case is referred to as *CCFT*. In September 2005, the *Canfor*, *Tembec* and *Terminal Forest* cases, all related to the US–Canada *Softwood Lumber* dispute, were consolidated as one Chapter 11 case, now known as *Softwood Lumber*. United Nations Commission on International Trade Law (UNCITRAL), *Canfor Corp.* v *Government of the United States of America*; UNCITRAL, *Tembec Inc., et al.* v *United States of America*; UNCITRAL, *Terminal Forest Products Ltd.* v *Government of the United States of America*.

[17] In particular, a web site maintained by attorney Todd Weiler contains all the major documents pertaining to the NAFTA investor–state cases, http://www.naftaclaims.com/.

Table 1. Investor–state cases filed against the US Government under NAFTA (1994–2006)

Date of Filing	Claimant	Measure	Claim (in US Dollars)	Award
30 October 1998	Loewen Group and Raymond L. Loewen (Canada)	The conduct and a verdict of a Mississippi State Court	725 million	On 26 June 2003, the tribunal dismissed the claims against the United States in their entirety. In October 2005, a US court dismissed Loewen's appeal.
2 July 1999	Methanex (Canada)	A California ban on the use of the gasoline additive MTBE	1 billion	In August 2005, the tribunal dismissed Methanex's claims against the United States in their entirety.
1 September 1999	Mondev (Canada)	A Massachusetts court ruling on a real estate contract with the City of Boston	50 million	On 11 October 2002, the tribunal issued an award dismissing all claims against the United States.
19 July 2000	ADF Group (Canada)	The Buy America Act	90 million	On 9 January 2003, the tribunal dismissed ADF's claims against the United States in their entirety.
15 March 2002	J. R. Baird (Canada)	Actions of the Department of Energy and Congress to prohibit sub-seabed disposal of nuclear waste	580 million	No procedures recorded after notice of intent.
1 May 2002	Doman (Canada)	Antidumping, countervailing duty determinations issued by the US Department of Commerce	573 million	No procedures recorded after notice of intent.
9 July 2002	Canfor (Canada)	Antidumping, countervailing duty determinations issued by the US Department of Commerce	250 million	In September 2005, the case was consolidated with *Tembec* and *Terminal Forest*.
2 August 2002	Kenex (Canada)	A US regulation pertaining to a substance included in the claimant's manufactured products	20 million	In February 2004, the US 9th Circuit Court gave reason to the claimant.
September 2002	Hemp Oil Canada (Canada)	A US regulation pertaining to a substance included in the claimant's manufactured products	Unknown	In February 2004, the US 9th Circuit Court gave reason to the claimant.

Table 1 *Continued*

Date of Filing	Claimant	Measure	Claim (in US Dollars)	Award
3 December 2003	Tembec (Canada)	Antidumping, countervailing duty determinations issued by the US Department of Commerce	200 million	In September 2005, the case was consolidated with *Canfor* and *Terminal Forest*.
9 December 2003	Glamis Gold (Canada)	Refusal by the Department of Interior and the State of California to approve a plan of operation	50 million	Procedures in progress.
10 March 2004	Grand River (Canada)	An agreement between State attorney generals and major tobacco companies	340 million	Procedures in progress.
30 March 2004	Terminal Forest Products (Canada)	Antidumping, countervailing duty determinations issued by the US Department of Commerce	90 million	In September 2005, the case was consolidated with *Canfor* and *Tembec*.
16 March to 6 June 2005	Canadian Cattlemen for Fair Trade	US border closure for Canadian cattle in response to BSE concerns	The 107 claims range from C$38,000 to C$95 million	107 notices of arbitration were filed and are likely to be consolidated.

As of February 2006, the litigation process can be considered completed for five of these cases: *Methanex*, *Mondev*, *ADF*, *Kenex* and *Hemp Oil*.
Source: http://www.naftaclaims.com/.

The first surprising feature of NAFTA cases is that many of them are brought against nations with well-developed legal systems. At the beginning, BITs were signed to provide 'protection from harmful state interference in countries that otherwise have weak or corrupt judicial systems'.[18] For a long time, developing countries were the typical respondent host states, while the United States was often the origin country of the investor claimants. Even if the United States was one of the first states to ratify the International Centre for Settlement of Investment Disputes (ICSID) Convention in 1966, the first ICSID case filed against the United States, *Loewen*,[19] occurred only in October 1998. But the wind of litigation has changed. Since 1994, the three NAFTA member states have received approximately the same number of notices of intent. Therefore, the United States has come to see itself not only as a capital exporter but also as a host state exposed to foreign investors' claims. What was meant to be a shield to protect US investors has turned into a sword against the US government.[20] As Noah Rubins puts it, the United States 'found [itself] bound to obey principles of international law [it] had developed to control the conduct of others'.[21]

The US anxiety at being the subject of claims has been amplified by the growing number of cases. While ICSID had registered only 21 arbitration cases during its first twenty years, it had registered 123 cases by June 2005,[22] including 26 cases during the single year of 2003.[23] At the NAFTA level, while only one claim was filed against the United States between January 1994 and January 1999, the US government was, in February 2006, the defending party in five simultaneous cases, disregarding those for which only a notice of intent has been filed.

Even if some NAFTA claims filed against the United States during the last couple of years are due to particular circumstances, namely the *Softwood Lumber* and *CCFT* disputes, there is undoubtedly an underlying trend to litigate. The growing foreign investment stock among NAFTA countries[24] and

[18] Dana Krueger, 'The Combat Zone: Mondev International, Ltd. V. United States and the Backlash Against NAFTA Chapter 11', 21 Boston University International Law Journal 399 (2003), at 420.

[19] International Centre for Settlement of Investment Disputes (ICSID), *The Loewen Group, Inc. and Raymond L. Loewen* v *United States of America*, Case No. ARB(AF)/98/3.

[20] Guillermo Aguilar Alvarez and William W. Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11', 28 Yale Journal of International Law 365 (2003), at 393; Ray C. Jones, 'NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?', Brigham Young University Law Review 527 (2002), at 528.

[21] Above n 15, at 867.

[22] UNCTAD, *Recent developments in international investment agreements*. Research Note UNCTAD/WEB/ITE/IIT/2005/1, 30 August 2005, http://www.unctad.org/sections/dite_dir/docs/webiteiit20051_en.pdf.

[23] Many claims in 2003 were related to Argentina's financial crisis. However, even putting aside the claims against Argentina, the increasing number of cases is still apparent. ICSID, 'Annual Report 2003', 4, http://www.worldbank.org/icsid/pubs/1998ar/2003_ICSID_ar_en.pdf.

[24] Canada, Department of Foreign Affairs and International Trade, *NAFTA @ 10: A Preliminary Report*, Catalogue No. E2–487/2003, 33.

the successful attempt by some investors to obtain compensation undoubtedly contribute to the rise in litigation. Interestingly, of the three completed investor–state cases adjudicated under NAFTA in which the United States was involved, no arbitral award found in favour of the investors.[25] All claims against the United States were, in fact, dismissed and no compensation has thus far been awarded.[26] But these two factors, the investment flows and the psychological effect of favourable rulings on investors' strategies, are difficult to foresee. Thus, the amplitude of the litigation trend is difficult to evaluate in the long term.

However, the home country of the claimants seems quite foreseeable. In fact, all of the NAFTA cases against the United States were filed by Canadian investors! This trend is not surprising because the value of Canadian FDI in the United States is 10 times higher than the Mexican.[27] In other words, the Canadian share of investors complaining against the United States would tend to be commensurate with the Canadian share of investment inflows to the United States.[28]

A large flow of investment does not necessarily lead to a large number of claims. Under NAFTA Article 1116, an investor may submit a claim only if the host country has breached one of its obligations and the United States is not known to be a harmful country for private investment. We do not know of any case where the US government has nationalized an oil company or expropriated land to build an airport without paying compensation. But the alleged breaches of an obligation are not always that simple, obvious and predictable. All the claims of expropriation against the United States, namely the *Loewen*,[29] *Methanex*,[30]

[25] ICSID, *Mondev International Ltd.* v *United States of America*, Case No. ARB(AF)/99/2, Award, 11 October 2002; ICSID, *ADF Group Inc.* v *United States of America*, Case No. ARB(AF)/00/1, Award, 9 January 2003; UNCITRAL, *Methanex Corporation* v *United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.

[26] In the *Loewen* case, the claimant may still appeal a ruling from a US court. United States District Court for the District of Columbia, *Arbitration Between Raymond L. Loewen, Petitioner* v *United States of America, Respondent*, Civil Action No. 04–2151(RWR), Memorandum Opinion, 31 October 2005. The *Kenex* and *Hemp Oil* cases were both solved following a decision from a US court. UNCITRAL, *Kenex Ltd.* v *United States of America*, Notice of Arbitration, 2 August 2002; NAFTA, *Hemp Oil Canada Inc.* v *United States of America*, Notice of Intent to Submit a Claim to Arbitration, September 2002; United States Court of Appeals for the Ninth Circuit, *Hemp Industries Assoc.* v *Drug Enforcement Agency*, Opinion by Judge B. Fletcher, 6 February 2004.

[27] BEA, 'Foreign Direct Investment in the United States: Country Detail for Selected Items', 2003, http://www.bea.gov/bea/di/fdilongcty.htm.

[28] Above n 15, at 866.

[29] *Loewen*, Notice of Claim, 30 October 1998.

[30] *Methanex*, Notice of a Submission of a Claim to Arbitration, 3 December 1999.

Mondev,[31] *Baird*,[32] *Doman*,[33] *Canfor*,[34] *Tembec*,[35] *Glamis Gold*,[36] *Grand River*[37] and *Terminal Forest*,[38] involve measures 'tantamount to' expropriation rather than a direct transfer of property. Many alleged breaches of obligations under NAFTA are actually measures taken for public policy purposes, apparently not directly related to foreign investment.

B. Some key cases and issues and the 2001 interpretation

In the *Methanex* case, for instance, the measure was a ban on the use of a gasoline additive for an environmental purpose that did not explicitly target a specific investor. Methanex claimed, on the contrary, that the ban unfairly targets a specific product, methyl tertiary butyl ether (MTBE), made from methanol, of which the Canadian firm is the world's largest manufacturer, while not acting vis-à-vis other like harmful products, such as ethanol, produced by US competitors.[39] However, Methanex's claims were completely dismissed in August 2005. The arbitral award set a tough standard for a finding of 'regulatory taking' or of a 'measure tantamount to expropriation', largely in line with US jurisprudence on takings.[40] Nonetheless, given the broad scope of international investment rules, it might still be quite difficult to predict if a measure could lead to a claim when a public authority enacts it. Should it be pursued, the *CCFT* case, in particular, involving a significant segment of the Canadian beef industry, would be telling of the reach of NAFTA investment provisions and their consequences for US regulatory authorities.

Many commentators and analysts have strong feelings about investors' claims, often taking an overt pro-government [e.g. public authorities and non-governmental organizations (NGOs)] or pro-investor stance (e.g. business associations and corporate lawyers). In fact, there is an uneasy balance to find between regulatory and investment interests, as abuse is possible from both sides. If, for the United States and its NAFTA partners, there has been abuse of the NAFTA investment provisions on the part of foreign investors, at the same time, it has been recognized that at least some of the NAFTA

[31] *Mondev*, Notice of Arbitration, 1 September 1999.

[32] NAFTA, *James Russell Baird* v *United States of America*, Notice of Intent to Submit a Claim to Arbitration, 15 March 2002.

[33] NAFTA, *Doman Industries Ltd.* v *United States of America*, Notice of Intent to Submit a Claim to Arbitration, 1 May 2002.

[34] *Canfor*, Notice of Arbitration and Statement of Claim, 9 July 2002.

[35] *Tembec*, Notice of Arbitration and Statement of Arbitration Claim, 3 December 2004.

[36] UNCITRAL, *Glamis Gold Ltd.* v *United States of America*, Notice of Arbitration, 9 December 2003.

[37] UNCITRAL, *Grand River Enterprises Six Nations, Ltd., Jerry Montour & Kenneth Hill, and Arthur Montour* v *United States of America*, Notice of Arbitration, 10 March 2004.

[38] *Terminal Forest*, Notice of Arbitration, 30 March 2004.

[39] *International Trade Reporter*, 14 November 2002, 1965–66.

[40] *Methanex*, above n 25; *Inside US Trade*, 19 August 2005, 1, 12–14.

claims had substantive merits. Governments are also well versed in disguising improper action as 'legitimate' regulation in the public interest. The *Loewen* award, in particular, recognizes the substantive merit of the claim despite dismissing it on technical grounds.[41]

If virtually any kind of measure might affect foreign investment, any type of public authority can also take such a measure. Even if the defending party is always the central government, the alleged breaches of an obligation could result from a measure taken by the legislative, executive or judicial branches at the federal, state or municipal levels. In the *Loewen* case, the measure involved was the conduct and the verdict of a Mississippi State Court, and in the *Grand River* case, it is an agreement between various state attorney generals and the major tobacco companies. The inability of the US government to anticipate claims is thus worsened by the diversity of entities whose actions might affect foreign investment. Even more so if one considers that most local authorities are not the best informed, *a priori*, on the intricacies of international investment law.

Investor–state procedures are not only recurrent and unforeseeable, they can also be costly. Investors' claims against the United States have ranged from US$20 million to US$1 billion. So far, no Chapter 11 tribunal has ruled a final award against the United States, but this might change shortly as five cases, *Loewen*, *Softwood Lumber*, *Glamis Gold*, *Grand River* and *CCFT*, are still under adjudication. On the other hand, NAFTA cases have shown that there is a substantial difference between the amounts claimed and the amounts ultimately awarded. In *S.D. Myers*, the claim was US$20 million, and the award was set at US$3.87 million.[42] Nevertheless, these amounts, increased by legal fees, could be significant enough to make public authorities worry. Even more so if one considers that an award against a state party, even for a minor amount, could have heavy political cost.

To avoid an unmanageable number of claims and a potential 'regulatory freeze', the US government has systematically challenged the admissibility of claims and the competence of tribunals. Yet this could only be a short-term strategy, because the NAFTA tribunals established under Chapter 11 are not officially bound by previous awards. Therefore, some US agencies, such as the Justice Department and the Environmental Protection Agency, called for sustainable safeguards on the investor–state arbitration process.[43] One might add that, for the United States, the NAFTA was negotiated by the Office of the United States Trade Representative, while the defence of NAFTA investor–state cases has been under the responsibility of the State Department.

[41] *Loewen*, Award, 26 June 2003.

[42] UNCITRAL, *S.D. Myers, Inc.* v *Government of Canada*, Second Partial Award, 21 October 2002.

[43] Gilbert Gagné, 'The Investor-State Provisions in the Aborted MAI and in NAFTA: Issues and Prospects', 2 (3) The Journal of World Investment 481 (2001), at 504.

A first attempt to address some of the issues raised by the Chapter 11 investor–state disputes took place in 2001, when the NAFTA Free Trade Commission issued Notes of Interpretation to clarify the minimum standard of treatment, one of the most sensitive substantive provisions.[44] NAFTA Article 1131.2 states clearly that an 'interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under [Chapter 11 Section B]'. Interestingly, there have been issues over whether these Notes are only an interpretation or an amendment which departs from the original meaning of Chapter 11 and thus whether or not they are binding on arbitrators.[45]

Having learned from the NAFTA experience, the US government has concluded FTAs that, as we will see in the next sections, provide, from the start, substantive and procedural safeguards for US authorities.

II. SUBSTANTIVE PROVISIONS

In terms of the substantive provisions, the main changes to the NAFTA investment chapter included in the recent FTAs and the 2004 US model BIT revolve around the notions of investment, minimum standard of treatment and expropriation. Unlike NAFTA Chapter 11, the 2004 US model BIT and the recent US FTAs, although providing for a non-exhaustive list of covered activities, nevertheless further clarify and narrow the definition of investment. As for minimum treatment and expropriation, both substantive provisions were left undefined in NAFTA, whereas the recent US FTAs and the 2004 model BIT have included substantial clarifications aimed at limiting the scope of these obligations.

A. Definition of investment

US BITs have tended to adopt a broad, descriptive approach to the scope of covered investment and generally provide an extremely general statement of coverage. Under the 1994 US model BIT, the notion of investment is described as 'every kind of investment owned or controlled directly or indirectly', followed by a non-exhaustive list of asset categories falling within the definition of 'investment'. Typical categories in US investment treaties

[44] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions', 31 July 2001, http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp.

[45] In *Pope & Talbot*, the award in respect of damages stated 'Were the Tribunal required to make a determination whether the [NAFTA Free Trade] Commission's action is an interpretation or an amendment, it would choose the latter'. *Pope & Talbot Inc.* v *Government of Canada*, Award in Respect of Damages, 31 May 2002, para 47. Under NAFTA Article 2202, an amendment needs to be done in accordance with 'applicable legal procedures of each Party'. However, in the *Mondev* and *Loewen* cases, the tribunal recognized the Notes as a valid interpretation. *Inside US Trade,* 4 January 2002, 1, 22–25; Aguilar Alvarez and Park, above n 20, at 397–98; Marcia J. Staff and Christine W. Lewis, 'Arbitration Under NAFTA Chapter 11: Past, Present, and Future', 25 Houston Journal of International Law 301 (2003), at 326–28.

include real estate and other direct property rights, shareholdings and other forms of participation in local companies, claims to payment or performance, intellectual property and other intangibles, and concession agreements.[46] The NAFTA treaty provides a somewhat different approach to defining investment, setting forth a broad but exhaustive list of covered economic activities. Investments under the NAFTA include FDI (an enterprise), portfolio investment (equity securities), partnership and other interests giving the owner a right to share in profits or liquidated assets, and tangible and intangible property 'acquired in the expectation ... of economic benefit'. Loan financing, meanwhile, is only protected when funds flow within a business group, or when debt is issued on a relatively long-term basis. Contract rights not falling under other categories of investment are covered only if they involve a 'commitment of capital or other resources in the territory of a party ... to economic activity in such territory'. NAFTA complements its exhaustive list of investment categories with a negative definition, establishing certain kinds of property not to be considered investments, such as money claims arising solely from commercial contracts for the sale of goods or services.[47]

The recent US FTAs represent a departure from the definitions of investment found in the NAFTA and the 1994 US model BIT. The recent US FTAs and the 2004 model BIT define investment broadly, as every asset owned or controlled, directly or indirectly, by an investor, which has 'the characteristics of an investment', and include a non-exhaustive list of 'forms' such investments may take. Besides the typical 'core' investment types, such as enterprises, shares, intellectual property rights and moveable or immovable property, the recent US FTAs and the 2004 model BIT also cover various debt instruments, 'futures, options and other derivatives' and 'turnkey, construction, management, production, concession, revenue sharing and other similar contracts'. The recent US FTAs and the 2004 model BIT also innovate in that they include explanatory notes, designed to clarify and narrow the seemingly boundless definition. Hence, the 'characteristics of an investment' include 'the commitment of capital, the expectation of gain or profit, or the assumption of risk', while in case of debt instruments, these would normally have to be long term.[48]

Unlike the NAFTA's approach, the recent US FTAs and the 2004 model BIT opt for a non-exhaustive list of investment activities, as found in the 1994 US model BIT. Yet, even though they retain flexibility and refer to certain recent forms of economic activity, the recent US FTAs and model BIT

[46] United States, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (1994 Model BIT), 1994.

[47] NAFTA, Article 1139; Rubins, above n 15, at 874.

[48] SFTA, Article 15.1.13; CFTA, Article 10.27; AFTA, Article 11.17.4; CAFTA, Article 10.28; MFTA, Article 10.27; 2004 Model BIT, Article 1. In the latter, the specified characteristics of an investment read: 'the commitment of capital or other resources'.

nevertheless provide guidance to arbitrators, directing them to look beyond the 'form' in favour of the economic essence of investment. In this regard, they seem to be both less restrictive than NAFTA's exhaustive definition of investment and more restrictive through their definition of investment in economic terms.[49]

B. Minimum standard of treatment

NAFTA Article 1105.1 on minimum standard of treatment reads: 'Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security'. As Anthony VanDuzer points out, there have been two main issues in relation to Article 1105: first, is the requirement to give fair and equitable treatment independent from the requirement to give the minimum protection required by international law?; second, what is the standard of treatment guaranteed by 'international law'?[50]

Some tribunals adopted a broad interpretation of Article 1105 in addressing these two issues. In the *Pope & Talbot* case, the tribunal determined that fair and equitable protection was distinct from minimum treatment, leading to additional requirements.[51] In the *S.D. Myers* case, the tribunal ruled that a violation of the national treatment meant a violation of the minimum treatment.[52] As for *Metalclad*, the tribunal found that the minimum standard of treatment was not limited to customary international law.[53]

Following these decisions of the tribunals, in July 2001, the NAFTA Free Trade Commission adopted Notes of Interpretation that clarify the obligations under Article 1105 by providing a narrow interpretation. The Notes limit the meaning of international law to 'customary' minimum standard, thereby preventing recourse to other sources of international law, such as WTO agreements, that could have imposed higher obligations for host states on the treatment of foreign investors.[54] The notions of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by customary international law. The Notes further specify that a breach of another NAFTA provision or of a

[49] For more on the evolution of the definition of investment in the 2004 US model BIT and the recent FTAs, see Rubins, above n 15, at 873–76; UNCTAD, above n 22, at 4–5.

[50] J. Anthony VanDuzer, 'NAFTA Chapter 11 to Date: The Progress of a Work in Progress', in Laura Ritchie Dawson (ed), *Whose Rights? The NAFTA Chapter 11 Debate* (Ottawa: Centre for Trade Policy and Law 2002), 47–97, at 77.

[51] *Pope & Talbot*, Award on the Merits Phase 2, 10 April 2001, para 118.

[52] *S.D. Myers*, Partial Award, 13 November 2000, para 266.

[53] ICSID, *Metalclad Corporation* v *United Mexican States*, Case No. ARB(AF)/97/1, Final Award, 2 September 2000, para 100.

[54] Gaetan Verhoosel, 'The Use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law', 6 (2) JIEL 493 (2003), at 497.

separate international agreement does not establish that there has been a breach of Article 1105.1.[55]

The provision on minimum standard of treatment in the recent US FTAs reads: 'Each Party shall accord to covered investments treatment in accordance with *customary* international law, including fair and equitable treatment and full protection and security' (emphasis added). 'Fair and equitable treatment' and 'full protection and security' are part of customary international law (as against international law in general as under NAFTA) and do not entail additional obligations. Examples of obligations derived from the minimum treatment standard are given, such as access to justice and police protection. Repeating the NAFTA's Notes of Interpretation, it is stipulated that a breach of another provision or of another agreement is not sufficient to find a violation of minimum treatment.[56]

The article shall be interpreted in accordance with an annex that stipulates that the

> Parties confirm their shared understanding that 'customary international law' [...] results from a general and consistent practice of states that they follow from a sense of legal obligation. With regard to [the article on the minimum standard of treatment] 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.[57]

C. Expropriation

NAFTA Article 1110 reads: 'No Party may directly or indirectly nationalize or expropriate an investment [...] or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation")'. In the absence of further clarification in the NAFTA treaty, the wording in Article 1110.1 leaves open the question as to whether 'a measure tantamount to expropriation' is redundant with indirect expropriation, if it refers to a subset of indirect expropriation, or if it constitutes a more lenient standard that

[55] Above n 44. The NAFTA Commission's 2001 Statement has been criticized by many legal experts, in particular, its 'interpretation' of international law and customary law and its assertion that breach of a treaty does not violate customary international law. In an opinion to the *Methanex* tribunal, the late Professor Sir Robert Jennings, former president of the International Court of Justice, said in substance that the NAFTA Commission's Statement twists, rather than interprets, the intent of Article 1105. See *Methanex*, Investor's First Submission re: NAFTA FTC Statement on Article 1105, 18 September 2001, http://www.naftaclaims.com. For further analysis, see Andreas F. Lowenfeld, *International Economic Law* (Oxford: Oxford University Press 2002), chapters 13–15. Beyond the issue of investment protection, this is seen by many as another illustration of the US government's reluctance to embrace the development of international law, an attitude manifested in various contexts in recent years.

[56] SFTA, Article 15.5; CFTA, Article 10.4; AFTA, Article 11.5; CAFTA, Article 10.5; MFTA, Article 10.5; 2004 Model BIT, Article 5.

[57] SFTA, Letter exchange on customary international law; CFTA, Annex 10-A; AFTA, Annex 11-A; CAFTA, Annex 10-B; MFTA, Annex 10-A; 2004 Model BIT, Annex A.

catches a wider range of government measures. Indeed, claimants in NAFTA cases have asserted that the term 'a measure tantamount to expropriation' covers a category of government actions unto itself. The tribunals in the *Pope & Talbot* and *S.D. Myers* cases, however, found that the scope of NAFTA Article 1110 was not broader than the interpretation of indirect expropriation generally found in international law.[58]

In the recent US FTAs and the 2004 model BIT, the article pertaining to expropriation reads: 'Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization'.[59] The article shall be interpreted in the light of two annexes, a first on customary international law, mentioned before, and a second on expropriation. The latter specifies that the article on expropriation is intended to reflect customary international law and that an action cannot constitute an expropriation unless it interferes with a property right or a property interest. The determination of an indirect expropriation must consider, *inter alia*, (i) the economic impact of a government action (which, standing alone, does not establish that an indirect expropriation has occurred); (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action. Except in rare circumstances, non-discriminatory regulatory actions designed and applied to protect public health, safety and the environment do not constitute indirect expropriations.[60] These criteria for the consideration of indirect expropriation reflect US case law, as required under the TPA.

Interestingly, these changes introduced by the United States inspired other countries. The three American criteria that must be used to consider an expropriation, namely the economic impact, the interference with expectations and the character of the government action, are reproduced in the new Canadian model BIT adopted in 2003.[61] Thus, in its future BIT negotiations, the Canadian government will paradoxically promote criteria unknown in Canadian law. Similarly, the FTA between Chile and Korea replicates the provisions of the NAFTA Commission's 2001 Interpretation and of the recent US FTAs on the minimum standard of treatment.[62] Overall, this demonstrates the strong influence of the United States in the regulatory process of

[58] *Pope & Talbot*, Interim Award, 26 June 2000, para 96; *S.D. Myers*, above n 52, para 286.

[59] SFTA, Article 15.6; CFTA, Article 10.9; AFTA, Article 11.7; CAFTA, Article 10.7; MFTA, Article 10.6; 2004 Model BIT, Article 6.

[60] SFTA, Letter exchange on expropriation; CFTA, Annex 10-D; AFTA, Annex 11-B; CAFTA, Annex 10-C; MFTA, Annex 10-B; 2004 Model BIT, Annex B.

[61] Canada, Agreement Between Canada and ... for the Promotion and Protection of Investments (Canadian Model BIT), Annex B.13, http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf (visited 6 August 2004).

[62] Free Trade Agreement Between the Government of the Republic of Korea and the Government of the Republic of Chile, 15 February 2003, Article 10.5.

the global investment regime. It also shows that countries beyond the NAFTA boundaries draw lessons from the NAFTA experience.

The main US business associations have themselves recognized, in the light of the NAFTA cases, the need to more effectively protect US regulatory interests. Yet they have opposed changing the substantive investment protection standards, which, they argue, would weaken investor protection. Rather, they have insisted on procedural safeguard mechanisms, such as a filtering mechanism for frivolous claims and a review mechanism to address errant awards.[63]

III. PROCEDURAL PROVISIONS

Three features stand out when we consider the procedural provisions in the recent US FTAs: the absence of a direct investor–state mechanism in the Australian FTA, the improvement of investor–state procedures in other FTAs and the creation of new mechanisms for labour and environmental law enforcement.

A. The lack of a direct investor–state mechanism in the Australian FTA

At first sight, the absence of direct investor–state arbitration in the US–Australia FTA is perplexing. Although the 1989 US–Canada FTA,[64] the forerunner of NAFTA, did not include an investor–state dispute mechanism, at least since NAFTA's inception, the United States and Australia had both consistently included such a mechanism in their respective FTAs. Instead, Article 11.16 of the US–Australia FTA provides that the parties can enter into consultations with a view towards allowing an investor of a party to submit a dispute to arbitration. Therefore, if an investor and the host country have not anticipated by a contract to settle disputes in an international arbitration tribunal, the investor who distrusts national courts must rely upon his home country to enter into consultations with the host country.

During the negotiations, Australia consistently rejected US demands for an investor–state mechanism, arguing that it has a functioning legal system capable of handling private-sector claims. However, the absence of investor–state provisions cannot only be attributed to Australia's stance, as US authorities apparently conceded to Australia's position without much resistance.[65]

This return to a 'politicized' state–state mechanism is in some way a revision of the US fight against the *Calvo* doctrine. Until recently, the United States seemed entirely opposed to this doctrine which states essentially that aliens 'are not entitled to "extra" rights and privileges and thus may only seek redress in local courts'.[66] During the MAI negotiations, US authorities

[63] *Inside US Trade*, 7 September 2001, 5–6.

[64] United States–Canada Free Trade Agreement, 2 January 1988.

[65] *Inside US Trade*, 13 February 2004, 1, 16–17.

[66] Jessica S. Wiltse, 'An Investor-State Dispute Mechanism in the Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven', 51 Buffalo Law Review 1145, at 1154.

considered an investor–state arbitration mechanism a central objective and a deal breaker. Following the controversy sparked by the first NAFTA claims, the United States tabled both substantive and procedural safeguard provisions but never suggested abandoning direct binding arbitration for investors.[67]

The withdrawal of direct investor–state procedures has not been a general policy for all subsequent US FTAs and BITs. Actually, ten days after the United States had signed the Australian FTA, it signed an FTA with the Central American countries that includes direct procedures for investor–state dispute settlement. Therefore, the absence of direct investor–state procedures seems acceptable to the United States only for FTAs with developed countries or, more precisely, with countries that have a legal system developed enough to comfort US investors.[68]

Besides, countries with a developed legal system are also major capital exporters to the United States and may represent a threat of 'over-litigation'. The fact that all Chapter 11 claims against the United States come from Canadian investors is probably not irrelevant to the fact that the United States considers that an investor–state mechanism is not necessary with Australia. The NAFTA experience seems to have convinced the US Intergovernmental Policy Advisory Committee (IGPAC) members that opposing the *Calvo* doctrine should not be a universal rule:

> IGPAC members' objection to the investor–state provision [in the US–Australia FTA] stems from concerns that investors from nations with well-developed legal systems have abused such FTA provisions to challenge the authority of state and local governments. The *Methanex* and *Loewen* cases [under NAFTA] in particular have reinforced concerns that the provision will be abused by investors who simply hope to circumvent established legislative and judicial procedures.[69]

The focus on developing countries for investor–state procedures is consistent with previous BITs and FTAs. Indeed, all US BITs and FTAs concluded after NAFTA were systematically directed at developing countries. The Australian FTA is the first within a decade, that is, since NAFTA's inception, to be concluded with a member of the Organization for Economic Cooperation and

[67] Above n 43, at 485–88.

[68] In the FTA with Bahrain, there is no investor–state mechanism and, more importantly, no chapter on investment. Yet, in this case, a BIT concluded in 1999 and effective since 2001 is to take care of investment issues. This is in line with US policy's insistence on strong investor protection, including direct arbitration, in FTAs with developing countries. United States–Bahrain Free Trade Agreement, 14 September 2004; Treaty Between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, 29 September 1999.

[69] United States, Intergovernmental Policy Advisory Committee (IGPAC), 'Advisory Committee Report to the President, the Congress and the United States Trade Representative on the US-Australia Free Trade Agreement', 12 March 2004, 14–15, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Reports/asset_upload_file482_3384.pdf.

Development (OECD). Thus, it is the first time the United States clearly indicates that it does not consider investor–state procedures an essential component of investment agreements, when signed with a major capital-exporting country.

However, it represents a departure from the strategy underlying the MAI negotiations. The MAI was supposed to be concluded among OECD countries, and many anticipated it would have been open to other countries once concluded.[70] But this strategy of concluding a multilateral agreement or a North–North agreement to be used as a model for subsequent multilateral agreements seems to be pushed aside. Seven years after the failure of the MAI, the United States is now reluctant to negotiate a MAI at the WTO, or even a plurilateral agreement among interested countries, as the European Union has suggested.[71] Some argue that the United States lacks enthusiasm for a WTO agreement on investment, because it remains highly pessimistic about the outcomes.[72] Moreover, with the Australian FTA, the United States seems to be moving away from an *overall* approach on investment protection to a *differentiated* strategy with respect to industrial countries.

This policy oriented on developing countries is not coherent with US outward investment flows. Even if developing countries may represent destinations more hazardous for US investment, protection of investment in developed countries is still relevant considering that they host over 80% of US FDI outflows.[73] US outward investment flows towards Australia are more than 10 times higher than towards CAFTA countries.[74] The Industry Sector Advisory Committee on Capital Goods thus expressed 'extreme [disappointment] and concern that the [US–Australia FTA] omits the principal protection for US investors that has been included in the other FTA investment chapter(s)'.[75]

One can argue that disappointed investors could use the most favoured nation (MFN) clause to bypass the lack of investor–state procedures in the

[70] Elizabeth Smythe, 'The Multilateral Agreement on Investment: A Charter of Rights for Global Investors or Just Another Agreement', in Fen Osler Hampson and Maureen Appel Molot (eds), *Canada Among Nations 1998: Leadership and Dialogue* (Toronto: Oxford University Press 1998), 239–66, at 241 ff.

[71] *Inside US Trade*, 20 July 2001, 5; 27 August 2003, 18.

[72] Elizabeth Smythe, 'Just Say No! The Negotiation of Investment Rules at the WTO' (Paper presented at the Conference *The WTO and Beyond: Global Governance and State Power in the 21st Century,* hosted by the Centre of Global Political Economy, Simon Fraser University, Burnaby, British Columbia, Canada, 16 July 2004, 29).

[73] BEA, 'US Direct Investment Abroad: Capital Outflows, 2002', http://www.bea.gov/bea/di/usdcap/cap_02.htm.

[74] Ibid.

[75] United States, Industry Sector Advisory Committee on Capital Goods for Trade Policy Matters (ISAC-2), 'Advisory Committee Report to the President, the Congress and the United States Trade Representative on the US–Australia Free Trade Agreement', 15 March 2004, 5, http://www.ustr.gov/new/fta/Australia/advisor/isac02.pdf.

US–Australia FTA. In the *Maffezini* case, the arbitrators concluded 'that if a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause'.[76] Because both Australia and the United States have concluded third-party treaties providing for direct investor–state procedures, one could argue that the MFN clause of the US–Australia FTA could be used by a firm to file a case against one of the state parties.

However, such a contention seems doubtful for three reasons. Firstly, unlike a number of BITs and FTAs, Article 11.4 of the US–Australia FTA provides expressly that the MFN is limited to the 'establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments'. This would seem to exclude dispute settlement, although the 'management' of an investment could probably include dispute procedures to protect it. Secondly, the fact that the lack of investor–state dispute settlement procedures is unusual for both states could mean that it is a conscious and well-informed move guided by public policy considerations. As the arbitrators ruled in *Maffezini*, 'The beneficiary of the [MFN] clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question'.[77] Thirdly, recent tribunal awards suggest that the MFN provisions of a treaty can be extended to other treaties only when it is clearly intended.[78] Therefore, Canada might remain the only developed country (if we exclude European economies in transition) against which American investors could directly file a claim under an investment treaty.

B. Improved investor–state procedures with developing countries

Unlike the US–Australia FTA, the FTAs recently concluded by the United States with Singapore, Chile, the Central American countries and Morocco include an investor–state dispute settlement mechanism. Procedures provided in these FTAs are similar to NAFTA's but differ on three significant points, that is, the adding of preliminary procedures, the improvement of transparency and openness and the anticipation of an appellate body.

First, the recent US FTAs and the revised model BIT provide preliminary procedures as a means to deter the filing of frivolous claims and, ultimately, curb the growing number of claims. To reach this goal, the US government

[76] ICSID, *Emilio Agustin Maffezini* v *Kingdom of Spain*, Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, para 56, http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf.

[77] Ibid, para 62.

[78] See ICSID, *Salini Costruttori S.p.A. and Italstrade S.p.A.* v *The Hashemite Kingdom of Jordan*, Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004; ICSID, *Plama Consortium Limited* v *Republic of Bulgaria*, Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para 223.

could otherwise have required the exhaustion of local remedies as a precondition for resorting to arbitration as the Justice Department had considered.[79] But it probably experienced the value of preliminary procedures when systematically challenging the claims' admissibility and the tribunals' competence under NAFTA.

Thus, while NAFTA leaves preliminary procedures, or the jurisdictional test, to UNCITRAL or ICSID rules, the recent FTAs and the model BIT provide that 'a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made'. In doing so, the tribunal shall suspend any proceedings and issue an award on an expedited basis 'no later than 150 days after the date of the request'. If the tribunal considers that the claim is frivolous, it may award costs and fees to the prevailing claimant.[80]

In addition, the FTAs provide new grounds to disallow the admissibility of a claim in preliminary procedure. Actually, they include safeguard clauses on different sectors or circumstances that can justify the inadmissibility of a claim, such as treatment in case of strife, measures regarding payments and transfers and a dispute already submitted to a national court.[81] Therefore, the screening mechanism, coupled with the threat to pay costs and attorney's fees and the addition of new grounds for inadmissibility, may 'discourage investors from filing claims merely to strong-arm the government'.[82]

Aside from preliminary procedures, the recent FTAs formalize the arbitral proceedings' transparency and openness. Following the arbitration rules of the ICSID Additional Facility and UNCITRAL, the proceedings may only be made public with the consent of both parties to a dispute. Hence, the opening of proceedings in NAFTA is provided by none of the arbitration rules and has been addressed by each tribunal on an *ad hoc* basis. This lack of transparency, although reflecting the traditional practice of international private law, has been criticized by many civil society groups that underline the important issues of public policy raised by the disputes.[83] In response to these criticisms, the main documents were to be made available to the public following the NAFTA's Notes of Interpretation of 31 July 2001.[84] In addition, Canada and the United States issued statements two years later to indicate that they will push for public hearings in all Chapter 11 cases in which they are involved.[85]

[79] *Inside US Trade*, 23 November 2001, 18.

[80] SFTA, Article 15.19; CFTA, Article 10.19; CAFTA, Article 10.20; MFTA, Article 10.19; 2004 Model BIT, Article 28.

[81] CFTA, Annexes 10-C and 10-E; CAFTA, Annexes 10-D and 10-E; MFTA, Annex 10-E.

[82] Above n 18, at 424.

[83] Jeffery Atik, 'Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process', in Todd Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley: Transnational Publishers 2004), 135–50, at 140.

[84] Above n 44.

[85] *Inside US Trade*, 10 October 2003, 5.

The recent US FTAs and model BIT integrate these elements by requiring that the main documents of the proceedings be released to the public and that hearings be open to the public except to prevent the disclosure of certain investors' confidential information.[86] Consequently, these FTAs will provide the most transparent and publicly accessible of all investment arbitration proceedings.[87]

Under the recent FTAs, non-disputant parties may also intervene in the proceedings. The NAFTA and applicable arbitration rules are silent as to the participation of amici curiae. Nevertheless, NAFTA tribunals in the *Methanex* and *UPS* cases declared they had the power to accept amicus briefs based on UNCITRAL rules.[88] Following these awards, the recent FTAs and the model BIT unambiguously provide that a tribunal shall have the authority to accept and consider amicus submissions.[89] Considering that most amici curiae will most likely be submitted by environmental and other such advocacy groups, investors had a defensive reaction.[90] They even asked for a return to the NAFTA model as it was before the 2001 Notes of Interpretation were adopted.[91] The main impact of the transparency and openness of arbitral proceedings will probably not be on tribunals' awards, but on public perceptions regarding the legitimacy of the investor–state mechanism.[92]

The last major procedural feature of the recent FTAs is the anticipation of an appellate body. The ICSID and UNCITRAL arbitration rules[93] provide for reviews on certain procedural grounds, such as corruption on the part of a tribunal member or excess of jurisdiction. Under the ICSID Convention, an application to annul an award is referred to an *ad hoc* three-member committee. Awards made pursuant to the ICSID Additional Facility and UNCITRAL rules are in general subject to the control of the courts at the place of arbitration. Here the law authorizes the courts to set aside arbitral awards on

[86] SFTA, Article 15.20; CFTA, Article 10.20; CAFTA, Article 10.21; MFTA, Article 10.20; 2004 Model BIT, Article 29.

[87] Rubins, above n 15, at 872; Locknie Hsu, 'Dispute Settlement System in Recent Free Trade Agreements of Singapore: ANZSCEP, JSEPA and ESFTA', 4 (2) The Journal of World Investment 277 (2003), at 282.

[88] *Methanex*, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001; UNCITRAL, *United Parcel Service of America Inc* v *Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001.

[89] SFTA, Article 15.19.3; CFTA, Article 10.19.3; CAFTA, Article 10.20.3; MFTA, Article 10.19.3; 2004 Model BIT, Article 28.3.

[90] For instance, Methanex Corporation has requested to limit amici curiae submissions to legal issues raised by the parties.

[91] United States, Subcommittee on Investment, 'Report of the Subcommittee on Investment Regarding the Draft Model Bilateral Investment Treaty' (Presented to the Advisory Committee on International Economic Policy, 30 January 2004, 2, http://www.ciel.org/Publications/BIT_Subcmte_Jan3004.pdf).

[92] Above n 50, at 63.

[93] ICSID Convention, Regulations and Rules, ICSID/15/Rev.1, January 2003, Articles 50–52; UNCITRAL Model Law on International Commercial Arbitration, 11 December 1985, Articles 50–52.

the grounds of non-arbitrability of the dispute or conflict with public policy, as well as on similar grounds as the ICSID Convention.[94]

But these procedures are not a true appeal mechanism that can challenge previous decisions as regards their substance and that can substitute for them its own decisions.[95] On 13 January 2004, the Federal Court of Canada ruled that it did not have jurisdiction to challenge the arbitration tribunal's interpretation of NAFTA's Articles 1102 and 1105 in the *S.D. Myers* case: 'A dispute falling within the terms of the submission to arbitration, even if wrongly decided on a point of fact or law, cannot be judicially reviewed'.[96] However, such procedures can still make a difference. In *Loewen*, the US District Court for the District of Columbia may have struck the final blow to Loewen's claims.[97] In *Metalclad*, the Supreme Court of British Columbia reduced the amount of the arbitral award.[98]

The TPA calls 'for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements'.[99] The recent US FTAs have not completely reached this objective but provide that if a separate multilateral agreement establishes an appellate body, 'the Parties shall strive to reach an agreement that would have such appellate body review awards rendered'.[100] It is still unclear when and how the United States could promote a multilateral agreement on an appellate body because it is sceptical of the possibility of a multilateral or plurilateral agreement on investment at the WTO.[101] Moreover, in their comments in 2005 to the suggestion from the ICSID Secretariat to establish an appeals facility, most governments, business and civil society groups considered the establishment of such a mechanism to be premature.[102] On the other hand, the United States refused to delay the negotiations of FTAs and BITs until a bilateral appellate body could be developed. Therefore, side letters or annexes to the FTAs provide that the parties should negotiate a bilateral appellate body in the years following their entry into force.[103] But until then, the FTAs'

[94] ICSID, *Possible Improvements of the Framework for ICSID Arbitration*, Secretariat Discussion Paper, 22 October 2004, Annex, at 4.

[95] See UNCTAD, *Dispute Settlement: Investor-State*, Sales no.: E.03.II.D.5, 2003, 61.

[96] Canada, Federal Court, *Attorney General of Canada* v *S.D. Myers, Inc.*, FC 38, 13 January 2004, para 76.10.

[97] *Loewen*, above n 26.

[98] Supreme Court of British Columbia, *The United Mexican States, Petitioner and Metalclad Corporation, Respondent and Attorney General of Canada and la Procureure générale du Québec on Behalf of the Province of Québec*, 2001BCSC0664, Reasons for Judgment of the Honourable Mr Justice Tysoe, 2 May 2001.

[99] Above n 9, s 2101(b)(3)(G)(iv).

[100] SFTA, Article 15.19.10; CFTA, Article 10.19.10; CAFTA, Article 10.20.10; MFTA, Article 10.19.10; 2004 Model BIT, Article 28.10.

[101] *Inside US Trade*, 27 August 2003, 18; *International Trade Reporter*, 19 June 2003, 1040–42.

[102] ICSID, *Suggested Changes to the ICSID Rules and Regulations*, Working Paper of the Secretariat, 12 May 2005, 4.

[103] SFTA, Side letter of 6 May 2003; CFTA, Annex 10-H; CAFTA, Annex 10-F; MFTA, Annex 10-D; 2004 Model BIT, Annex D.

investor–state procedures do not, after all, depart greatly from the NAFTA practice.

C. New dispute settlement mechanism for labour and environmental law enforcement

In Article 1114.2, the NAFTA parties 'recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures'. Yet this provision has a hortatory character. If a party considers that another has offered such an encouragement, it could only request consultations with a view to avoiding any such encouragement. Given that many investment dispute cases under NAFTA have been related to environmental measures, as in *Metalclad*,[104] *Ethyl*,[105] *S.D. Myers*,[106] *Sun Belt*,[107] *Methanex*[108] and *Crompton*,[109] some environmental NGOs advocate that the investor–state mechanism meant to ensure the protection of investment should be balanced by another mechanism to ensure the enforcement of Article 1114.2.[110]

Actually, NAFTA has a side agreement pertaining to the environment, the North American Agreement on Environmental Cooperation (NAAEC).[111] Together with the North American Agreement on Labour Cooperation,[112] this side agreement, negotiated at the request of the United States, was a political necessity both to allay the fear of delocalization due to lax environmental (and labour) standards and to ensure Congressional ratification.[113] Under Articles 14 and 15 of the NAAEC, any person may petition the trinational Commission for Environmental Cooperation (CEC) to conduct an investigation into whether the member states are effectively enforcing their own environmental standards. These investigations do not lead to awards but

[104] *Metalclad*, Notice of Claim, 2 January 1997.

[105] UNCITRAL, *Ethyl Corp.* v *Government of Canada*, Notice of Arbitration, 14 April 1997.

[106] *S.D. Myers*, Statement of Claim, 30 October 1998.

[107] UNCITRAL, *Sun Belt Water, Inc.* v *Her Majesty the Queen*, Notice of Claim and Demand for Arbitration, 12 October 1999.

[108] Above n 30.

[109] NAFTA, *Crompton Corp.* v *Government of Canada*, Notice of Intent to Submit a Claim to Arbitration, 6 November 2001.

[110] United States, Trade and Environment Policy Advisory Committee (TEPAC), 'Advisory Committee Report to the President, the Congress and the United States Trade Representative on the US–Central American Free Trade Agreement', 22 March 2004, http://www.ustr.gov/new/fta/Cafta/advisor/tepac.pdf.

[111] North American Agreement on Environmental Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, 1993.

[112] North American Agreement on Labour Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, 13 September 1993.

[113] Pierre-Marc Johnson and André Beaulieu, *The Environment and NAFTA: Understanding and Implementing the New Continental Law* (Washington: Island Press 1996), at 25.

to factual records that, being publicly available, could put political, rather than judicial, pressure on governments.

This process can paradoxically be used by investors who seek to bolster their claim against a host state. In 1999, Methanex filed a petition under the NAAEC alleging that California failed to enforce its environmental laws by allowing gasoline to be released into the environment from leaking underground storage tanks.[114] Methanex's objective was then to use the factual record issued by the CEC in its dispute under Chapter 11 over a Californian ban on the MTBE gasoline component. The factual record could have supported Methanex in demonstrating that California focuses its attention on a specific and discriminatory symptom, the MTBE, rather than on the real environmental problem, the leakage itself. Although the CEC refused to conduct an investigation on Methanex's petition because the matter was the subject of a pending judicial proceeding,[115] a subsequent investor could strategically file a petition under NAAEC before filing a claim under Chapter 11.

All the recent US FTAs devote whole chapters to labour and environmental issues. Among other things, these chapters provide that 'A Party shall not fail to effectively enforce its [labour and] environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties'.[116] If a party fails to enforce its labour or environmental laws, the other party may request the establishment of an arbitration panel to consider the matter. In contrast with other infringements of the provisions of the FTAs, a panel that finds a breach of the obligation to enforce labour or environmental laws can, at the complaining party's request, impose an annual monetary assessment, up to US$15 million per year, payable into a bilateral fund for labour or environmental initiatives.[117] As the Trade and Environment Policy Advisory Committee noted, 'the high level of visibility and resultant embarrassment associated with such a violation, in conjunction with the transparency of the process, would likely be a sizeable "supplement" to the monetary penalty'.[118]

One objective of such a mechanism is to address the threat of labour and environmental dumping, that is, the displacement of investments from the United States to locations where labour and environmental standards are

[114] Methanex Corporation, 'California's Failure to Enforce its Regulations Concerning Underground Storage Tanks: A Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation', A14/SEM-99-001/01/SUB, 14 October 1999, http://www.cec.org/files/pdf/sem/99-1-SUB-E.pdf.

[115] NAFTA, Commission for Environmental Cooperation, Secretariat, 'Determination Pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation', A14/SEM/99-001/06/14(3), 18 October 1999, http://www.cec.org/files/pdf/sem/99-1-DET-E1.pdf.

[116] SFTA, Articles 17.2 and 18.2; CFTA, Articles 18.2 and 19.2; AFTA, Articles 18.2 and 19.2; CAFTA, Articles 16.2 and 17.2; MFTA, Articles 16.2 and 17.2.

[117] SFTA, Article 20.7; CFTA, Article 22.16; AFTA, Article 21.12; CAFTA, Article 20.17; MFTA, Article 20.12.

[118] Above n 110, at 12.

lower. But the FTAs' chapters on labour and the environment could have negative side effects on US investment abroad, such as the enforcement of foreign labour and environmental laws harmful to US investment and even laws that contradict the investment chapter.

The recent FTAs provide that in the event of inconsistency between, on the one hand, the investment chapter and, on the other hand, the labour and environment chapters, the latter shall prevail.[119] However, this does not necessarily mean that 'any bona fide [labour or] environmental requirement at odds with an investment-related requirement will trump that latter requirement'.[120] It is still unclear when an inconsistency between the two chapters can occur because a state can be forced under the labour and environment chapters to enforce a law discriminating against foreign investments and, at the same time, be forced under the investment chapter to offer monetary damages to foreign investors. Such an ironic situation is conceivable because investor–state arbitration tribunals cannot award the withdrawal or the non-enforcement of a national law but only monetary damages or eventually restitution of property.[121] At least, the FTAs' labour and environmental law enforcement mechanism will impact on out-of-court negotiations between an investor and a host state, because the non-enforcement of a labour and environmental law is no longer an option to consider without any risk of an international dispute under the relevant chapters. This is one of the main differences between the recent US FTAs and the 2004 model BIT, which does not provide for any dispute settlement mechanism on environment and labour.

CONCLUSION

Many commentators are doubtful that the NAFTA Chapter 11 on investment could be replicated in other international agreements.[122] If one may conclude to a reorientation that contradicts some long-held key tenets of US foreign investment strategy, especially ever stronger protection for US investors, it has been limited to mere adjustments. The TPA intends that the pursuit of strong investment protection and investor–state dispute settlement be continued in future FTAs. Even though a central element of US international investment strategy has been questioned, namely the automatic right for investors to binding international arbitration, as particularly illustrated by the absence of investor–state provisions in the US–Australia FTA, this remains an isolated example.

While preserving the fundamentals of US investment protection, changes to investor–state provisions in the recent FTAs seemed necessary to address the

[119] SFTA, Article 15.2; CFTA, Article 10.2; AFTA, Article 11.2; CAFTA, Article 10.2; MFTA, Article 10.2.

[120] Above n 110, at 12.

[121] SFTA, Article 15.25; CFTA, Article 10.25; CAFTA, Article 10.26; MFTA, Article 10.25.

[122] James McIlroy, 'NAFTA's Investment Chapter: An Isolated Experiment or a Precedent for a Multilateral Investment Treaty?', 3 (1) The Journal of World Investment 127 (2002).

issues raised by the NAFTA cases. Above all, such changes are intended to lessen the possibilities of a replication of the claims under NAFTA where the investor–state provisions have been perceived by NAFTA members as being abused by foreign investors. Most substantive and procedural clarifications and safeguards, such as those on the characteristics of an investment, the scope of the minimum treatment provision, the meaning of the expression 'measure equivalent to expropriation', the publication of proceedings' documents and the possibility to submit amicus curiae briefs, integrate lessons from the implementation of the NAFTA's investment chapter, including elements of some previous NAFTA tribunal awards or the NAFTA Commission's Notes of Interpretation.

The revised American policy has sought essentially to better reconcile the objectives of strong investor protection with the possibility for governments to enact regulations without fear of compensatory claims. In so doing, the evolving US policy has focused on clarifications to substantive provisions and on procedural safeguard mechanisms. Overall, despite some significant changes, the investment rules in the recent US FTAs and model BIT do not undermine the fundamental core of investor–state provisions and these still resemble closely those in NAFTA Chapter 11.

This assertion is further illustrated by the fact that the United States has not considered necessary to amend existing BITs. Neither did it take advantage of the FTA negotiations with Bahrain to update its earlier BIT concluded in 1999. The previous generation of BITs is still considered an effective tool to protect US investments and a minor threat of over-litigation against the US government. It is even possible that the new FTAs will strengthen previous BITs. Claimants could use the language of the recently concluded US FTAs to argue that if BIT parties had meant what is said in these FTAs, they would have used the same language. Paradoxically, safeguards in the recent FTAs could support expansive interpretations of previous BITs.[123]

Strong investment protection, including investor–state provisions, remains high on the US agenda, despite the fact that the United States has apparently become wary of such provisions in the case of major capital-exporting countries. Although they are not optimistic about the prospects for a WTO-sponsored investment agreement, US authorities would nevertheless insist on investor–state provisions in any such multilateral treaty.[124] Therefore, even if some substantive provisions may be further scaled back and more procedural safeguards be added, there is no evidence that the United States will do away with investor–state dispute settlement or even that it will accept that such provisions be significantly curtailed.

[123] David A. Gantz, 'Contrasting Key Investment Provisions of the NAFTA with the United States – Chile FTA', in Todd Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley: Transnational Publishers 2004), 393, at 423.

[124] *International Trade Reporter*, 22 May 2003, 870.