11

Investor-State Dispute Settlement

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Among the most disputed provisions in the Trans-Pacific Partnership (TPP) is an already agreed provision designed to protect firms that invest abroad against unfair or arbitrary treatment by foreign governments. The investor-state dispute settlement (ISDS) provision in the TPP is the latest version of a mechanism contained in a series of international economic agreements going back many decades. These substantive rules limit the grounds for expropriation, grant foreign firms the same rights and benefits as local firms (national treatment) or third-country firms (most favored nation treatment), and require governments to give "fair and equitable treatment" to foreign firms. The rules are usually enforced by arbitration systems that enable foreign firms to challenge unfair treatment by local governments and win compensation, if justified. Such protections have been deemed necessary in agreements going back at least to an accord between Germany and Pakistan in 1959, and they have successfully protected US investments in many countries.

Although these rules are sought by investors, emerging-market and developing countries also embrace them as a means of reassuring foreign firms that the welcome mat is out for direct investment and that once a factory, mine, or office is established, the foreign firm will enjoy fair treatment.

The value of ISDS assurance lies in its role as a restraint against unjustified expropriation or unfair treatment when governments change political direction. In recent years, for example, ISDS played a central role in a handful of high-profile, billion-dollar cases, such as Argentina's renationalization of YPF and the Russian seizure of Yukos in the mid-2000s. But expropriation

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awards are not restricted to billion-dollar cases or emerging-market countries. AbitibiBowater, a US firm, filed an ISDS claim under the North American Free Trade Agreement (NAFTA) against Canada in 2008, after the Newfoundland government expropriated some $300 million worth of assets when the company announced that it would close a paper mill in the province.[1] The Newfoundland legislation was unusually forthright: The legislation contained subsections labeled "No compensation" and "Expropriation of land and assets." Abitibi and Canada settled the case for $130 million.

The TPP improves upon the ISDS model inherited from NAFTA and contained in various bilateral investment treaties (BITs). Nevertheless the ISDS measure has drawn fire from TPP critics. Senators Elizabeth Warren (D-MA) and Bernie Sanders (I-VT), alongside the AFL-CIO and other critics, charge that creation of an international tribunal in which corporations can challenge governments and sometimes win awards could undermine health, safety, and environmental regulations in the United States and other trading partner countries. Many of these critics, however, oppose the TPP for its general purpose of encouraging liberalized trade and direct investment by US multinational corporations. These fundamental objections put the critics at odds with the philosophy of the TPP and other trade and investment agreements, which, after all, are designed to promote international commerce. Following the economic and financial crisis of 2007–08, multinational corporations (MNCs) have generally come under fire from all sides because of their outsized role in the globalized economy. As for trade, in 2012 the top 500 US companies accounted for 60 to 70 percent of US exports and imports, and fewer than 5,000 companies worldwide are estimated to handle more than 70 percent of global trade in goods and services (Soroka 2014). As for foreign direct investment (FDI), in 2014 just 100 MNCs controlled 10 percent of global FDI, and fewer than 5,000 MNCs are estimated to control 80 percent of global FDI (UNCTAD 2015).

But the ISDS provisions in the TPP are a significant improvement over those in previous agreements, though they substantially replicate the provisions found in the Korea-US FTA (KORUS), which entered into force in March 2012. The ISDS mechanism in the TPP, for example, respects environmental, health, and safety regulation, and ensures the transparency of dispute proceedings. Echoing recent EU agreements, the TPP more narrowly defines "fair and equitable treatment" than the definition in previous such accords. It also eliminates forum shopping—i.e., the attempt by companies to litigate in the most sympathetic places—and enables the assessment of costs against a losing party (a provision that discourages frivolous cases).

TPP Chapter 9 also clarifies that the investor bringing the case against the government bears the burden to prove all elements of its claims. It makes

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1. For a summary of the case, see Cris Best, "The Federal Government Settles AbitibiBowater's NAFTA Claim," The Court, August 27, 2010 (accessed on November 12, 2015). The relevant legislation of the Newfoundland government is available at www.canlii.org/en/nl/laws/stat/snl-2008-c-a-1.01/latest/snl-2008-c-a-1.01.html#1_.

proceedings fully open and transparent and allows civil society organizations and others not party to the dispute to participate. In addition, Chapter 9 will for the first time clarify important concepts in the nondiscrimination and minimum standard of treatment obligations. For example, it clarifies the definition of legitimate public welfare objectives as grounds for defending a country's regulations and makes clear that frustrated investor expectations are not in and of themselves sufficient to overturn such regulations. TPP countries will also establish a code of conduct for ISDS arbitrators to guide arbitrator independence and impartiality.

The major shortcoming of the TPP is the absence of an appellate mechanism for ISDS cases. But the TPP also contains some other innovations that respond to ISDS critics and are generally disliked by the US business community. Highly prominent is that Article 29.5 of TPP Chapter 29, Exceptions, bars tobacco companies from bringing ISDS claims. This innovation responds to criticism that tobacco firms have launched claims against both Uruguay and Australia for their cigarette package regulations.[2] Business firms fear that the precedent set by the TPP proscription on tobacco claims could, in subsequent investment chapters, be extended to alcohol, corn syrup, or other products.

Less prominent, but perhaps commercially more important, at US insistence, financial firms are precluded from bringing ISDS claims that assert they are being discriminated against in terms of market access. TPP Article 9.3(3) defers consideration of covered financial services issues to TPP Chapter 11, Financial Services. Importantly, Chapter 11 allows financial regulators complete discretion to determine which foreign firms are permitted to participate in local financial markets. An aspiring foreign financial firm must prove that it is "fit and proper" to do business; the regulator is not obligated to prove defects. US regulators, including the Federal Reserve, refused to have their latitude curbed by TPP provisions. The flip side, of course, is that US financial firms are precluded from bringing discrimination claims against the regulatory practices of other TPP members that deny them market access. Neither NAFTA nor other US bilateral trade and investment agreements curbed the unlimited discretion of financial regulators, so in this respect the TPP continues a well-established tradition.

The revamped ISDS provisions in Chapter 9 of the TPP apply to all 12 member countries and go far more than half-way in meeting the specific objections of ISDS critics.

Why Are ISDS Provisions in the TPP?

The TPP is generally considered a trade agreement, but reducing barriers to trade will also increase FDI flows among firms in the 12 partner countries. Firms will gain greater access in each other's markets, allowing them to expand

2. The regulations in question either require plain packages, without evocative camels or cowboys, or require packages showing disfigured cancer victims. These cases are still being litigated.

their overseas operations and capture a bigger share of the global market. To protect these investments, Chapter 9 in the TPP seeks to strengthen the rule of law in the Asia-Pacific region, to deter foreign governments from discriminating against foreign investors, and to protect the right to regulate in the public interest. Toward these ends, the TPP ensures that investors have effective remedies in the event of a breach of their rights, while reforming the ISDS system by providing for tools to dismiss frivolous claims and instituting a range of other procedural and substantive safeguards.

Customarily, ISDS provisions were part of BITs, of which almost 3,000 are now in force worldwide. The United States has 41 BITs with countries near and far and is actively negotiating a BIT with China, aimed at strengthening the rights of US firms in a country with a checkered record on investment issues. Starting with NAFTA in 1994, however, the United States has also included an investment chapter in its free trade agreements (FTAs, now numbering 20), and ISDS provisions are an integral part of these chapters.[3]

A principal goal of BITs and FTAs is to promote investment—ISDS provisions are supports, not the main show. Given their principal objective, what does empirical research show about the success of BITs and FTAs in promoting investment?[4]

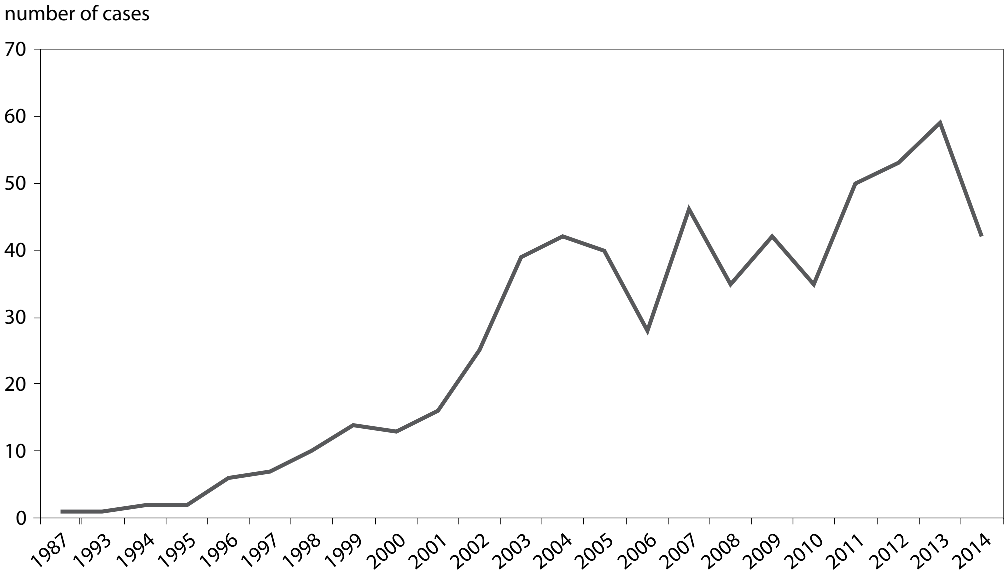
Several studies find that BITs do increase direct investment.[5] They also identify factors that determine when BITs are more or less effective at promoting FDI. In particular, BITs are most useful when they supplement weak domestic legal institutions in the host country (Busse, Königer, and Nunnenkamp 2010). Axel Berger et al. (2010) focused on transition countries in Central and Eastern Europe and concluded that BITs attracted FDI when national reputations were in doubt immediately after the Cold War regimes collapsed. Peter Egger and Valeria Merlo (2007) used firm-level data for German multinationals and found that the presence of a BIT increased the number of multinational firms that were active in a particular host country, as well as the amount of FDI per firm. BITs also have been shown to improve foreign

3. An exception is the US-Australia FTA, which did not include ISDS provisions. This omission was at the insistence of Australian officials and based on the "recognition of the Parties' open economic environments and shared legal traditions, and the confidence of investors in the fairness and integrity of their respective legal systems." However, Australia has included ISDS provisions in its other FTAs with China, Korea, Australia, Thailand, Singapore, ASEAN, and now TPP. See "Australia-United States FTA–Guide to the Agreement," Australia Department of Foreign Affairs and Trade, March 1, 2014.

4. Ample empirical research shows that strong FTAs boost trade between the partners above baseline levels. See, for example, Hufbauer and Schott (2009).

5. For example, see Egger and Merlo (2007), Egger and Pfaffermayr (2004), Rose-Ackerman and Tobin (2009, 2011), Busse, Königer, and Nunnenkamp (2010), Neumayer and Spess (2005), and Haftel (2010). A blog post by Lindsay Oldenski summarizes this literature; see "What Do the Data Say about the Relationship between Investor-State Dispute Settlement Provisions and FDI," March 11, 2015, Trade and Investment Policy Watch, Peterson Institute for International Economics.

Figure 11.1 Number of investor-state dispute settlement (ISDS) cases, 1987, 1993–2014



Source: UNCTAD database of ISDS, http://unctad.org/en/Pages/DIAE/ISDS.aspx.

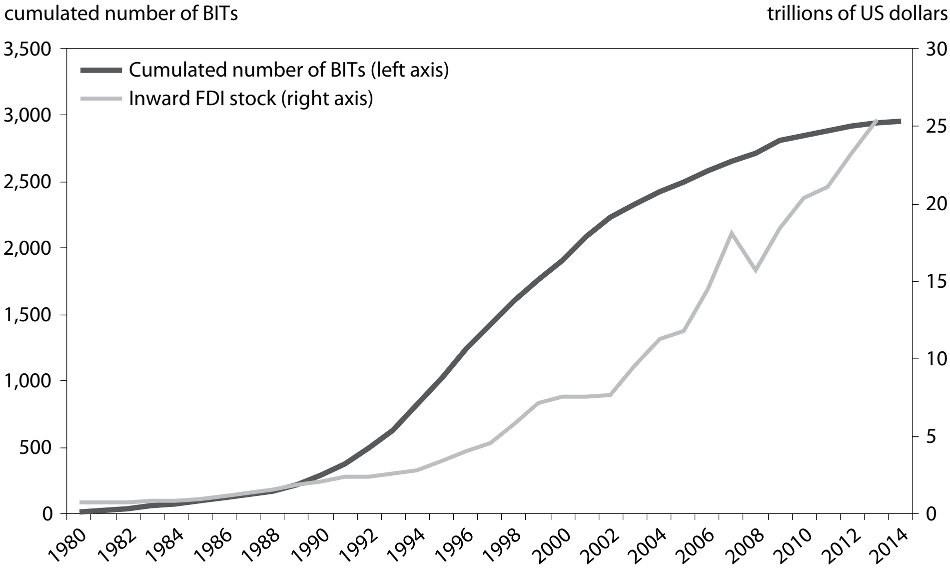
investor perceptions of the property rights environment (Rose-Ackerman and Tobin 2011, UNCTAD 2009).

Investment experts commonly believe that ISDS provisions are crucial for establishing the credibility and effectiveness of BITs when one of the partners is a developing country.[6] On the other hand, a study of the potential benefits to the United Kingdom from including ISDS provisions in an agreement with the United States suggested that the benefits would be modest since "the US government assesses the UK as a very safe place to invest" (Skovgaard Poulsen, Bonnitcha, and Yackee 2013). Generalizing from that study, ISDS systems seem less useful for investment between advanced countries. The rub is that, in an agreement that covers both advanced and developing countries, such as the TPP, it would be invidious to limit ISDS provisions to disputes involving the developing-country members.

Figure 11.1 shows that the number of ISDS cases worldwide has steadily grown. This rise, however, appears to track the expansion of FDI and overall growth in the number of BITs in force (figure 11.2). Critics point to the growing number of ISDS cases as evidence of a "corporate takeover of sovereignty." A

6. See, for example, Wälde (2005) and Allee and Peinhardt (2010). However, a BIT, even with ISDS provisions, cannot completely compensate for an extremely weak investment environment (see Rose-Ackerman and Tobin 2009, 2011).

Figure 11.2 Global inward foreign direct investment stock and investment treaties, 1980–2014



BITs = bilateral investment treaties

Sources: FDI data from UNCTAD Statistics, http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx; number of BITs from UNCTAD International Investment Agreements Navigator, http://investmentpolicyhub.unctad.org/IIA.

more plausible explanation is that the rapid expansion of FDI creates more opportunities for friction between firms and states, and the growing number of ISDS cases simply tracks a world economy in which BITs and FTAs are designed both to entice FDI and to ensure fair play thereafter.

Arbitration procedures were standardized in 1966, when the World Bank created the International Center for Settlement of Investment Disputes (ICSID) as a neutral forum to handle ISDS claims. Similar fora are based in London, Paris, and Stockholm, but ICSID oversees the vast majority of claims. To date, ICSID has handled almost 500 cases (ICSID 2015). Of these, 36 percent were settled between the parties before going to arbitration. The arbitrators declined to hear 16 percent of claims for want of jurisdiction. They dismissed 19 percent of claims for lack of merit. Only in 29 percent of cases did the arbitrators uphold some or all of the business claims. According to UNCTAD's *World Investment Report 2015* there were only 42 known ISDS cases in 2014, down from a high point of 59 in 2013 (see figure 11.1). Globally, as the characteristics of the caseload suggest (settlements, dismissal, etc.), the ISDS system has provided an effective forum for governments and corporations to settle their disputes in a timely manner, without getting bogged down in local courts, which are often clogged, sometimes incompetent, and might well apply very different substantive standards to similar claims.

The United States has been a leading proponent of the ISDS system for resolving investment disputes, alongside the World Trade Organization (WTO) system for resolving trade disputes, precisely because the United States has been able to sell the virtues of its legal principles to other countries. ISDS arbitration and WTO arbitration are not alien concepts; they are part of the broader US answer to the demands of 21st century globalization. Otherwise diplomats would spend a much larger fraction of their time in the political resolution of investment and trade disputes. Global commerce requires global rules consistently applied, and ISDS is part of the needed structure. To be sure, that does not mean the system should not be improved upon where warranted, such as in its transparency and review procedures.

Far from a record of MNCs trampling sovereign states, firms have won less than one-third of the cases resolved by the ISDS process.[7] Over past decades, only 13 ISDS cases have been brought against the United States. And the United States has not lost a single case. Why? Because the United States does not expropriate private property without compensation nor does it enact arbitrary or discriminatory laws against foreign firms. The *World Investment Report 2015* highlights that, to date, US firms have brought more cases against foreign states than any other country, some 124 cases by the end of 2014 (UNCTAD 2015). Argentina, with 56 cases brought against it, takes the honor of the most frequent respondent, reflecting of course Argentina's fast and loose behavior toward foreign investors.

Misleading Charges and Legitimate Complaints

Contrary to what the critics imply, American taxpayers have not had to cough up billions or even millions of dollars in ISDS damages. They have not had to cough up anything. Lacking examples from actual cases in the US context, critics resort to hypothetical scenarios that find no basis in 50 years of ISDS history. Critics rely on four misleading charges to reject the ISDS system. However, in addition to these charges, they have two legitimate complaints.

Arbitrators Lack Integrity. Critics argue that arbitrators serve corporate clients one day and decide ISDS cases the next. They neglect to mention that arbitrators are selected from a large panel of qualified attorneys and that each side has several opportunities to remove candidates with a potential bias. Critics overlook the oath of impartiality, the arbitrator's commitment to

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7. High-profile cases cited as cause for concern about ISDS often refer to companies that allegedly seek to roll back regulations. Important examples include the Philip Morris–Australia plain-packaging tobacco case (see "Tobacco plain packaging-investor-state arbitration," Australian Government, for more detail) and the Vattenfall-Germany nuclear energy case (see Bernasconi-Osterwalder and Hoffman 2012), among others. But the fact that such cases have been launched says nothing about the utility of the ISDS system. Moreover, the cited cases and most others in contention have not yet been fully decided; it makes no sense to condemn the ISDS system for imagined failures. See table 11.1 for a description of these "notorious" cases.

decide cases strictly in accordance with the law and the facts. Critics are unable to cite a single case of corrupt or inappropriate behavior by an ISDS arbitration panel. The idea floated by the European Union of a standing investment court has good points, as discussed in the next section, but past improprieties are not among the justifications. TPP Article 9.21, Selection of Arbitrators, restates the requisite impartiality and integrity of arbitrators.

Only MNCs Use ISDS. But that is hardly a surprise. An "investor-state dispute settlement" procedure by definition involves investors—the firms at risk of expropriation or discrimination by foreign governments. Also by definition, international firms tend to be big firms: In the world of FDI fewer than 5,000 MNCs probably control more than 80 percent of the assets of foreign affiliates, now totaling approximately $100 trillion. There is ample precedent for creating special courts for special purposes, in this case investors, because expertise is required to make sensible decisions. Thus the US Court of Appeals for the Federal Circuit has exclusive jurisdiction over patent appeals, and the WTO's Appellate Body decides government-to-government disputes over trade rights.

Critics may have a legitimate complaint that kindred dispute forums should be created for nongovernmental parties—e.g., labor unions or environmental organizations—to bring complaints against violations of other chapters in trade agreements. But that's not an argument for denying MNCs the avenue of ISDS relief.

National Courts Should Decide Disputes. It is true that some countries have honest, speedy, and competent judicial systems, but many others do not. Moreover, the international law of investor rights is a complex field, and in many respects it differs from laws applied by domestic courts. In particular, international law has higher standards in terms of fair compensation, and ISDS procedures work faster than many national courts. Critics respond that MNCs should just take a gamble on national court systems and forget about ISDS. This ignores two basic facts of international investment life. First, many developing countries want ISDS provisions in their BITs and FTAs in order to make themselves more attractive to MNCs. Second, when countries change political course and decide to expropriate the property of American investors or discriminate against US firms, it is not just Wall Street that loses. The "investor class" includes Harvard's endowment, major public employee pension funds like CalPERS, and ordinary Americans with retirement savings managed by mutual funds. Thus ISDS is needed to protect the pocketbooks of a great many American families and institutions.

ISDS Decisions Overturn Local Laws. Critics often cite cases against Egypt, Germany, and the Czech Republic as examples where claimants seek to overturn local labor, health, and environmental laws, largely based on claims of discriminatory treatment and "indirect expropriation." But in these and other "notorious" cases, critics are running ahead of decisions (see table 11.1 for summaries). To take just one example, the Veolia firm has been accused of

Table 11.1 "Notorious" ISDS cases

Case	Summary
	Pending cases
Renco v. Peru	In 2010, the Renco Group launched an $800 million case against Peru under the US-Peru FTA. It claimed that Peru failed to provide "fair and equitable treatment" when it did not approve an extension to a pollution abatement plan for a metal smelter in La Oroya, Peru.
Philip Morris v. Australia; Philip Morris v. Uruguay	In 2011, Philip Morris International claimed that the company was subject to an unconstitutional acquisition of property due to public health measures that allegedly violated its intellectual property rights via a requirement to cover the logo on its tobacco products. In 2012, Australia's Highest Court ruled against Philip Morris claiming the labels qualify as public health measures. In 2014, a tribunal bifurcated the proceedings and is separately considering jurisdictional issues and the merits. Meanwhile, the case with Uruguay is still pending.
Vattenfall v. Germany II	In 2012, Vattenfall, a Swedish energy firm, launched a case under the EU's Energy Charter Treaty against Germany, due to Germany's decision to phase out nuclear power. The final ruling is still pending. This is Vattenfall's second investor-state dispute settlement case (see below). Vattenfall is seeking nearly $5 billion in the claim.
Occidental Petroleum v. Ecuador	In 2012, a tribunal ruled on a long-running case between Ecuador and Occidental Petroleum Corporation under the US-Ecuador BIT. The ruling ordered Ecuador to pay the company $2.3 billion due to its expropriation of all of the firm's office and property (including oil fields). Ecuador has filed a request for annulment of the award, and a decision on annulment is pending.
Churchill Mining v. Indonesia	Since 2012, Churchill has been seeking damages of not less than $1.05 billion to settle a long-running dispute over Indonesia's ability to regulate locally issued permits for mining rights.
Veolia v. Egypt	In 2012, Veolia Propreté launched a case against Egypt under the France-Egypt BIT. The company is seeking at least $110 million based on disputes related to the minimum wage for employees affecting the terms of a 15-year contract for waste management in the city of Alexandria.
Eli Lilly v. Canada	In 2013, Eli Lilly, a US pharmaceutical firm, launched a case seeking $481 million for Canada's denial of patents for Strattera and Zyprexa, drugs used to treat attention deficit hyperactivity disorder, schizophrenia, and bipolar disorder.
Lone Pine v. Canada	In 2013, Lone Pine Resources launched a $241 million claim under NAFTA against Canada for its "arbitrary, capricious, and illegal revocation of the Enterprise's valuable right to mine for oil and gas under [Quebec's] Saint Lawrence River."
Infinito Gold v. Costa Rica	In 2014, Infinito Gold claimed that Costa Rica violated the Costa Rica–Canada BIT when a domestic court revoked its mining concession in San Carlos, Alajuela in 2010. The company is seeking $94 million in compensation for expenditures it incurred to build and develop the gold mine.

(table continues)

Table 11.1 "Notorious" ISDS cases *(continued)*

Case	Summary
	Decided and settled cases
Ethyl v. Canada	In 1997, Ethyl launched a NAFTA claim against Canada when it instituted a ban on imports of the gasoline additive MMT for use in unleaded gasoline. Canada, which was facing numerous suits for the ban, settled the claim and agreed to pay the company $13 million in damages and legal fees.
S.D. Myers v. Canada	In 1998, S.D. Myers launched a NAFTA claim against Canada's temporary ban on the export of a hazardous waste, polychlorinated biphenyls (PCBs). The tribunal ordered Canada to pay the company $5.6 million.
Metalclad v. Mexico	In 1999, Metalclad Corporation launched a NAFTA claim against Mexico when Guadalcazar, a Mexican municipality, failed to grant a construction permit for expansion of a toxic waste facility. The tribunal awarded the company $16.2 million.
Saluka v. Czech Republic	In 2001, Saluka claimed that the Czech Republic violated rights under the Netherlands–Czech Republic BIT. The tribunal decided that the Czech Republic violated the "fair and equitable" treatment provision and acted unfairly when it granted greater aid to banks in which the government was a major stakeholder during an economic downturn. The tribunal ordered the government to pay Saluka $236 million.
CMS Gas v. Argentina	In 2001, CMS Gas Transmission Company filed a claim against Argentina under the US-Argentina BIT when the state attempted to alter the company's contract related to tariff rates on electricity. These actions were part of Argentina's response to a 2001 economic meltdown. The tribunal ruled in CMS's favor; subsequently Blue Ridge Investment purchased the rights from CMS to collect on the award.
Eureko v. Poland	In 2003, Eureko filed a claim against Poland under the Netherlands-Poland BIT after the country failed to honor an agreement to complete the insurance company's privatization process. The two parties settled the case for an undisclosed amount. Reports estimate that Poland paid $1.6 billion to settle.
RDC v. Guatemala	In 2007, Railroad Development Corporation (RDC) launched a claim under the CAFTA-DR after the government of Guatemala decided that RDC's use of state-owned resources to operate the country's railways under a 50-year contract was *lesivo* (harmful to the country's interest). This decision ultimately forced RDC to stop operating the railway. While the tribunal dismissed allegations of violation of national treatment and expropriation, it did find a violation of the "minimum standard of treatment." The company was awarded $18.6 million.
ExxonMobil and Murphy Oil v. Canada	In 2007, ExxonMobil and Murphy Oil filed a NAFTA claim arguing that Newfoundland and Labrador had violated the agreement by imposing retroactive research-spending requirements on their offshore oil producers. ExxonMobil and Murphy Oil were awarded $13.9 million and $3.4 million, respectively.

Table 11.1 "Notorious" ISDS cases *(continued)*

Case	Summary
	Decided and settled cases *(continued)*
TCW v. Dominican Republic	In 2007, TCW Group claimed that the Dominican Republic violated CAFTA-DR by failing to compensate the company for negotiated tariffs rates and subsidies. The government decided to settle and agreed to pay TCW $26.5 million.
Chevron v. Ecuador	In 2006, Chevron launched a case against Ecuador claiming it had failed to provide an "effective means of asserting claims and enforcing rights" under the US-Ecuador BIT. This case is separate from the litigation from the Lago Agrio oil fields, but Chevron and Ecuador are contesting several large legal battles, which remain unresolved and span several jurisdictions. While the ISDS tribunal awarded Chevron approximately $700 million in this case, it is unclear whether Ecuador will honor any international arbitration rulings against it.
Bilcon of Delaware et al. v. Canada	In 2008, Bilcon launched a case under NAFTA claiming that the company was subject to an excessive environmental assessment in an "arbitrary and unfair manner," after a report by a Canadian Joint Review Panel halted Bilcon's efforts to operate a quarry in Nova Scotia. In particular, Bilcon claimed that the panel's proceedings were inconsistent with Canadian law and that similar projects undertaken by Canadian firms were not subject to such scrutiny. The tribunal ruled that Canadian action breached its "minimum standard of treatment" and national treatment obligations. While the case has been decided, a decision on the amount of compensation is pending—investors are seeking $300 million.
Vattenfall v. Germany I	In 2009, Vattenfall launched its first claim against Germany under the EU's Energy Charter Treaty when a local municipality delayed the issuance of permits for a coal-fired power plant and issued new environmental standards, making the investment "unviable." The company claimed the actions amounted to an expropriation and violated the "fair and equitable treatment" principle. The German government reached an undisclosed settlement with Vattenfall, which modified the new environmental standards.
Abengoa v. Mexico	In 2010, Abengoa filed a claim under the Mexico-Spain BIT arguing that Zimapán's denial of an operating license for a hazardous waste facility was a violation of the "minimum standard of treatment." The tribunal ordered Mexico to pay Abengoa more than $40 million, plus interest.

ISDS = investor-state dispute settlement; FTA = free trade agreement; BIT = bilateral investment treaty

Sources: Government of Canada, "NAFTA - Chapter 11 - Investment," www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/mobil.aspx?lang=eng; "Abengoa S.A. y COFIDES S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2," www.italaw.com/cases/1871; Lawrence Herman, "Canada Loses Another Investment Dispute under NAFTA," http://hermancorp.net/2015/03/23/canada-loses-another-investment-dispute-under-nafta/; Public Citizen, "Case Studies: Investor-State Attacks on Public Interest Policies," www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf; Marek Strzelecki and Marynia Kruk, "Poland and Eureko Settle Dispute," *Wall Street Journal*, October 5, 2009, www.wsj.com/articles/SB125469684214462753; US State Department, "Railroad Development Corp. v. Republic of Guatemala," www.state.gov/s/l/cafta15/c33261.htm.

repealing a higher minimum wage in Egypt. That case is still pending, and even if the arbitrators rule in favor of Veolia, the result will be a damage award, not a repeal of Egypt's minimum wage law.

Most of the contentious cases, like Veolia's claim, await judgment. Corporate claims may be dismissed or settled, or the responding countries may well prevail. Americans know very well that lawyers often seek huge damages to create a splash or prompt a settlement, even when the facts are weak. Just look at claims in the 13 ISDS cases brought against the United States where the claimants lost, or the 175 cases dismissed worldwide. Since NAFTA was ratified, ISDS provisions have been amended to ward off frivolous claims against environmental, health, and safety regulations.

KORUS, which has been widely acknowledged as a baseline template for the TPP, since it includes the highest standards of US past practice, sheds light on this issue. Annex 11-B to the investment chapter declares:

> 3. (b) Except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations.(1)
>
> Note (1): For greater certainty, the list of "legitimate public welfare objectives" in subparagraph (b) is not exhaustive.

The Korea-Australia and Korea-Canada FTAs have identical ISDS provisions to KORUS, but they additionally state that government decisions to refuse investments under Australia's Foreign Investment Policy and the Investment Canada Act are exempt from ISDS litigation.[8] The Korea-Vietnam FTA has largely the same ISDS provisions as KORUS. Thus Korea and its four FTA partners preserved their sovereign right to enact and enforce appropriate regulations. Only when, in rare circumstances, regulations discriminate in a severe or disproportionate way against foreign investors can they be challenged.

TPP Article 9.15, Investment and Environmental, Health and Other Regulatory Objectives, coupled with Annex 9-11, essentially restate these limitations on ISDS:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its terri-

8. Australia's Foreign Investment Policy requires the government to review every foreign investment proposal against a national interest test; for the full text, see www.firb.gov.au/content/policy.asp. The Investment Canada Act also requires the government to review foreign investments that could threaten national security; for the full text, see http://laws-lois.justice.gc.ca/eng/acts/I-21.8/page-1.html.

tory is undertaken in a manner consistent with environmental, health or other regulatory objectives.

Secret Proceedings. Critics have pointed to a lack of transparency in ISDS hearings. On this matter, there is room for criticism. In many legal disputes, some degree of confidentially is required—particularly when trade secrets are involved. The track record of ISDS cases shows, however, that secrecy has gone too far in many of the decided cases. An UNCTAD report recommending reform to ISDS proceedings points out that, of the 85 cases heard before the UN's Permanent Court of Arbitration only 18 were made public (see UNCTAD 2013). ICSID, to its credit, includes a public registry of its cases, though settlements are often undisclosed and other cases can remain confidential if both disputing parties agree. In two general categories the lack of transparency seems especially counterproductive. The first category includes cases where the dispute clearly concerns the public interest—such as Australia's battle with tobacco labeling requirements. The second category includes cases in which public finances could be severely affected because of the size of the claim.

TPP negotiators heeded this criticism. Article 9.23, Transparency of Arbitral Proceedings, calls for open hearings and public disclosure of all documents, with a narrow exception for "protected information" (e.g., trade secrets). Three of the four Korean FTAs also address the secrecy criticism. ISDS provisions under KORUS state that hearings and documents must be open to the public. Further, nondisputing third parties can request admission to hearings. ISDS provisions do allow disputing parties to hold closed hearings and to preserve confidential information but only when circumstances require—the same as for court proceedings in many countries. The Korea-Canada FTA adopts an identical transparency text. The Korea-Australia FTA goes further and requires that both parties consider application of the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in future cases. While the Korea-Vietnam FTA does not ensure transparency of arbitral proceedings, TPP Article 9.23 requires transparency in arbitral hearings between TPP members if launched under TPP Chapter 9.

No Appellate Review. Both opponents and supporters of ISDS are concerned about the absence of appellate review in ISDS cases. This likely reflects the slow evolution of ISDS case management within the international economic system. A major current shortcoming is that, under the ICSID Convention, appellate reviews are limited to "irregular constitution or corruption of the arbitral tribunal, serious departure from a fundamental rule of procedure, failure to state reasons for the award or a manifest excess of power" (UNCTAD 2015, 150). These grounds importantly exclude instances when arbiters make errors of law in their rulings or make awards that are not supported by the facts of the case. Unlike criticisms about undue secrecy in ISDS cases, which can be answered with relatively simple fixes, creating an effective appellate review process is complicated, though still a worthy endeavor.

Recognizing this ISDS concern, KORUS attached Annex 11-D, Possibility of a Bilateral Appellate Mechanism, which states that Korea and the United States will consider the establishment of a bilateral appellate body to review decisions made in arbitrations within three years after the agreement was enacted.[9] The Korea-Australia and Korea-Canada FTAs share this same understanding, but not the Korea-Vietnam FTA. As noted, the TPP has no provision for appellate review.

The European Union has recently tabled a creative proposal in the context of the Transatlantic Trade and Investment Partnership (TTIP) (discussed in the next section). Unfortunately, TPP Chapter 9 makes no provision for appellate review. One reason is that the United States is so happy with its win-loss record in ISDS cases (13-0) that it did not want to risk the possibility of adverse appellate decisions.

European Proposal: An Investment Court?

Prior to the TPP, the European Union took the lead on reforming ISDS mechanisms in the wake of intensive public debate. The EU trade commissioner recently tabled a proposal that outlines recent improvements to ISDS mechanisms adopted in EU bilateral trade agreements, proposes a single international court, and suggests a path forward for the TTIP negotiations (see EC 2015).

The European Union concluded trade negotiations with both Canada (Comprehensive Economic and Trade Agreement or CETA) and with Singapore (EU-Singapore FTA) in 2014. These agreements incorporated several major improvements in their ISDS mechanisms, which now find parallels in TPP Chapter 9.

- The "right to regulate" for legitimate policy objectives was made explicit. These objectives may include "public health, safety, environment, public morals, and the promotion and protection of cultural diversity." The TPP contains parallel language.
- Clearer language has been added on key concepts—such as fair and equitable treatment and indirect expropriation. The TPP does likewise.
- "Forum shopping" is explicitly prohibited. Moreover, UNCITRAL rules of transparency have been adopted, which makes all documents publicly available and opens hearings to the public. The TPP does likewise.[10]

9. As of June 2015, the KORUS Implementation Committee has not released its discussion report.

10. Existing ISDS provisions in US agreements with FTA and BIT partners, such as Mexico, Canada, and Korea, will remain available as alternatives to TPP Chapter 9 for corporate complainants that choose to use those forums.

- States are able to issue binding interpretations of provisions which subsequent arbitrators must abide by. The TPP allows amendments if all members agree in writing.
- The "loser pays principle" has been adopted, which requires investors to cover all the legal costs in lost cases. The TPP gives arbitrators the power to allocate costs.

These provisions address several complaints and create a better framework for dealing with investment disputes. The EU proposal for ISDS reform acknowledges, however, that further improvements are needed, specifically the right to regulate, the appellate mechanism, and the relationship between ISDS and domestic courts. Of these, the appellate mechanism is arguably most in need of reform. As discussed above, ISDS cases are one of the few—if not only—category of cases for which no substantive appeals process exists. Rulings may be "annulled" or "set aside" for improprieties, but decisions are not reviewed for their adherence to the law and the facts. The EU proposal suggests using the WTO Appellate Body as a model, though it acknowledges the political difficulty of creating an appeals court. Unfortunately, as revealed in TPP negotiations, US officials have expressed skepticism toward this proposal. Despite US reluctance, these proposals should, and likely will, serve as a platform for the ongoing TTIP negotiations.

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