**Investment Protection Agreements and Contemporary Anti-Globalization:**

**The Cases of the U.S. and Europe**

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**Introduction**

Dispute settlement in the domain of foreign direct investment has an established, and relatively uncontroversial, history in the postwar era. Yet over the last two decades, all of that has changed and so-called investor state dispute settlement (ISDS) has become a lightning rod for controversy. This paper initially began with a very simple question: why the change?

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

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

One popular mechanism for mitigating these problems with respect to foreign direct investment has been the emergence and use of bilateral investment treaties (BITs) in the postwar era, starting in 1959 with the BIT between Germany and Pakistan. The use of BITs between state parties to define the treatment of private investment, including rules for dispute settlement and compensation, have offered private interests a form of “personality” within international law through which they can defend their interests.

The short history of the global expansion of BITs was, until recently, relatively uncontroversial. The end of the Cold War is sometimes marked as the start of a brief, but intense, period of rapidly expanding liberal democratic and economic governance, typified by integration projects in North America, their deepening in Europe, or their expansion and further codification as in the case of the World Trade Organization (formerly the General Agreement on Tariffs and Trade). Not surprisingly, there have also been efforts to bring coherence and uniformity to the proliferation of BITs through the development of a multilateral set of investment rules.

In fact, there have been two major efforts to multilateralize global investment rules; first between 1995-1998 with the Multilateral Agreement on Investment (MAI) and more recently in the context of the proposed Trans-Atlantic Trade and Investment Partnership (TTIP) between the United States and the European Union (EU).[[1]](#footnote-1) However, these efforts have been scuttled by a combination of timing and unresolved disagreements among the countries at the table. That poor timing has been exacerbated by ISDS suits flowing from the investment provisions of two 1994 regional economic pacts; the North American Free Trade Agreement, and the Energy Charter Treaty. [[2]](#footnote-2)

Between the ratification of the NAFTA in 1994 and the IMF/World Bank meetings in the Spring of 2000, criticism of ISDS was muted against the larger backdrop of anti-globalization resistance typified by the infamous Battle in Seattle in November 1999. However, as ISDS cases began to emerge in the NAFTA context, the attention given to these provisions by NAFTA governments and civil society intensified. Similarly, but nearly 20 years later, ISDS cases flowing from Europe’s 1991 Energy Charter and that agreement’s subsequent expansion and treatification as the Energy Charter Treaty in 1994, concentrated anxieties about investment rules.

Since approximately 2005, the experience with ISDS itself has made investment dispute settlement more of a focal point for resistance to globalism. While that resistance appears to have had its successes in terms of the failed MAI and the uncertain future of the TTIP, the same experience with ISDS that brought about popular resistance has also initiated important changes in the way governments approach ISDS. Had the TTIP, including its proposed investment provisions, not been put into limbo by the anti-global populism that led to “Brexit” and the election of Donald Trump as President of the United States, it is the argument of this paper that the European Union

and the United States had been evolving toward a convergence of views on investment that may finally have multilateralized the application of those rules.

The argument of this paper unfolds in three parts. **Part I** will revisit elements of anti-global populism as they flowed out of the NAFTA debate in the mid-1990s, ultimately scuttling the proposed Multilateral Agreement on Investment in 1998. **Part II** will highlight some of the specific sources of angst generated by ISDS flowing from the NAFTA experience that elevated the profile of ISDS among critics of globalization. **Part III** will focus on how the NAFTA experience was replicated in Europe under the terms of the *Energy Charter Treaty*, also prompting a broad reconsideration of investment protections by states. The aim here is to show how specific ISDS cases themselves have led governments to redefine and shape investment rules over time to protect the state against frivolous ISDS suits.

Until the NAFTA, ISDS was uncontroversial because developed economies were never the targets of suits. In theory, BIT provisions could have been directed at host country governments in the developed world, but flows of capital and the lack of investment by developing country firms in rich countries largely precluded that. With the NAFTA, two developed states in a relatively integrated economic zone were suddenly subject to ISDS rules. The shock and anxiety that followed was real, legitimate, and contributed to the demise of the MAI. Yet, the controversy did not mean differences among parties to the MAI were unbridgeable. Indeed, even as ISDS suits against developed states proliferated, governments on either side of the Atlantic were responding to these challenges with important limitations in nearly every post-NAFTA agreement they concluded. As the U.S. and the EU pondered the multilateralization of investment protections in the mid-2010s via the TTIP, significant convergence of opinion had developed on the need for reforming investment rules. However, that convergence has once again washed up on the rocks of anti-global sentiment—this time in the form of the populist sentiment driving Brexit and the election of Donald Trump as President of the United States.

In many ways, complaints about ISDS have been overdrawn. However, important reforms flowed from areas where anxieties did exist, reforms that were not present in time to save the MAI, but were intended for incorporation in agreements such as the Trans-Pacific Partnership and arguably the Trans-Atlantic Trade and Investment Partnership. Those reforms have effectively been stalled by the populist opposition to those agreements.

**Part I: BITs, Anti-Globalism, and the NAFTA**

While there is some debate about how to fully maximize the benefits of FDI,[[3]](#footnote-3) one of the historical challenges for developing states is getting FDI to flow their direction at all. The Organization for Economic Cooperation and Development (OECD) reports that in 2007 FDI outflows from OECD countries reached a record US$1.82 trillion in value, with outflows from the United States alone amounting to US$333 billion.[[4]](#footnote-4) However, the disparity in flows of FDI between rich and poor countries is as stark as ever. As reported by the OECD, there is a strong correlation between FDI outflows from rich countries and FDI inflows to poor countries. In 2007, developing countries matched the record growth in FDI outflows from the OECD by attracting record inflows amounting to US$471 billion. However, the distribution of those inflows among developing states was unbalanced with BRIC countries (Brazil, Russia, India, and China) accounting for 50-60 percent of all inflows.[[5]](#footnote-5) In 2014, OECD countries still accounted for 40 percent of FDI inflows and 70 percent of all outflows. In other words, in spite of the financial crises in the United States and a debt crisis in the Euro Area, developed states were still the primary targets and sources of foreign direct investment flows.[[6]](#footnote-6)

Moreover, the top five targets and sources of U.S. investment flows are exclusively members of the OECD. Table 1 lists the top sources and targets of FDI for the United States according to the U.S. Bureau of Labor Statistics. The most significant sources and targets of FDI are all members of the OECD. While Mexico is a member of the OECD, and one of America’s NAFTA partners, Mexico is also relatively poor with a per capita income of just $12,104 and ranks well behind the United Kingdom, the Netherlands, and Canada as a source (17th) and target (12th) for U.S. investment flows.

[INSERT TABLE 1 HERE]

However, when contrasted with the more than 40 countries[[7]](#footnote-7) with whom the United States has BITs in force, Mexico is a relatively significant source and target. Moreover, the disparity among U.S. BIT partners between flows into and from the developing country partner is stark. Table 2 lists the top sources and targets of U.S. FDI among BIT partner countries. Turkey, for example concluded its BIT with the United States in 1990, and in 2015 was the target of $3661 million in U.S. investment. However, as a source of FDI into the United States, Turkey sent a paltry $625 million.

[INSERT TABLE 2 HERE]

Moreover, flows of FDI to BIT partners are so small in many instances that Bureau of Economic Analysis statistics for many countries are suppressed to protect the identities of the individual firms making the investment.[[8]](#footnote-8)

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

Tables 3-8 unambiguously depict the growth of cross-border FDI flows among NAFTA countries after 1993. Unlike the host country targets under the US BIT program, the NAFTA area represented an entirely new investment environment for the application of dispute settlement. In short, there was plenty of investment in an out of all three countries to which the rules of Chapter 11 could be applied.

[INSERT TABLES 3-8 HERE]

As economies become more economically interdependent, the scope for investment disputes grows as well.[[9]](#footnote-9) This is borne out in studies on the incidence of trade disputes wherein the volume of trade between countries is correlated with the incidence of disputes within the World Trade Organization.[[10]](#footnote-10) Moreover, changing patterns of contemporary global FDI flows, more and more of which involve rapidly developing countries like the BRICs, are generating disputes between *developing* country firms and their *developed* country hosts.[[11]](#footnote-11)

The origins of the investor-state dispute settlement mechanisms of the NAFTA (Chapter 11) are part of a much larger history of the institutionalization of international economic activity in the postwar period.[[12]](#footnote-12) By the end of 2001, the United Nations Conference on Trade and Development (UNCTAD) had recorded nearly 2,902 BITs, the overwhelming majority of which continue to be concluded between developed and developing countries.[[13]](#footnote-13) The dramatic rise in BIT activity since World War II (44 BITs in 2013 alone) has reflected the desire on the part of capital exporting countries, and more specifically the private investors within them, to bring additional certainty to the process of investing in foreign countries with weak legal protections or a history of expropriation. In general, BITs have three basic objectives; investment protection, promotion, and liberalization. [[14]](#footnote-14) For developing countries in need of development capital, particularly in the wake of the 1980's debt crisis, BITs have become an attractive way to solidify confidence in potential foreign investors regarding nationalization, expropriation, creeping confiscation through regulatory changes, or performance requirements like local content rules.[[15]](#footnote-15)

Numerous proposals for regional or multilateral investment rules or conventions, as well as schemes for investment security funds to guard against nationalization or expropriation of private capital have been hatched, among them the failed Havana Charter of 1948 that would have created the International Trade Organization (ITO) and the disastrous Multilateral Agreement on Investment (MAI) in 1998.[[16]](#footnote-16) Among the most successful mechanisms to emerge from the struggle to find international investment rules was the creation of centers for arbitration of disputes between consenting parties (states and private investors). In 1965, the International Centre for the Settlement of Investment Disputes (ICSID) was created as part of the World Bank, followed a year later by the United Nations Commission on International Trade Law (UNCITRAL).[[17]](#footnote-17) It was thought that ICSID and UNCITRAL mechanisms would facilitate the satisfactory resolution of conflicts between foreign investors and sovereign hosts. However, up to 1970, few states had been willing to submit to the jurisdiction of these bodies and the first ICSID arbitration case was not filed until 1972.

In comparison with the United States, Europe has been at the forefront of BIT development, the very first concluded between Germany and Pakistan in 1959.[[18]](#footnote-18) Although the United States undertook to incorporate investment provisions into some twenty-two bilateral commercial treaties (mostly FCNs) concluded between 1946 and 1966,[[19]](#footnote-19) the U.S. didn’t adopt a formal BIT program until 1981, and had negotiated just 41 by the end of 2014.[[20]](#footnote-20)

When ISDS became part of the NAFTA, Mexico was poised to play the traditional role of a developing country party to a BIT. The NAFTA put in place investment rules where none existed before. In September 1978, the Additional Facility Rules were approved by the ICSID Administrative Council, and defined additional rules by which ICSID could administer proceedings outside its original jurisdiction. In most cases, this meant that either the State party or the State whose national is a party to the dispute is not an ICSID Contracting State, or that the dispute itself did not arise as a direct result of an investment. Oddly enough, this described the situation of Canada and Mexico. Only in 2013 did Canada finally ratify the ICSID Convention, having signed in 2006. Mexico has yet to sign or ratify.[[21]](#footnote-21)The NAFTA’s negotiators assumed that Mexico was the major concern where investment was concerned. Indeed, as a developing country with a 20-year history of expropriation, Mexico fit the mold that BITs were largely created for. Indeed, between the formal creation of the U.S. BIT program in 1981 and the insertion of BIT language into the NAFTA in 1994, there had been no significant reforms; nothing suggested reforms were necessary.

The North American Free Trade Agreement effectively trilateralized the U.S. BIT program into a single chapter of a regional trade agreement. Indeed, a side-by-side comparison of NAFTA Chapter 11 and a U.S. BIT reveals far more similarities than differences. The same three objectives outlined in a BIT (investment protection, promotion, and liberalization) are also outlined in Chapter 11.

On several dimensions, the application of the U.S. BIT model to Canada and Mexico in the NAFTA negotiations made sense. Although Canada and Mexico were already important sources and targets of U.S. investment flows, neither were parties to international arbitration bodies ICSID or UNCITRAL. Moreover, Canada and Mexico had just emerged from important periods of economic nationalism and sought new sources of investment capital, especially from the United States.[[22]](#footnote-22) Moreover, the rationale for doing so was not dissimilar to that used in pursuit of BITs with several developing countries. Both sought new inflows of capital and were ultimately willing to adopt American-style investment protections to secure it.[[23]](#footnote-23)

Chapter 11 would eventually generate unexpected criticism and concern where similar provisions in BITs concluded over decades had not.[[24]](#footnote-24) However, a larger wave of anti-global populism would first permanently envelop the larger NAFTA in controversy from which it has never really recovered.

*The NAFTA Zapatista-ed*

On January 1, 1994, the North American Free Trade Agreement (NAFTA) between Canada, the United States, and Mexico officially entered into force after being approved by all three national legislatures. The very same day, approximately 3000 leftist revolutionaries known as the Zapatista Army of National Liberation (EZLN) seized several municipalities in the southern Mexican state of Chiapas in a violent challenge to Mexico’s governance. The approval of the NAFTA had been a bruising political battle in all three countries, but particularly in the United States wherein the Agreement featured prominently in the 1992 presidential contest.

Scholars of North American integration remember well the impact of the Zapatista Rebellion for many reasons, not the least of which was the Rebellion’s timing in emphasizing that the NAFTA remained unpopular with many groups. Moreover, it drove home the growing unease among many regarding the spread of neo-liberal economic policies that were both symptom and driver of globalization. For many Americans, the Zapatista Rebellion was simply further evidence of either the wisdom of the NAFTA in locking in Mexican reforms or the foolishness of an economic partnership with a country of questionable stability.

However, it was also in this time period that the Internet first came of age as a tool in the political debate over globalization. The debate over the NAFTA itself was largely fought on traditional organizational grounds that students of interest group politics would readily recognize. However, it was the aftermath of the NAFTA, and the Zapatista Rebellion in particular, that became the first flashpoint of anti-globalization activism and organization on the Internet. Subcomandante Marcos, the EZLN leader, became an overnight media sensation, and the EZLN itself used the Internet to great effect in broadcasting the plight of Mexico’s poorest citizens to the wider world.

According to the web-site Internet World Stats, in 1995 there were just 15 million Internet users worldwide, mushrooming to more than 360 million by December 2000, and approximately 3.6 billion today.[[25]](#footnote-25) The number of users more than doubled between 1995 and 1996 alone. On the one hand, the proliferation of information technology that has brought the world closer to home have opened up windows of transparency onto countless economic, political, and social issues, raising awareness and activism aimed at changing the status quo.[[26]](#footnote-26) Yet, as David Jones has argued, information narrowcasted through new communication technologies tends to be more extreme than information broadcasted through traditional media because new communication technologies can better tailor messages to segmented audiences that are much more homogeneous than audiences of traditional broadcast media.[[27]](#footnote-27) In 2008, Yzer and Southwell highlighted research affirming the considerable self-selection among users of a rapidly proliferating media universe.[[28]](#footnote-28)

Some have referred to the Chiapas Rebellion as the first Internet revolution,[[29]](#footnote-29) others have termed the advent of web-based social activism and protest the “electronic riot.” [[30]](#footnote-30) By posting all manner of manifestos and commentaries to the Internet, the Zapatistas made it possible for otherwise disconnected citizens in far-flung parts of the world to bond over the commonality in their own concerns about globalization.[[31]](#footnote-31) Importantly, the Internet offered the Zapatistas a measure of control over their message unavailable through more traditional media.[[32]](#footnote-32)

The use of web-based mechanisms for organizing has become entirely mainstream, indeed a requisite part of nearly any part of organizing for political action. Yet, in the mid-1990s it was something entirely new to be able to directly, and inexpensively, reach large numbers of people with a message unfiltered by traditional media.[[33]](#footnote-33) More importantly, the Zapatista Rebellion seemingly ushered in a new period of activism that, aided by the Internet, would expand the global commons, significantly augment transparency and rapidly mobilize public opinion.[[34]](#footnote-34)

What began in Chiapas mushroomed into the streets of Seattle, Washington and the World Trade Organization ministerial meetings in November 1999. Tens of thousands of anti-globalization protesters choked the streets of Seattle, clashed with police, and ultimately caught the attention of everyone inside the meeting. The “Battle in Seattle” was shocking in its scale, but has repeated itself at countless subsequent international meetings of economic policy makers (IMF/World Bank, G7/G8, NAFTA).[[35]](#footnote-35)

Yet, in all of the anti-global activism of the late 1990s, little of it was directed specifically at investment rules or ISDS specifically. Jeffrey Ayres claims the oppositional and organizational forces that spilled into the streets of Seattle also contributed to the demise of the proposed Multilateral Agreement on Investment (MAI) in 1998.[[36]](#footnote-36) Indeed, anti-global activists have assigned themselves considerable credit for the MAI’s demise.[[37]](#footnote-37) However, Graham argues that while anti-corporate activists have been around a long time, they were newcomers to the world of foreign direct investment in the 1990s. As Ayres notes, there were few physical protests organized against the OECD countries negotiating the MAI.[[38]](#footnote-38) Investment rules in the form of BITs simply hadn’t drawn much attention. In fact, by the time the MAI had been pronounced dead, evidence of the threat posed by investment rules was just beginning to materialize.

**Part II: Much Ado About NAFTA?**

The rhetoric of the earliest days of the NAFTA was all about the distributional consequences of trade liberalization on manufacturing and employment. It was a set of politics that was easy to predict since both economic theory and hundreds of years of experience with liberalization all suggest difficult politics.[[39]](#footnote-39) Yet, where investment was concerned, no such theory or wealth of experience suggested the controversies that followed. The argument developed here is that the rationale for introducing investment rules to North American economic governance was the same as it had been in the context of BITs—protection, promotion, and liberalization. When ISDS became part of the NAFTA, Mexico was poised to play the traditional role of a developing country party to a BIT. Yet, the United States had issues with Canada as well. For a while, things worked as they always had; developed country firms using ISDS against their developing country hosts. Yet, for the first time, the NAFTA had instilled ISDS rules between dyads of developed countries and the cases began to pile up. It should have come as no great surprise as the mere implementation of ISDS rules paved the way for investment disputes where none could have been launched before.

*The Early Trials of the Trilateral BIT*

The NAFTA’s path to implementation was shrouded in controversy. It was a political and economic piñata in the 1992 U.S. presidential election. In 1993, President Clinton spent a lot of his early political capital to win approval of the pact in the U.S. Congress. And to top it all off, the Zapatista Rebellion exploded out of the southern Mexican State of Chiapas at the moment of implementation. Yet, in most respects, complaints about the NAFTA were mostly about the standard distributional consequences of liberalization; in other words, jobs. Investment rules were not especially controversial.

Then, in July 1998, Loewen Group, a Canadian funeral services firm, filed a “notice of intent” to initiate arbitration proceedings under NAFTA Chapter 11. At issue was an adverse Mississippi state court decision wherein Loewen argued it had not received “fair and equitable treatment” as a foreign investor and had, in effect, had its investment in Mississippi “expropriated” by the state.[[40]](#footnote-40) Something was different.

Mississippi’s reputation for law enforcement has not always been stellar, but how often were American states and expropriation ever mentioned in the same context? In the short history of America’s BIT program, disputes had followed the traditional pattern of rich country private investors having their property expropriated by a poor country government—in some cases by force of arms. Hence, when the Clinton White House sent NAFTA implementing legislation to Capitol Hill, the accompanying Statement of Administrative Action (an interpretive document) confidently claimed that “No change in statute will be required to implement the provisions of Chapter Eleven.”[[41]](#footnote-41) Then, just four years later, Loewen.

Indeed, starting with Loewen, Chapter 11 opened a can of legal and political worms that heightened the controversy already swirling around the NAFTA and complicated larger, multilateral efforts like the MAI. Loewen and others began exploiting linguistic ambiguities in Chapter 11 that didn’t much matter when the U.S. BIT model was applied to the more traditional dyad of developed-developing country. Instead, Chapter 11 seemed to have turned the tables, prompting multiple filings against the two developed states. Indeed, as of September 2015, 49 separate Chapter 11 arbitration cases had been filed; 17 against Canada, 18 against the United States, and 14 against Mexico, the presumptive target of Chapter 11 protections given its history of expropriation.

Chapter 11 jurisprudence seemingly began the exploitation of definitional ambiguities in three main areas specific to the text itself. First, foreign firms alleged they were being denied “national treatment” (Article 1102) under the NAFTA, the long-standing norm in global trade and finance that prohibits discrimination based on national origin. Second, firms alleged that they were being denied “fair and equitable treatment” (Article 1105) as required by customary practices of international law.[[42]](#footnote-42) And third, firms were alleging several state measures that were “tantamount to expropriation” (Article 1110); nationalization of property not at the point of a bayonet, but through the state’s arbitrary application of its regulatory power.

That same jurisprudence raised three broader issues. First, in spite of the fact that one Party to ISDS arbitration proceedings was always the state, proceedings were held in private. The lack of transparency (some said accountability) in these proceedings was troublesome given the public’s inherent interest in the outcome. Second, arbitration proceedings had no provision for *amicus* (friend of the court) submissions from third parties with an interest in the outcome.[[43]](#footnote-43) And third, Chapter 11 spawned criticism that ISDS provisions had created a parallel, quasi-supranational, and preferential, legal system available only to foreign firms and that it was a process being exploited by foreigners to challenge the state’s sovereign capacity to govern in the public interest.[[44]](#footnote-44)

*The NAFTA’s Aftermath: Something Has Changed*

The *Loewen Group* case accelerated a broad reconsideration of ISDS rules. While this case was eventually dismissed in its entirety in June 2003, five years of litigation generated considerable angst in the three NAFTA governments, their legislatures, and civil society. Moreover, the controversy over Chapter 11 coincided doubts creeping into multilateral efforts to conclude common investment rules. Under the auspices of the Organization for Economic Cooperation and Development (OECD), a club of high-income developed countries, the Multilateral Agreement on Investment (MAI) was to have applied common investment rules all members, but fell apart in 1998 over a range of issues, including dispute settlement.[[45]](#footnote-45)

Chapter 11 inadvertently provided a mechanism for foreigners to challenge domestic court rulings—ISDS as a supranational legal body that none of the three governments intended to create. Critics have alleged that the application of national treatment within the NAFTA has conferred legal rights to foreign companies that are not accorded to domestic companies; the subsequent distribution of Chapter 11 cases (most against the United States and Canada) seemed to support that argument.[[46]](#footnote-46) Many North American firms have legal presences (incorporation and representation) in each of the countries in which they operate and could pursue their property claims through respective domestic court systems. Doing so falls within the long-standing tradition within older U.S. Treaties of Freedom, Commerce and Navigation (FCN) where firms sought recourse with host governments prior to pursuing “espousal” of their claim through home government diplomacy.[[47]](#footnote-47) Like BITs, Chapter 11 established a legal process (culminating in arbitration) that was thought to fill a hole in customary international law between states and private interests in North America. Where domestic court systems could conceivably discriminate against a foreign entity, under the NAFTA’s rules, discrimination based on nationality is prohibited (NAFTA, Article 1102).

Chapter 11's arbitration process provided essentially a “one-shot” opportunity (no U-turn to some alternate forum) to seek redress under arbitration rules with limited scope for appeal.[[48]](#footnote-48) Private parties have as long as three years to resolve their claims through domestic avenues before the NAFTA’s statute of limitations runs out (Article 1116.2). But, once a notice of intent is filed, NAFTA Article 1121.1(b) requires private parties waive the pursuit of future legal claims in the wake of any tribunal decision. Australia and parts of civil society have pushed for an even stronger requirement that domestic proceedings be exhausted prior to any “last-resort” claims made to an international tribunal.[[49]](#footnote-49)

Yet, whereas the old FCN treaties were characterized first by domestic and diplomatic efforts prior to arbitration (as under BITs), Chapter 11 Lowen started the anxiety over prospects that ISDS could be used either as a first-option or as an extra-judicial forum unavailable to domestic firms. Curiously, rather than de-politicizing investment disputes by subjecting them more directly to the rule of law, as BITs were thought to do, direct access to Chapter 11 rules arguably had the opposite effect as public anxiety over sovereignty grew.[[50]](#footnote-50)

The NAFTA’s negotiators did not intend for Chapter 11 to confer more legal rights to foreign investors than already afforded to domestic investors making investments “in like circumstances.”[[51]](#footnote-51) The Agreement was intended to fill a hole in international law and level the playing field between firms and host states. However, Chapter 11 has generated a range of creative suits alleging firms have been denied the “minimum standard,” or a “fair and equitable standard” of treatment (Article 1105) as required under customary international law (i.e. customary state practice).[[52]](#footnote-52) Others have claimed that the state has imposed forms of performance requirements (Article 1106) on their investments as a condition of their investment.[[53]](#footnote-53) And, of course, the cases of many investors have claimed that the intervention of the state has been tantamount to expropriation (Article 1110).[[54]](#footnote-54)

Interestingly, virtually none of them allege that there was an outright nationalization or expropriation of property as we think about it historically, or as the NAFTA’s negotiators envisioned.[[55]](#footnote-55) Instead, most suits allege forms of discriminatory treatment in the application of regulatory measures imposed by states that have the effect of expropriating (taking) private property.[[56]](#footnote-56) Curiously, in the twenty years since the NAFTA came into force, there have been more than 45 Chapter 11 suits. Yet, until 2012, not a single dispute under the U.S. BIT program had been launched.[[57]](#footnote-57) Even more perplexing, the majority of the NAFTA suits are against countries (Canada and the United States) with established legal systems and stable systems of property protections.

The most contentious cases have been decided in favor of the state, [[58]](#footnote-58) and only a few have resulted in arbitral awards.[[59]](#footnote-59) However, with almost every new case, public interest and environmental organizations grew more concerned about the potential for the provisions of Chapter 11 to be used to challenge state regulatory control over safety and the environment; this in spite of explicit language within the Agreement to the contrary (Articles 1101 and 1114). Several cases became lightning rods for such criticism as private investors take advantage of the choice set created by Chapter 11's provisions to test limits of new rules governing private property rights.

Cases such as *Ethyl vs. Government of Canada*, *S.D. Myers vs Government of Canada*, or *Metalclad vs. United Mexican States* are all derided by environmentalists and others as a subversion of the state’s ability to regulate in the public interest. The most watched NAFTA chapter 11 case to date, *Methanex Corp. vs. United States*, was a case in point. Methanex Corporation, a Canadian marketer and distributor of methanol, claimed damages of $1 billion for alleged injuries resulting from a California ban on the use or sale of the gasoline additive MTBE that contains methanol as a key ingredient. Methanex contends that a California Executive Order and the regulations banning MTBE expropriated parts of its investments in the United States in violation of Article 1110, denied it fair and equitable treatment in accordance with international law in violation of Article 1105, and denied it national treatment in violation of Article 1102.[[60]](#footnote-60)

In each of these cases, the state seemed to hold its own. Indeed, the United States has been so successful defending itself that the Obama Administration was able to essentially tell the public to “relax” where investment in the Trans Pacific Partnership was concerned; nothing to worry about, we’ve never lost a case.[[61]](#footnote-61)

*NAFTA, U-Turns and Forks in the Road?*

In the absence of Chapter 11, Methanex would have little recourse but to pursue its claim through the U.S. court system or via “espousal.” The key question is why Methanex chose to pursue its Article 1110, 1105, and 1102 claims through the Chapter 11 rather than the domestic courts? Part of the answer rests in the differences in each of the NAFTA Party’s legal systems in defining terms like property and expropriation, and in the absence of a precise definition of these and others such as “tantamount to expropriation” within the NAFTA itself.[[62]](#footnote-62) United States jurisprudence on expropriation rests primarily on a body of case law derived from interpretations of the Fifth Amendment of the U.S. Constitution and the eminent domain clause, therein.[[63]](#footnote-63) Until the early twentieth century, the Fifth Amendment’s protection against direct takings (outright expropriation) was understood to apply only to circumstances of outright expropriation of property (ie. the government acquired title to the land). However, starting with the 1922 *Pennsylvania Coal Co. v. Mahon* case, the Supreme Court introduced the idea of a form of taking that was more regulatory in nature.[[64]](#footnote-64) Eventually, U.S. courts arrived at a kind of three-pronged test to determine whether regulatory changes rose to the level of expropriation as protected by the Fifth Amendment: 1) what was the government’s intent in setting the regulation 2) what was the extent of the economic impact and 3) was the investor’s expectation for his/her investment reasonable given the nature of the property. In practice, then, U.S. domestic standards regarding regulatory expropriation have held that regulatory taking in the public interest does not rise to the level of compensable expropriation, that the impact of a regulatory change needs to be substantial, and that the mere loss of opportunity by an investor because of a regulatory change can and should often be anticipated and therefore does not amount to regulatory expropriation.[[65]](#footnote-65) Hence, because U.S. legal practice has a long, well-defined history whereas Chapter 11 standards did not, the incentives for firms to test those ill-defined standards has been high.

Unfortunately, Chapter 11 of the NAFTA has no clear definitions or criteria for determining which measures rise to the level of expropriation, no deep body of jurisprudence through which definitions have emerged, and a clause in the Agreement (Article 1136 (1)) explicitly separating the cases from one another limiting the scope for the creation of precedent. Some of the only international case law providing guidance on these issues has emerged out of the Iran-United States Claims Tribunal, which adopted a fairly liberal approach to the meaning of takings, including regulations.[[66]](#footnote-66) For instance, the Tribunal ruled “liability exists whenever acts attributable to a state have deprived an alien owner of property rights of value to him, regardless of whether the state has thereby obtained anything of value to it.”[[67]](#footnote-67) In addition, the Tribunal has ruled, “liability is not affected by the fact that the state has acted for legitimate economic or social reasons and in accordance with its law.”[[68]](#footnote-68) Yet, while tribunals such as this have developed a set of liberal standards for expropriation, most of which go beyond U.S. domestic law, international law continues to be broadly biased in favor of the state rather than private investors.[[69]](#footnote-69) Critics of the NAFTA worry that within Chapter 11 proceedings, a similarly liberal definition of takings is emerging that threatens to go beyond domestic law in all three NAFTA countries. If the NAFTA somehow provided established new legal grounds for property rights claims beyond their traditional conception, and the institutional mechanisms to pursue them, the implications for governing, including regulation in the public interest, could be profound.[[70]](#footnote-70) Private foreign actors would have recourse to a set of legal mechanisms and standards of expropriation unavailable to domestic firms.[[71]](#footnote-71)

Two Chapter 11 cases, *Pope & Talbot v. Government of Canada* and *Metalclad v. United Mexican States*, offer some sense of where jurisprudence on Chapter 11 was headed that explains the subsequent nervousness regarding the *Methanex* case.[[72]](#footnote-72) The *Pope & Talbot* decision acknowledged “the exercise of police power needed to be analyzed with special care,” and it also concluded that “regulations can indeed be exercised in a way that would constitute creeping expropriation.”[[73]](#footnote-73) Further, the tribunal argued “much creeping expropriation could be done by regulation, and a blanket exception for regulatory measures would create a gaping hole in international protections against expropriation.”[[74]](#footnote-74) Although the panel went on to reject Pope & Talbot’s claim because the regulatory change imposed upon it was not substantial enough, the decision inserted the notion of creeping expropriation due to regulatory changes squarely into Chapter 11's body of jurisprudence, thus placing the standards for expropriation under the NAFTA near those of the United States.

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

Expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure of formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[[75]](#footnote-75)

By using the phrase “in whole or significant part” the *Metalclad* tribunal seemed to go one step beyond the “substantial” economic test put forward in *Pope & Talbot* and introduced a more expansive and subjective standard for expropriation, thus opening the door for a range of regulatory measures that even slightly infringe upon investment performance to be considered a form of expropriation, including the possibility of lost opportunity.[[76]](#footnote-76) This definition reaches beyond the standards for takings in any of the three NAFTA Party’s domestic legal systems, but not out of line with the approach taken by Iran-United States Claims Tribunal rulings.[[77]](#footnote-77)

If the *Methanex* tribunal had adopted this expansive definition of expropriation, it would have the practical effect of extending the protection from expropriation afforded to foreign investors beyond that offered to domestic investors by the U.S. legal system, which currently offers the strongest private property protections of the three NAFTA Parties.[[78]](#footnote-78) The Methanex case was closely watched because of the impact a win for Methanex may have had on the NAFTA, international law, and on domestic legal systems should foreign investors be accorded greater protection than that currently provided domestically.[[79]](#footnote-79) Methanex attempted to take advantage of the relative lack of definition in NAFTA jurisprudence to push its claim that California should be liable for opportunity costs due to regulatory changes; a claim that, if pursued through the U.S. court system, seemed likely to fail.

**Part III: Spreading Angst, Reconsideration, and the CETA Test Bed**

The early 1990s were periods of significant integration for both Europe and North America; European countries moving dramatically toward monetary union, North America starting with free trade. For some, Europe’s dramatic leap toward, and North America’s reticence about, deeper stages of integration signal a kind of divergence of views about deeper stages of integration.[[80]](#footnote-80) However, the early 1990s also saw parallel innovation in the regional application of investment rules that, in the late 1990s, began to generate controversy in North America, and would, in the early 2000s, generate similar angst in Europe.

Jan Paulson argues there were two extraordinary developments in investment protection treaties, both in 1994; one was NAFTA Chapter 11implemented in January, the other under the European *Energy Charter Treaty* in December. Paulson argues that Europe and North America entered precarious new territory with investment in that arbitration under these agreements wherein the claimant need not have a contractual relationship with the defendant and where the tables could not be turned: the defendant could not have initiated the arbitration and the right to file a counterclaim is ambiguous; arbitration without privity.[[81]](#footnote-81) In Paulson’s view, the NAFTA and *Energy Charter Treaty* amounted to a dramatic extension of arbitral jurisdiction allowing direct legal recourse by private parties over a wide range of issues.[[82]](#footnote-82)

This new approach to the resolution of international disputes offers the hope of sanctioning legal right in individual cases brought directly by the aggrieved party. It grants innumerable present and future investors the right to arbitrate a wide range of grievances arising from the actions of a large number of public authorities, whether or not any specific agreement has been concluded with the particular complainant, and so impels us to reconsider fundamental assumptions about the international legal process as it affects investors abroad.[[83]](#footnote-83)

Whereas the implications of the NAFTA arbitration “without privity” began to emerge with the first cases in the late 1990s, the implications under the *Energy Charter Treaty* did not fully materialize until 2009 when a Swedish power company, Vattenfall (often referred to as *Vattenfall I*), sued Germany over what the firm claimed were arbitrary restrictions placed on the development of a coal-fired power plant in Hamburg.[[84]](#footnote-84) That action was compounded with another Vattenfall suit (commonly referred to as *Vattenfall II*), this time in response to Germany’s decision to accelerate the closure of most of the country’s nuclear facilities after the Fukushima nuclear disaster.[[85]](#footnote-85)

The *Vattenfall* cases had the same galvanizing effect on civil society organizations in Europe that NAFTA Chapter 11 had on their counterparts in North America. However, in the European context, there was virtually no attention focused on the *Energy Charter Treaty* by these groups between the Charter’s completion in 1994 and *Vattenfall I* in 2009. For example, in 2007, Attac, a German NGO, produced a report chronicling its resistance activities focused on the G8, WTO, and neoliberalism generally. It notes the “success” achieved in the demise of the MAI talks in 1998, but does not focus on investment or investment disputes as a specific target of their work.[[86]](#footnote-86) Similarly, Campact, another European NGO, focused on critiques of neoliberalism and the institutions that support it, but didn’t focus on the “dangers” of ISDS until 2014,[[87]](#footnote-87) and then only retrospectively on the renewed attention brought to ISDS by a 2010 NAFTA case against Canada.[[88]](#footnote-88)

The point is that much like North American civil society groups, their European counterparts were not initially focused on investment or ISDS. The provisions of the *Energy Charter Treaty* were not especially worrisome until invoked by *Vattenfall*, wherein much like the NAFTA, those provisions involved a developed country multinational making a claim against another developed country government.

Civil society organizations like to claim credit for stopping the MAI, highlighting the dangers of NAFTA Chapter 11, and offering critiques no one had seen. However, governments on both sides of the Atlantic were already working on reforming investment rules. Throughout 2008 and 2009, Canada and the EU moved toward the official launch of what became the Comprehensive Economic and Trade Agreement (CETA). The CETA talks were always expected to be a protracted set of negotiations, in part because they were widely viewed as a means by which the EU sought to establish precedents for the launch of the much larger Trans-Atlantic Trade and Investment Partnership (TTIP) negotiationsin 2013.[[89]](#footnote-89) Yet, in the wake of *Vattenfall I* and *II*, the investment provisions of the CETA drew the white-hot focus of civil society, put additional pressure on European governments to address investment, and were singularly responsible to delaying the effective completion of the CETA talks until 2016, with approval by all European governments not expected for several more years.[[90]](#footnote-90) Even though the European Council has adopted a decision to sign the CETA on October 28, 2016[[91]](#footnote-91) and the European Parliament ratified the Agreement on February 15, 2017, the CETA may only be ‘provisionally applied’ in 2017. It will only enter into full force once all 28 EU Member States have ratified the Agreement.[[92]](#footnote-92)

Germany was arguably one of the key drivers in shaping the way in which the ISDS debate unfolded in the CETA and TTIP context. Surprising given its role and reputation in shaping the evolution of investment protection mechanisms. As already mentioned earlier, Germany was a party to the original BIT with Pakistan in 1959, and by 2014 was a party to 147 of them, the most of any EU country.[[93]](#footnote-93) Yet, in 2014, coincident with the first signs of popular opposition to the investment provisions of the CETA, Germany began having reservations.[[94]](#footnote-94) Then in July, in an interview with a Canadian journalist, the Deputy German Economy Minister, Stefan Kapferer made it explicit:

The German government does not view as necessary stipulations on investor protection, including on arbitration cases between investors and the state with states that guarantee a resilient legal system and sufficient legal protection from independent national courts.[[95]](#footnote-95)

Indeed, growing German and European reticence about ISDS were responsible for investment being excluded from TTIP negotiations after March 2014. One reading of this situation is that growing public angst—arguably driven exclusively by *Vattenfall*—prompted governments to re-think ISDS and to find a new approach to dealing with investment protection. Yet, the EU and the United States had already begun thinking seriously about the implications of the NAFTA and the *Energy Charter Treaty* and may have been converging toward a common approach toward investment.

In mid-2013, the European Union began formal TTIP negotiations with the United States. As part of the public consultation process, and due to the intensified interest in investment policy, the EU launched an online consultation specifically focused on investment. Public input focused squarely on the same issues raised by the experience with the NAFTA; the scope of investment protection, non-discriminatory treatment for investors, “fair and equitable” treatment, the definition of expropriation, ensuring the state’s right to regulate, transparency, relationship of ISDS to domestic law, the ethics and qualifications, limiting scope for frivolous cases, and prospects for an appellate mechanism.[[96]](#footnote-96)

In part due to the experience with several near-misses with Chapter 11 of the NAFTA, the United States embarked on a review of its BIT Model in 2003-2004, the first such review since 1994 when that Model BIT was essentially inserted into the NAFTA.[[97]](#footnote-97) The result was a new U.S. BIT model unveiled in 2004 which broadly “sought to reserve host state regulatory discretion by creating new exceptions to host state BIT obligations.”[[98]](#footnote-98) The 2004 BIT did this in three main ways:

1) reducing the discretion that investor-state arbitral tribunals could exercise; clarifying the meaning of key concepts such as “minimum standard of treatment,”[[99]](#footnote-99) “fair and equitable treatment,”[[100]](#footnote-100) the scope of indirect expropriation.[[101]](#footnote-101)

2) by taking issues away from the tribunals entirely; language that provides for a retroactive intervention by state Parties to short-circuit cases beyond the intended scope of the BIT.[[102]](#footnote-102)

3) discouraging the use of investor-state arbitration; language insisting upon local remedy exhaustion before being eligible for arbitration,[[103]](#footnote-103) a three-year statute of limitations,[[104]](#footnote-104) and far greater transparency, including the allowance of amicus submissions.[[105]](#footnote-105)

Moreover, the 2004 BIT provided for the prompt dismissal of frivolous claims,[[106]](#footnote-106) and the prospect for an appellate mechanism to review arbitral decisions.[[107]](#footnote-107) In 2009, the Obama Administration initiated another formal review of the U.S. BIT Model in response to perceptions that linguistic weaknesses remained.[[108]](#footnote-108) The sub-committee of the State Department’s Advisory Committee on International Economic Policy (ACIEP), charged with the review was aware of the *Vattenfall I* case, as well as tobacco giant Phillip-Morris’ 2011 attempt to sue Australia using the ISDS provisions of its 1993 Free Trade Agreement with Hong Kong.[[109]](#footnote-109) Yet, the review committee made no fundamental changes to the basic structure of ISDS in U.S. investment agreements in existence since prior to the NAFTA.[[110]](#footnote-110) In spite of the recommendations of the ACIEP, the Obama Administration determined that “ISDS should remain a cornerstone feature of the U.S. BIT model.”[[111]](#footnote-111) Defenders of investor-state arbitration continue to argue that the overarching principle behind these mechanisms is the solidification of the rule of law as “mutual commitments of good governance,” but “…do not and should not preclude host states from pursuing a wide range of legitimate policy objectives.” [[112]](#footnote-112)

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

When the text of the 12-nation TPP was released, in late 2015, Chapter 9 covering investment reads much like the 2004 BIT model; commitment to transparency (Art 9.23), amicus curiae submissions (Art 9.22.3), an admonition to seek a negotiated settlement (Art 9.17) a commitment on the part of state Parties to intervene to prevent frivolous ISDS suits (9.22.4), and the explicit assertion of the state right to legislate in the public interest (Art 9.9.3 and 9.15).[[113]](#footnote-113)

That there were no significant changes to the investment provisions of the TPP did not go unnoticed by critics.[[114]](#footnote-114) Yet the Obama White House defended the inclusion of ISDS along very traditional lines as critical to establishing and protecting the rule of law for American investment abroad.[[115]](#footnote-115) Moreover, the White House argued, the United States had never lost an ISDS suit that had been filed against it and the concerns flowing from other suits raised by critics--*Phillip Morris* and *Vattenfall* in particular—were not cause for concern.[[116]](#footnote-116)

While the United States is evidently comfortable with ISDS for now, the same cannot be said for European Union. Indeed, the EU demanded retroactive changes to the ISDS provisions of the text of their trade and investment agreement with Canada (CETA).[[117]](#footnote-117) Specifically, the CETA replaces investor-state arbitration with a state-centric form of dispute settlement anchored in the constitution of an investment Tribunal appointed by the CETA Joint Committee (government officials) to hear and resolve investment disputes.[[118]](#footnote-118) Moreover, the CETA creates provision for a state-to-state appellate process to review Tribunal decisions and entrenches a commitment to establish a multilateral institution for the resolution of investment disputes.[[119]](#footnote-119)

The changes to CETA have made their way into EU investment chapter proposals within the Trans-Atlantic Trade and Investment Partnership (TTIP) with the United States. Specifically, Sub-Section 4, Article 9 of the EU’s investment proposal posits the creation of an “Investment Court System” that includes a “Tribunal of First Instances” comprised of state-appointed judges that would hear claims and an appellate system (Article 10).[[120]](#footnote-120)

Hence, the United States and the EU have different views on dispute settlement in the context of investment protections, but they are also views that appeared to be converging as the two sides made progress on the TTIP. Although the U.S. accepted a state-to-state process in its 2005 agreement with Australia, subsequent reviews have reasserted traditional investor-state modes, including within the recently concluded TPP. The EU , on the other hand, has a clear preference for institutionalizing state-to-state adjudication.

While there is undoubtedly an interaction between government and stakeholders over investment, alarm bells over ISDS had been raised by the case histories of the NAFTA and Energy Charter Treaty themselves, not members of civil society. Indeed, the timing of the investment reviews initiated in the way of specific cases against the states (U.S. and Germany) is less a consequence of civil society pressure than it is a byproduct of the way in which governments were scrambling to defend cases launched against them. Public outrage over ISDS came only at the 11th hour, and largely after governments had already initiated processes to remedy perceived weaknesses.

**Conclusion**

The EU and U.S. experiences with investment rules have many parallels, starting with near-simultaneous innovations to investment rules contained in regional integration schemes; the Energy Charter Treaty and the North American Free Trade Agreement. The alarm bells set off by the investment provisions of these agreements rang nearly two decades apart, but centered on almost exactly the same issues; definitional debates over “expropriation” or “minimum standards of treatment,” concerns about ISDS in seemingly creating a parallel legal system for foreigners, and of course, preserving the state’s power to regulate in the public interest. Moreover, both the NAFTA and Energy Charter Treaty amounted to experiments in the application of investment rules to dyads of developed economies that for decades generated no controversy when applied as BITs to developing countries. The experiences on both sides of the Atlantic have many parallels. And, it would be easy to conclude that the EU and U.S. responses have generated divergent responses that would have created an impasse in the TTIP negotiations; the U.S. sticking with (a reformed) ISDS, the EU pushing for the institutionalization of an investment court system.

When ISDS in the NAFTA began generating anxieties, both governments and civil society took note. Those anxieties contributed to the civil society opposition to, and government divisions over, the Multilateral Agreement on Investment and its failure in 1998. However, the perceived weaknesses in the NAFTA were soon addressed by governments in the form of both a NAFTA Commission “interpretation” in July 2001 and then a major overhaul of the U.S. Model BIT in 2004, then incorporated into subsequent U.S. trade agreements. A similar experiential path began in Europe in 2009 with *Vattenfall I* would not necessarily have meant the demise of investment within TTIP in the same way that doomed the MAI. For one, the TTIP is far more than an investment agreement. However, the shock of the Energy Charter’s provisions being used by a developed country multinationals to challenge a developed state’s regulatory capacity did threaten Europe’s willingness to include ISDS in future agreements. In the midst of negotiations with Canada, heavy with precedent setting implications for future negotiations with the United States, Europe moved the goal-posts and pushed for linguistic changes to investment they hoped would address many of the same concerns confronted by the United States. Like the United States within the NAFTA, European governments similarly moved to rebalance the terms of investment in negotiated agreements. Indeed, that experience was over the same issues and initiated changes that have brought both sides of the Atlantic far closer to each other today than they were when the MAI collapsed in 1998.

**Table 1**

**U.S. Flows of Foreign Direct Investment, 2015**

(Millions of U.S. dollars)

Incoming FDI FDI Outflows

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

Source: U.S. Bureau of Economic Analysis

**Table 2**

**U.S. Flows of Foreign Direct Investment, 2015**

**BIT Countries**

(Millions of U.S. dollars)

Incoming FDI FDI Outflows

|  |  |
| --- | --- |
| Panama 2653  Poland 1456  Turkey 625  Uruguay 391  Trinidad and Tobago 175 | Egypt 23,326  Argentina 13,323  Trinidad and Tobago 7, 916  Panama 4, 075  Turkey 3, 661 |

Source: U.S. Bureau of Economic Analysis

**Table 3: U.S.-Canada and U.S.-Mexico Incoming Foreign Direct Investment (IFDI) and Foreign Direct Investment Outflows (OFDI) 1993-2013.**

**IFDI and OFDI for all industries in US Dollars in millions.**

|  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | **1993** | **1995** | **1997** | **1999** | **2001** | **2003** | **2005** | **2007** | **2009** | **2011** | **2013** |
| **U.S.-Canada IFDI** | 40.373 | 45.618 | 65.175 | 90.559 | 92.420 | 95.707 | 165.667 | 201.924 | 188.943 | 205.225 | 235.247 |
| **U.S.-Mexico IFDI** | 1.244 | 1.850 | 3.100 | 1.999 | 6.645 | 9.022 | 3.595 | 8.478 | 11.111 | 12.500 | 17.036 |
| **U.S.-Canada OFDI** | 69.922 | 83.498 | 96.626 | 119.590 | 152.601 | 187.953 | 231.836 | 250.642 | 274.807 | 330.041 | 390.172 |
| **U.S.-Mexico OFDI** | 15.221 | 16.873 | 24.050 | 37.151 | 52.544 | 56.851 | 73.687 | 91.046 | 84.047 | 85.599 | 102.418 |

**Table 4: NAFTA Area Incoming Foreign Direct Investment (IFDI) and Foreign Direct Investment Outflows (OFDI) 1993-2013.**

**IFDI and OFDI in US Dollars at current prices and current exchange rates in millions.**

|  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | **1993** | **1995** | **1997** | **1999** | **2001** | **2003** | **2005** | **2007** | **2009** | **2011** | **2013** |
| **NAFTA Area IFDI** | 59783.387 | 77553.072 | 127752.7398 | 322059.7702 | 217156.4291 | 79518.83546 | 155199.0041 | 365093.253 | 183982.4913 | 292907.2269 | 345959.8503 |
| **NAFTA Area OFDI** | 82838.969 | 103272.606 | 119942.5342 | 228539.0137 | 165305.7801 | 153529.6994 | 49381.45246 | 466401.4697 | 337105.7368 | 461353.1567 | 392017.3994 |

**Table 5: U.S.-Canada and U.S.-Mexico Incoming Foreign Direct Investment (IFDI) and Foreign Direct Investment Outflows (OFDI) 1993-2013.**

**Numbers presented represent the mean of the years listed.**

**IFDI and OFDI for all industries in US Dollars in millions.**

|  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | **1993/94** | **1995/96** | **1997/98** | **1999/00** | **2001/02** | **2003/04** | **2005/06** | **2007/08** | **2009/10** | **2011/12** | **2013** |
| **U.S.-Canada IFDI** | 40.796 | 50.227 | 68.936 | 102.434 | 92.475 | 110.492 | 165.474 | 185.335 | 190.703 | 212.524 | 235.247 |
| **U.S.-Mexico IFDI** | 1.657 | 1.746 | 2.578 | 4.731 | 7.237 | 8.307 | 4.453 | 8.449 | 11.041 | 13.059 | 17.036 |
| **U.S.-Canada OFDI** | 72.072 | 86.545 | 97.413 | 126.031 | 159.537 | 201.442 | 218.485 | 248.563 | 285.007 | 348.375 | 195.086 |
| **U.S.-Mexico OFDI** | 16.095 | 18.112 | 25.354 | 38.252 | 54.424 | 60.118 | 78.326 | 89.245 | 84.899 | 94.994 | 102.418 |

**Table 6: NAFTA Area Incoming Foreign Direct Investment (IFDI) and Foreign Direct Investment Outflows (OFDI) 1993-2013.**

**Numbers presented represent the mean of the years listed.**

**IFDI and OFDI in US Dollars at current prices and current exchange rates in millions.**

|  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | **1993/94** | **1995/96** | **1997/98** | **1999/00** | **2001/02** | **2003/04** | **2005/06** | **2007/08** | **2009/10** | **2011/12** | **2013** |
| **NAFTA Area IFDI** | 62027.5015 | 90413.6435 | 168873.4729 | 360582.4652 | 168902.437 | 120014.889 | 236805.5837 | 380810.9681 | 218257.457 | 260401.9379 | 345959.8503 |
| **NAFTA Area OFDI** | 83221.2375 | 100416.411 | 143329.8173 | 208103.1429 | 163957.6587 | 248106.682 | 162786.8282 | 427565.9308 | 332328.5236 | 424553.9806 | 392017.3994 |

**Table 7: U.S.-Canada and U.S.-Mexico Incoming Foreign Direct Investment (IFDI) and Foreign Direct Investment Outflows (OFDI) 1993-2013.**

**IFDI and OFDI for all industries in US Dollars in millions.**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Year** | **U.S.-Canada IFDI** | **U.S.-Mexico IFDI** | **U.S.-Canada OFDI** | **U.S.-Mexico OFDI** |
| **1993** | 40.373 | 1.244 | 69.922 | 15.221 |
| **1994** | 41.219 | 2.069 | 74.221 | 16.968 |
| **1995** | 45.618 | 1.850 | 83.498 | 16.873 |
| **1996** | 54.836 | 1.641 | 89.592 | 19.351 |
| **1997** | 65.175 | 3.100 | 96.626 | 24.050 |
| **1998** | 72.696 | 2.055 | 98.200 | 26.657 |
| **1999** | 90.559 | 1.999 | 119.590 | 37.151 |
| **2000** | 114.309 | 7.462 | 132.472 | 39.352 |
| **2001** | 92.420 | 6.645 | 152.601 | 52.544 |
| **2002** | 92.529 | 7.829 | 166.473 | 56.303 |
| **2003** | 95.707 | 9.022 | 187.953 | 56.851 |
| **2004** | 125.276 | 7.592 | 214.931 | 63.384 |
| **2005** | 165.667 | 3.595 | 231.836 | 73.687 |
| **2006** | 165.281 | 5.310 | 205.134 | 82.965 |
| **2007** | 201.924 | 8.478 | 250.642 | 91.046 |
| **2008** | 168.746 | 8.420 | 246.483 | 87.443 |
| **2009** | 188.943 | 11.111 | 274.807 | 84.047 |
| **2010** | 192.463 | 10.970 | 295.206 | 85.751 |
| **2011** | 205.225 | 12.500 | 330.041 | 85.599 |
| **2012** | 219.822 | 13.618 | 366.709 | 104.388 |
| **2013** | 235.247 | 17.036 | 390.172 | 102.418 |

**Table 8: NAFTA Area Incoming Foreign Direct Investment (IFDI) and Foreign Direct Investment Outflows (OFDI) 1993-2013.**

**IFDI and OFDI in US Dollars at current prices and current exchange rates in millions.**

|  |  |  |
| --- | --- | --- |
| **Year** | **NAFTA Area IFDI** | **NAFTA Area OFDI** |
| **1993** | 59783.387 | 82838.969 |
| **1994** | 64271.616 | 83603.506 |
| **1995** | 77553.072 | 103272.606 |
| **1996** | 103274.215 | 97560.216 |
| **1997** | 127752.7398 | 119942.5342 |
| **1998** | 209994.206 | 166717.1004 |
| **1999** | 322059.7702 | 228539.0137 |
| **2000** | 399105.1602 | 187667.272 |
| **2001** | 217156.4291 | 165305.7801 |
| **2002** | 120648.4449 | 162609.5373 |
| **2003** | 79518.83546 | 153529.6994 |
| **2004** | 160510.9426 | 342683.6647 |
| **2005** | 155199.0041 | 49381.45246 |
| **2006** | 318412.1632 | 276192.204 |
| **2007** | 365093.253 | 466401.4697 |
| **2008** | 396528.6831 | 388730.392 |
| **2009** | 183982.4913 | 337105.7368 |
| **2010** | 252532.4226 | 327551.3105 |
| **2011** | 292907.2269 | 461353.1567 |
| **2012** | 227896.6489 | 387754.8045 |
| **2013** | 345959.8503 | 392017.3994 |

**Appendix A**

**U.S. BIT Partner Countries**

(date of entry into force)

|  |  |
| --- | --- |
| Albania 1998  Argentina 1994  Armenia 1996  Azerbaijan 2001  Bahrain 2001  Bangladesh 1989  Bolivia 2001  Bulgaria 1994, Revised 2007  Cameroon 1989  Congo (Brazzaville) 1989  Congo (Kinshasa) 1994  Croatia 2001  Czech Republic 1992, Revised 2004  Ecuador 1997  Egypt 1992  Estonia 1997, Revised 2004  Georgia 1997  Grenada 1989  Honduras 2001 | Jamaica 1997  Jordan 2003  Kazakhstan 1994  Kyrgyzstan 1994  Latvia 1996, Revised 2004  Lithuania 2001, Revised 2004  Laos 2005  Moldova 1994  Mongolia 1997  Morocco 1991  Mozambique 2005  Panama 1991  Romania 1994, Revised 2007  Rwanda 2012  Senegal 1990  Slovakia 1992, Revised 2004  Sri Lanka 1993  Trinidad and Tobago 1996  Tunisia 1993  Turkey 1990  Ukraine 1996  Uruguay 2006 |

**Agreements Signed, But Not Yet Entered Into Force Since 1984 (BITs)**

Belarus 1994

El Salvador 1999

Nicaragua 1995

Russia 1992

Uzbekistan 1994

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

1. The claim that the TTIP will/would have multilateralized investment rules can be challenged—it's , of course, technically a bilateral negotiation between the EU (as represented by the Commission) and the United States. However, because the TTIP investment negotiations would have involved most of the same OECD countries that were at the table during the MAI negotiations in 1995-1998, and would likely have established a new global standard for these rules others (perhaps in the WTO) would have followed, we use the term multilateral in connection to the TTIP. [↑](#footnote-ref-1)
2. Specifically, NAFTA Chapter 11, Articles 1115-1138;*Energy Charter Treaty*, , Article 26. [↑](#footnote-ref-2)
3. See Edward M. Graham, *Fighting the Wrong Enemy: Antiglobal Activists and Multinational Enterprises*, (Washington, D.C.: Institute for International Economics, 2000), 3-7; Deborah L. Swenson, “Why Do Developing Countries Sign BITs,” *U.C. Davis Journal of International Law & Policy* 12 (2005-2006): 131-155; Jeswald Salacuse and Nicholas Sullivan, “Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain,” *Harvard Journal of International Law* 46 no.1 (Winter 2005): 67-130. [↑](#footnote-ref-3)
4. *OECD Investment News*, Issue 7, June 2008. [↑](#footnote-ref-4)
5. Ibid.; The World Bank, “FDI Trends,” *Public Policy for the Private Sector*, Note Number 273, September 2004. [↑](#footnote-ref-5)
6. Organization for Economic Cooperation and Development, “FDI in Figures,” April 2015. [↑](#footnote-ref-6)
7. See Appendix A. [↑](#footnote-ref-7)
8. See Bureau of Economic Analysis, U.S. Direct Investment Abroad and Foreign Direct Investment in the U.S. at http://www.bea.gov/international/ [↑](#footnote-ref-8)
9. See Kenneth Waltz, “Globalization and American Power,” *The National Interest* (Spring 2000): 46-56; Beth V. Yarbrough and Robert M. Yarbrough, “Cooperation in the Liberalization of International Trade: After Hegemony, What?,” *International Organization* 41(1)(Winter 1987):1-26; John Mearsheimer, “The False Promise of International Institutions,” *International Security* 19(3)(Winter 1994/95): 5-49. [↑](#footnote-ref-9)
10. See Earl Grinols and Robert Perrelli, “The WTO Impact on International Trade Disputes: An Event History Analysis,” *The Review of Economics and Statistics* 88 no. 4 (November 2006): 613-624. [↑](#footnote-ref-10)
11. United Nations Conference on Trade and Development, *World Investment Report, 2014*, (New York: UNCTAD, 2014), 124-126. [↑](#footnote-ref-11)
12. Linda C. Reif, “The Evolution of Foreign Direct Investment Law: From an Inter-State to a Transnational Dynamic,” in M. Irish, ed., *The Auto Pact: Investment, Labor, and the WTO*, (London: Kluwer Law International, 2004): 175-193; Jeswald Salacuse, “BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries,” *International Lawyer* 24 (1990):655 -675; Edward M. Graham, *Fighting the Wrong Enemy: Anti-Global Activists and Multinational Enterprises*, (Washington, D.C.: Institute for International Economics, 2000), 20-24. [↑](#footnote-ref-12)
13. United Nations Conference on Trade and Development, World Investment Report, 2014, 114. In 2001 only 8% of all BITs concluded were between developing countries, reflecting the relative lack of FDI flowing between them. [↑](#footnote-ref-13)
14. Salacuse and Sullivan, “Do BITs Really Work,” 79; Swenson, “Why Do Developing Countries Sign BITs?,” 131-155. [↑](#footnote-ref-14)
15. Swenson, “Why Do Developing Countries Sign BITs,” 131-155. [↑](#footnote-ref-15)
16. Stephen J. Canner, “The Multilateral Agreement on Investment,” *Cornell International Law Journal* 31 (1998): 657-681; Riyaz Dattu, “A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment,” *Fordham International Law Journal* 24 (2000): 275-316; Jurgen Kurtz, “A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment,” *University of Pennsylvania Journal of International Economic Law*,” 23, no. 4 (Winter 2002): 713-789. [↑](#footnote-ref-16)
17. See Aron Broches, *Selected Essays, World Bank, ICSID, and other Subjects of Public and Private International Law*, (London: Kluwer Academic Publishers, 1995), especially chapters 5-8. [↑](#footnote-ref-17)
18. Salacuse, “BIT by BIT,” 657. [↑](#footnote-ref-18)
19. Salacuse, “BIT by BIT,” 656; Vandevelde, 162. [↑](#footnote-ref-19)
20. See U.S. Department of State, Bureau of Economic and Business Affairs, for a listing of current U.S. BITs at ; U.S. Department of Commerce, Trade Compliance Centre, Bilateral Investment Treaties, at http://ttc.export.gov. [↑](#footnote-ref-20)
21. See ICSID Member States Database, <http://icsid.worldbank.org>. All three NAFTA parties have been more consistent members of the UNCITRAL Commission: United States, 1968-2016; Canada, 1989-1995, 2001-2019; Mexico, 1968-1980, 1983-2019. [↑](#footnote-ref-21)
22. See Edward Graham and Christopher Wilkie, “Multinationals and the Investment Provisions of the NAFTA,” *The International Trade Journal* 8, no. 1 (Spring 1994): 9-38. [↑](#footnote-ref-22)
23. Earl Fry, *The Politics of International Investment*, (New York: McGraw-Hill, Inc. 1983), 80-90; Michael Hart, Bill Dymond and Colin Robertson, *Decision at Midnight: Inside the Canada-U.S. Free Trade Negotiations,* (Vancouver: UBC Press, 1994), 16, 221-224; George Glover, “Canada’s Foreign Investment Review Act,” *Business Lawyer*, vol. 29, no. 3 (April 1974): 805-822; Carlos Salinas de Gortari, *Mexico: The Policy and Politics of Modernization* (Barcelona: Plaza & Janes Editores, 2002), 37-47, 394-491; Maxwell Cameron and Brian W. Tomlin*, The Making of the NAFTA: How the Deal was Done* (Ithaca: Cornell University Press, 2000), 40-42, 62-63. [↑](#footnote-ref-23)
24. Public Citizen, *Myths and Omissions: Unpacking Obama Administration Defense of Investor-State Corporate Privileges*, (Washington, D.C.: Public Citizen’s Global Trade Watch, 2014); see also See Joseph De Pencier, “Investment, Environment and Dispute Settlement: Arbitration Under NAFTA Chapter Eleven,” *Hastings International and Comparative Law Review* 23 (1999-2000): 409-419. [↑](#footnote-ref-24)
25. Source: Internet World Stats (<http://www.internetworldstats.com/emarketing.htm>) Accessed February 14, 2017. [↑](#footnote-ref-25)
26. Jagdish Bhagwati, “Coping with Antiglobalization: A Trilogy of Discontents,” *Foreign Affairs* 81 no. 1 (January/February 2002): 2-7 [↑](#footnote-ref-26)
27. David A. Jones, “The Polarizing Effect of New Media Messages,” *International Journal of Public Opinion Research* 14 (2002): 158-74. [↑](#footnote-ref-27)
28. Marco C. Yzer and Brian G. Southwell, “New Communication Technologies, Old Questions,” *American Behavioral Scientist* 52 no. 1 (September 2008):12-13. [↑](#footnote-ref-28)
29. Jerry W. Knudson, “Rebellion in Chiapas: Insurrection by Internet and Public Relations,” *Media, Culture, & Society* 20, no. 3 (1998): 507-518. [↑](#footnote-ref-29)
30. Jeffrey M. Ayres, “From the Streets to the Internet: The Cyber-Diffusion of Contention,” *The ANNALS of the American Academy of Political and Social Science* 566 (November 1999): 132-143. [↑](#footnote-ref-30)
31. Knudson, 508-509. [↑](#footnote-ref-31)
32. Ibid., 512. [↑](#footnote-ref-32)
33. Ayres, 140. [↑](#footnote-ref-33)
34. Knudson, 515-16. [↑](#footnote-ref-34)
35. See “Lori’s War, the Foreign Policy Interview,” *Foreign Policy* 118 (Spring 2000): 29-55; Jeffrey Schott, *The WTO After Seattle*, (Washington, D.C.: Institute for International Economics, 2000); Greg Anderson, “Did Canada Kill Fast Track?,” *Diplomatic History* 36, no. 3 (June 2012). [↑](#footnote-ref-35)
36. Ayres, 137-42. [↑](#footnote-ref-36)
37. Edward M. Graham, *Fighting the Wrong Enemy: Anti-Global Activists and Multinational Enterprises*, (Washington, D.C.: Institute for International Economics), 35-49. [↑](#footnote-ref-37)
38. Ibid., 132-143; Peter Van Aelst and Stefaan Walgrave, “New Media, New Movements? The Role of the Internet in Shaping the ‘Anti-Globalization” Movement,” *Information, Communication & Society* 5, no. 4 (2002): 465-493; see also Maude Barlow, *MAI : The Multilateral Agreement on Investment and the Threat to Canadian Sovereignty*, (Toronto: Stoddard, 1997). Edward Graham has convincingly argued that the MAI’s failure is more easily understood as a mix of factors of which pressure from NGOs was only a part. See Edward Graham, *Fighting the Wrong Enemy: Antiglobal Activists and Multinational Enterprises*, (Washington: Institute for International Economics, 2000), 10-20. [↑](#footnote-ref-38)
39. See Douglass Irwin, *Against the Tide*, (New Haven: Yale University Press, 1996). [↑](#footnote-ref-39)
40. See The Loewen Group and Raymond L Loewen v. United States of America, Statement of Claim, October 30, 1998. [↑](#footnote-ref-40)
41. White House, *North American Free Trade Agreement Implementation Act, Statement of Administrative Action*, November 4, 1993,152. [↑](#footnote-ref-41)
42. Courtney Kirkman, “Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105,” *Law and Policy in International Business* 34 (2002-2003): 343-392. [↑](#footnote-ref-42)
43. Katia Fach Gomez, “Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest,” *Fordham International Law Journal* 35 (2012): 510-564. [↑](#footnote-ref-43)
44. Alberto Alvarez-Jimenez, “The Methanex Final Award: An Analysis from the Perspectives of Environmental Regulatory Authorities and Foreign Investors,” *Journal of International Arbitration* 23 no. 5 (2006): 427-434l; Joseph de Pencier, “Investment, Environment and Dispute Settlement: Arbitration Under NAFTA Chapter Eleven,” Hasting International Comparative Law Review 23 (1999-2000): 409-419. [↑](#footnote-ref-44)
45. Stephen J. Canner, “The Multilateral Agreement on Investment, *Cornell International Law Journal*,” 31 (1998): 657-681; See also, Tony Clarke and Maude Barlow, *MAI: The Multilateral Agreement on Investment and the Threat to Canadian Sovereignty*, (Toronto: Stoddard Press, 1997). [↑](#footnote-ref-45)
46. See Public Citizen, *Myths and Omissions*, 1-35; Clarke and Barlow, *MAI*, 30-54. [↑](#footnote-ref-46)
47. Vandevelde, 160; Gabriel Egli, “Don’t Get Bit: Addressing ICSID’s Inconsistent Application of Most-Favored Nation Clauses to Dispute Resolution Provisions,” *Pepperdine Law Review* 34, no. 4 (2006-2007): 1050-51. [↑](#footnote-ref-47)
48. See NAFTA Article 1136 (b) and ICSID Additional Facility Rules, Article 57. In October 2000, *Metalclad vs. United Mexican States*, Metalclad petitioned the Supreme Court of British Columbia to have the arbitration decision against it overturned on the grounds that the tribunal had exceeded its jurisdiction under the Convention and that enforcing the award would be a violation of public policy. On February 8, 2001 Canada made a similar claim before a federal court in Ottawa over an arbitral award in its case with S.D. Myers Inc. See also, Clodfelter, “U.S. State Department,” 1279. [↑](#footnote-ref-48)
49. See Leon Trakman, “The Status of Investor-State Arbitration: Resolving Investment Disputes under the Trans Pacific Partnership,” *Journal of World Trade* 48, no. 1 (2014): 4-7; Government of Australia, “Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity,” April 2011: 14; see U.S. Department of State, *The New U.S. Model Bilateral Investment Treaty: A Public Interest Critique*, Advisory Committee on International Economic Policy (ACIEP), May 9, 2012. [↑](#footnote-ref-49)
50. Vandevelde, 175; Egli, 1057. [↑](#footnote-ref-50)
51. See Free Trade Commission Clarifications Related to Chapter 11, July 31, 2001. [↑](#footnote-ref-51)
52. *ADF Group vs. United States*, *Methanex Corp. vs. United States*, *S.D. Meyers vs. Government of Canada*, *Waste Management vs. United Mexican States*, *Metalclad vs. United Mexican States*. [↑](#footnote-ref-52)
53. *ADF Group vs. United States*, *Ethyl Corp vs. Government of Canada*, *S.D. Meyers vs. Government of Canada*, *Metalclad vs. United Mexican States*. [↑](#footnote-ref-53)
54. *Methanex Corp. vs. United States*, *Ethyl Corp. vs. Government of Canada*, *S.D. Meyers vs. Government of Canada*, *Waste Management vs. United Mexican States*, *Metalclad vs. United Mexican States*. [↑](#footnote-ref-54)
55. An exception here is *AbitibiBowater Inc. v. Government of Canada*, launched in April 2009. Abitibi, a U.S. forest products company, alleged that the Province of Newfoundland and Labrador directly expropriated the firm’s assets via provincial legislation. In 2010, Ottawa settled with AbitibiBowater for $C130 million. See also, Levy, “NAFTA’s Provision for Compensation,” 423-53. [↑](#footnote-ref-55)
56. One possible exception to this is *Metalclad vs. United Mexican States* in which Metalclad was forced to abandon an investment to operate a hazardous waste facility in Mexico. The divestiture of the facility was largely the result of a bureaucratic dispute between Mexican local and federal officials over permits for operation that the tribunal ruled was *tantamount to* expropriation, but not outright expropriation. The tribunal awarded Metalclad $16.7 million on August 30, 2000 only to have the award set aside by a British Columbia court. [↑](#footnote-ref-56)
57. In 2012, four separate cases were launched in connection with the Allen Sanford financial services ponzi scheme fraud, one each using the investment protection provisions of, respectively, the US-Uruguay BIT, US-Peru FTA, US-Chile FTA, and the CAFTA-DR. [↑](#footnote-ref-57)
58. For example, *ADF Group vs. United States*, *Loewen Group Inc. vs. United States*, *Mondev International Ltd. vs. United States*, *Azinian et al. vs. United Mexican States*, *Marvin Roy Feldman Karper (CEMSA) vs United Mexican States* (partial dismissal); *Methanex v. United States.* [↑](#footnote-ref-58)
59. Thus far, *Metalclad v. United Mexican States* ($16 million); *Pope & Talbot v. Government of Canada* ($461,000); *S.D. Meyers v. Government of Canada* ($6 million). A couple of others have been settled outside arbitral proceedings; *Ethyl Corporation v. Government of Canada*; *AbitibiBowater v. Government of Canada*. [↑](#footnote-ref-59)
60. See *Methanex Corporation v. United States*, Notice of Claim, December 3, 1999. [↑](#footnote-ref-60)
61. Jeffrey Zients, Director of the National Economic Council, “Investor-State Dispute Settlement Questions and Answers,” White House Blog, February 2015; Chris Evans, Office of the United States Trade Representative, Investor State Dispute Settlement, Fact Sheet, March 2015. [↑](#footnote-ref-61)
62. See NAFTA, Article 1110. [↑](#footnote-ref-62)
63. Jon A. Stanley, “Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence,” *Emory International Law Review* 15, no. 1 (2001): 353-54; Note that the legal battle over the 5th Amendment’s property protections and takings remains unsettled as a result of the U.S. Supreme Court decision in *Kelo v. City of New London* on June 23, 2005; See *The Economist*, “An American’s Home is Still Her Castle,” November 23, 2006. [↑](#footnote-ref-63)
64. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 1922. Prior to this, the U.S. Supreme Court had taken a *de jure* approach to the definition of takings (see *Mulger v Kansas*, 123 U.S. 623, 1887). With *Pennsylvania Coal v. Mahon*, the Court introduced the concept of *de facto,* or regulatory takings. [↑](#footnote-ref-64)
65. Stanley, “Keeping Big Brother,” 365-370. Note again the uncertainty over takings in the public interest that has been generated by *Kelo v. United States* (2005). [↑](#footnote-ref-65)
66. Formally named the *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims of the Government of the United States of America and the Government of the Islamic Republic of Iran* (Claims Settlement Declaration), 19, January 1981. See also, Clodfelter, “U.S. State Department,” 1273-1283. [↑](#footnote-ref-66)
67. George H. Aldrich, “What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal.” *The American Journal of International Law* 88, no. 4 (October 1994): 609. [↑](#footnote-ref-67)
68. Ibid., 590. [↑](#footnote-ref-68)
69. Stanley, “Keeping Big Brother Out,” 385-89. Chapter 11 jurisprudence has followed this same pattern to now with numerous tribunals ruling in favor of governments. [↑](#footnote-ref-69)
70. See De Pencier, “Investment, Environment and Dispute Settlement,” 409-419; Marisa Yee, “The Future of Environmental Regulation After Article 1110 of NAFTA,” *Hastings West-Northwest Journal of Environmental Law and Policy* 9, no. 1 (2002): 85-108. [↑](#footnote-ref-70)
71. Yee, “The Future of Environmental Regulation,” 85-108. [↑](#footnote-ref-71)
72. I would like to thank Danny Calhoun of Keating Muething & Klekamp PLL in Cincinnati, Ohio for his helpful insights into the *Methanex* case; see also Kirkman, “Fair and Equitable Treatment,” 343-392; Alberto Alvarez-Jimenez, “The Methanex Final Award: An Analysis from the Perspectives of Environmental Regulatory Authorities and Foreign Investors,” *Journal of International Arbitration* 23, no. 5 (2006): 427-434. [↑](#footnote-ref-72)
73. See *Interim Award by Arbitral Tribunal in the Matter of an Arbitration Under Chapter Eleven of the North American Free Trade Agreement Between Pope & Talbot and the Government of Canada,* June 26, 2000, 35. Available at http://www.dfait‑maeci.gc.ca/tna‑nac/documents/pubdoc7.pdf. [↑](#footnote-ref-73)
74. *Interim Award, Pope & Talbot v. Government of Canada*, 34. [↑](#footnote-ref-74)
75. *Award Between Metalclad Corporation and The United Mexican States*, ICSID Additional Facility, Case No. ARB(AF)/97/1 (August 30, 2000). Available at http://www.worldbank.org/icsid/cases/awards.htm. [↑](#footnote-ref-75)
76. See Stephen Fietta, “Expropriation and the ‘Fair and Equitable’ Standard,” *Journal of International Arbitration* 23, no. 5 (2006):375-399. Fietta argues that NAFTA tribunals have been inconsistent in their interpretation of “fair and equitable treatment” under Article 1131 and have not dealt with the link between “fair and equitable” treatment and “expropriation,” particularly where the legitimate expectations of the investor are concerned. [↑](#footnote-ref-76)
77. See Aldrich, “What Constitutes Compensable Taking,” 585-610. [↑](#footnote-ref-77)
78. Courtney Kirkman, “Fair and Equitable Treatment,” 343-392; Yee, “The Future of Environmental Regulation,” 85-108; Alvarez-Jimenez, “The Methanex Final Award,” 427-434. [↑](#footnote-ref-78)
79. Marisa Yee, “The Future of Environmental Regulation,” 85-108. [↑](#footnote-ref-79)
80. Robert Pastor, *Toward a North American Community* (Washington, D.C.: Institute for International Economics, 2001). [↑](#footnote-ref-80)
81. Jan Paulson, “Arbitration Without Privity,” *ICSID Review: Foreign Investment Law Journal* 10 No. 2 (Fall 1995): 232. [↑](#footnote-ref-81)
82. Ibid., 233. [↑](#footnote-ref-82)
83. Ibid. [↑](#footnote-ref-83)
84. Der Speigel, “Power Plant Battle Goes to International Arbitration,” July 15, 2009; Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (ICSID Case No. ARB/09/6) [↑](#footnote-ref-84)
85. Nathalie Benasconi-Osterwalder and Martin Dietrich Brach, “The State of Play in Vattenfall v. Germany II: Leaving the German Public in the Dark,” International Institute for Sustainable Development Briefing Note December 2014: 1-8; Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12). [↑](#footnote-ref-85)
86. Attac, “Globalisierung Geht Ganz Anders,” G 8 Broschüre, February 2007, 37-38, available at http://www.attac.de/archive/G8%20Heiligendamm/www.attac.de/heiligendamm07/media/text\_dl/material/G8-Reader-Online-eBook.pdf (last accessed March 21, 2017). [↑](#footnote-ref-86)
87. Attac, “International Press Release: European-wide protests against TTIP, CETA and TISA on October 11, 2014,” available at http://www.attac.at/presse/attacpresseaussendung/datum/2014/10/10/international-press-release-european-wide-protests-against-ttip-ceta-and-tisa-on-october-11-2014.html (last accessed February 19, 2015); Stop TTIP, “10 October 2015,” https://stop-ttip.org/10-oktober-2015/ (last accessed April 30, 2016).   [↑](#footnote-ref-87)
88. Jürgen Maier, “Investoren-Schiedsgerichte: Lobbying in Eigener Sache,” Campact, February 26, 2014, available at <https://blog.campact.de/2014/02/investoren-schiedsgerichte-lobbying-in-eigener-sache/> (last accessed March 15, 2017). AbitibiBowater Inc. v. Canada (ICSID Case No. UNCT/10/1), award rendered in December 2010. <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=UNCT/10/1>, Accessed March 10, 2017. [↑](#footnote-ref-88)
89. “A Running Start for U.S.-Europe Trade Pact,” *New York Times*, February 13, 2013; see also, President Obama, State of the Union Address, February 12, 2013, <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/remarks-president-state-union-address> Accessed March 10, 2017; Stefanie Rosskopf, “New Challenges for EU-Trade Policy-making: Why is the EU Pursuing a Comprehensive Economic and trade Agreement with Canada,” in The EU and the Eurozone Crisis- Policy Challenges and Strategic Choices, ed. Finn Laursen (Surrey, England/ Burlington, USA: Ashgate Publishing Limited/ Ashgate Publishing Company, 2013), 115. [↑](#footnote-ref-89)
90. Janyce McGregor, “EU Quietly Asks Canada to Rework Thorny Investment Clause,” CBC News, January 21, 2016, available at <http://www.cbc.ca/news/politics/canada-europe-trade-isds-ceta-1.3412943> (last accessed March 15, 2017); European Commission, “CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement,” News Release, February 29, 2016, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468> (last accessed March 15, 2017). [↑](#footnote-ref-90)
91. European Council, “EU-Canada Trade Agreement: Council Adopts Decision to Sign CETA,” Press Release, October 28, 2016, available at <http://www.consilium.europa.eu/en/press/press-releases/2016/10/28-eu-canada-trade-agreement/> (last accessed March 15, 2017). [↑](#footnote-ref-91)
92. European Commission, “European Commission Welcomes Parliament’s Support of Trade Deal with Canada,” Press Release, February 15, 2017, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1624> (last accessed March 15, 2017). [↑](#footnote-ref-92)
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