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**Investor-State Dispute Resolution as an Issue in
Transatlantic Trade Negotiations:
Lessons from NAFTA**

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Investor-State Dispute Resolution as an Issue in Transatlantic Trade Negotiations: Lessons from NAFTA

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Abstract

A major issue in the ongoing Transatlantic Trade and Investment Partnership (TTIP) negotiations is investor-state dispute resolution as it relates to foreign investments. The United States would like to have strong investor protections similar to those of the North American Free Trade Agreement (NAFTA) included in the TTIP agreement. Civil society groups on both sides of the Atlantic object to binding arbitration of investment disputes, fearing that arbitration awards could endanger environmental and other types of regulations. This paper examines the experience with investor-state dispute resolution under NAFTA to determine whether judgments rendered in these cases have had adverse effects.

One of the more contentious issues concerning the proposed Transatlantic Trade and Investment Partnership (TTIP) agreement is investor-state dispute resolution (ISDS). Prior to the North American Free Trade Agreement (NAFTA), investment issues had not been incorporated into international trade agreements but had been handled through bilateral investment treaties. In the NAFTA negotiations, both the United States and Canada wanted assurances of a more predictable and friendly investment climate in Mexico. Therefore, provisions were written into NAFTA's investment chapter (Chapter 11) providing that companies could bring suit against the federal governments of the member countries for damages resulting from actions by any level of government that impaired foreign investments made by firms of a member country. Most subsequent trade agreements of the United States,¹ and those of several other countries as well, have contained such provisions. This paper surveys the 21-year experience with NAFTA's investor-state dispute resolution procedures to see what lessons can be learned from that experience that might be helpful for the TTIP negotiations.

Background of the Investment Provisions of NAFTA

Adequate protection of investment in Mexico was high on the priority list of both the United States and Canada during the NAFTA negotiations. Investment issues had in the twentieth century been particularly sensitive in Mexico. Resentment of foreign ownership fueled the Mexican revolution in the first part of the 20th century and led to the nationalization of the petroleum and some other industries. As recently as 1980, Mexico declined membership in the General Agreement on Tariffs and Trade for fear that GATT rules would interfere with Mexico's industrial policies. Mexico, like most Latin American countries, adhered throughout most of the 20th century to the principles of the Calvo Doctrine. This doctrine provided that foreigners involved in investment disputes could not claim the diplomatic protection of their own

¹ The US-Australia free trade agreement of 2004 is an exception.

government and instead would have their claims adjudicated by local tribunals. The Mexican Constitution provided that a foreign investor attempting to invoke diplomatic protection of their property would thereby surrender the property to the Mexican state. Mexico refused to sign bilateral investment treaties having dispute settlement mechanisms that would take adjudication away from local tribunals.

During the period of high petroleum prices of the 1970s, Mexico became dependent upon petroleum exports for seventy per cent of its export earnings. Despite inflated export earnings during this period, Mexico also was borrowing heavily abroad. Shortly before leaving office in 1982, Mexican President Lopez Portillo nationalized Mexico's banks, causing capital flight from Mexico and a reduced inflow of foreign investment. These effects, combined with a dramatic decline in export earnings from the plummeting price of petroleum, created a payments crisis for Mexico in the early 1980s. The country faced the alternative of either defaulting on international obligations or changing its import substitution model to a more export-oriented development model that would bring in more foreign exchange. It chose the latter.

As part of this policy change, Mexico began in 1985 to implement a remarkable unilateral trade and investment liberalization program. It dramatically reduced import tariff levels, abolished official import reference prices, reduced import licensing requirements, and liberalized foreign investment regulations. Mexico became a contracting party to GATT in 1986, and signed a framework of principles and procedures for consultation regarding trade and investment relations with the United States in 1987. On a visit to the United States in 1989, President Carlos Salinas de Gortari signed with President George Bush a new Understanding Regarding Trade and Investment Facilitation Talks agreement.

Mexico had hoped, through its economic reform program, to attract more foreign investment to help fund its economic development efforts. It courted potential Japanese investors without much success. Western Europe, which had been considered by Mexico a promising source of investment, had become distracted by investment opportunities to the east after the collapse of the Soviet Union and subsequent changes in Eastern Europe. The Mexican administration decided in early 1990 that attracting foreign capital would require a strong signal to the world economy that Mexican economic reforms were genuine and permanent. Asking for a free trade agreement with the United States was the most obvious choice.

NAFTA's Investment Provisions

Because of Mexico's past investment policies, the investment provisions negotiated in NAFTA were extensive and stringent (although each of the NAFTA countries insisted on some exclusions and derogations that are spelled out in the agreement). As in the case of most investment agreements, member countries agreed to accord investors from other member countries national treatment, i.e., treatment that does not in any way disadvantage foreign firms relative to domestic firms in the same industry. Further, NAFTA-country firms were entitled to most favored nation treatment, i.e., treatment as favorable as that accorded to any other foreign firm in like circumstances. Should the treatment of foreign firms and domestic firms differ for some reason, then the NAFTA member countries agreed to extend to NAFTA partner country investors the better of national treatment or most favored nation treatment. (McKinney 2000)

NAFTA-country investors were also to be accorded the minimum standard of treatment in accordance with international law, that is, "fair and equitable treatment and full protection and security." (NAFTA 1992) This provision is included in investment agreements to guard against substandard treatment that would not be ruled out by national treatment or most favored nation treatment, for example, when domestic and foreign firms are both treated poorly. In the early investment disputes arising under Chapter 11, this provision was used in novel ways to contest alleged non-transparency of governmental processes and inconsistencies in the rulings of the agencies of different levels of government. Consequently, on July 31, 2001 the North American Free Trade Commission issued a binding Note of Interpretation to clarify the parties' original intent in including this provision. (Free Trade Commission 2001) A summary of the US position on the issue mentions that the provision refers to such matters as providing investments with "...a

minimum level of police protection against criminal conduct” and that States “... grant aliens access to their courts and administer their judicial systems in a manner consistent with international law.” (Thornton 2012)

In addition to the investment protections listed above, Chapter 11 of NAFTA enjoins certain actions of member countries with respect to partner country investors. In general, it forbids governments from requiring foreign firms to export a portion of their output or to engage in trade balancing. Also, foreign firms cannot be required to use a certain percentage of local content or to give preference to domestic sourcing. Likewise, foreign investors cannot be required to transfer technology as a condition of foreign investment. Member country governments must not restrict conversion of the local currency at prevailing market rates and must allow repatriation of profits. Partner country firms must not have their property expropriated, either directly or indirectly, without fair compensation.

A particularly contentious provision of Chapter 11 is Article 1110 dealing with expropriation and compensation.² The article prohibits not only direct expropriation without adequate compensation, but also indirect expropriation, i.e., measures “...tantamount to nationalization or expropriation...” (NAFTA 1992) Companies have argued that actions of government such as changes in environmental regulations have, by reducing the profits that they expected to earn when the foreign investment was initially made, amounted to indirect expropriation of their property. This has been viewed as a possible threat to the regulatory prerogatives of governmental agencies, or at least to have a chilling effect on the strengthening of regulations, because of the possibility of having to compensate corporations claiming damages from the effects of regulatory changes.

Arbitration of Investment Disputes

The investment chapter of NAFTA is the only part of the agreement that provides direct private party access to dispute settlement via binding arbitration. According to the provisions for investor-state dispute settlement as spelled out in the chapter, aggrieved parties are required first to try settling the dispute through consultation and negotiation. If that process is not successful, the investor is required to give notice of intent to ask for an arbitral panel at least ninety days ahead of doing so. The member countries have agreed to submit unresolved disputes to binding arbitration. As a condition of submitting the dispute to an arbitral panel, the aggrieved party must agree in writing to waive the right to pursue the matter through other avenues after it has requested panel arbitration. It is noteworthy, however, that this waiver provision has not always been enforced.

For an investment case to be eligible for panel arbitration, the investor must file the case within three years of the alleged infringement of the NAFTA agreement terms, and must claim to have suffered direct loss or damage as a result of the infringement.

The arbitration panel consists of three persons. Each of the disputing parties appoints one arbitrator, while the third, who serves as chair of the panel, is appointed by mutual agreement of the parties. The decision

² Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6. (NAFTA 1994)

rendered by an arbitral panel is automatically enforceable in the domestic courts of the country involved. (McKinney 2000)

No transparency requirements are specified in NAFTA concerning Chapter 11 cases, and consequently information about them was at first difficult for the public to obtain. Theoretically, governments could have settled disputes and compensated the complaining parties without any public notification. This lack of transparency proved to be quite controversial, so in its Notes of Interpretation of Certain Chapter 11 Provisions on July 31, 2001 the Free Trade Commission made clear that there was "...no general duty of confidentiality..." and further stated that each country would "...make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal..." except for confidential business information or privileged information protected by domestic law of either country. (NAFTA Free Trade Commission 2001) Consequently, information about the investor-state dispute settlement cases of NAFTA is generally available to the public.

In cases that proceed to arbitration, the complaining party may choose to have the dispute settled according to either the World Bank's International Council for the Settlement of Investment Disputes Convention (ICSID), the Additional Facility Rules of the ICSID, or the United Nations Commission on International Trade Law Arbitration Law Arbitration Rules (UNCITRAL). Since neither Canada nor Mexico has subscribed to the ICSID Convention, in effect the choice is between the Additional Facility Rules of the ICSID and UNCITRAL. The NAFTA Secretariat plays a very limited role in the process, simply maintaining a register of Notices of Arbitration and holding some documents for the record. (Bogule and Alston 1999)

NAFTA Chapter 11 Cases and Claims Against the United States

As can be seen in Tables 1 and 2, during the twenty-one years that NAFTA has been in effect, 21 cases have been filed against the United States, an average of one per year. Of these cases, 11 have been taken to arbitration and two are pending. Ten of the cases taken to arbitration were dismissed (that is, the arbitrators ruled against the claimants). Even though damages in the amount of \$2,996 million were claimed, no damages have been paid by the US government. The eleventh case was part of a multifaceted softwood lumber case that was being pursued in other venues through NAFTA and World Trade Organization trade remedy provisions. The case was eventually settled by a new Softwood Lumber Agreement that specified rules for softwood lumber trade between the US and Canada for several years, and provided that most of the antidumping and countervailing duties inappropriately collected by US customs authorities from Canadian lumber producers would be returned to them.

Table 1
NAFTA Cases and Claims against United States

Cases Filed	Cases Taken to Arbitration	Cases Pending	Cases Dismissed	Cases Damages Paid
21	11	2	10	0

Table 2
For Cases against United States Taken to Arbitration

Damages Claimed	Damages Awarded
\$2,996 million	\$0

Source: Calculated by author from information in (Public Citizen, 2015)

Of the two pending cases against the United States, in one of them the Mexican trucker’s association CANARA is claiming damages of \$30 billion from the failure of the US to allow Mexican truckers nationwide access as agreed in NAFTA. This case is likely to be dismissed by the arbitrators because the only investment in the US claimed by those filing the case is certification fees paid to the Federal Motor Carrier Safety Administration. The case is simply an additional way of putting pressure on the US government to live up to terms agreed in NAFTA for trucking access to the US market. The claimant in the other pending case is Mexican cement company CEMEX, which is involved in a lawsuit with the state of Texas for alleged failure to pay royalties on minerals extracted from state-owned land. This case was filed by CEMEX in hopes of indemnifying itself against possible losses in the lawsuit (Public Citizen 2015).

NAFTA Chapter 11 Cases and Claims Against the Canada

As can be seen in Tables 3 and 4, considerably more Chapter 11 cases have been filed against Canada than against the United States, a total of 36. Of these, 11 have been taken to arbitration and 9 are pending. Of the cases taken to arbitration, 4 have been dismissed and damages have been paid in 6 others. A total of \$169.4 million in damages have been paid by the Canadian government, about 9% of the \$1,877.1 million of damages claimed.

Table 3

NAFTA Cases and Claims against Canada

Cases Filed	Cases Taken to Arbitration	Cases Pending	Cases Dismissed	Cases Damages Paid
36	11	9	4	6

Table 4

For Cases against Canada Taken to Arbitration

Damages Claimed	Damages Awarded
\$1,877.1 million	\$169.4 million

Source: Calculated by author from information in (Public Citizen 2015)

The earliest case in which Canada paid damages was filed by Ethyl Corporation asking for \$250 million for damages and compensation arising from a Canadian trade restriction banning the importation of MMT (methylcyclopentadienyl manganese tricarbonyl), an octane enhancer that is added to gasoline. MMT was not being produced in Canada, but substitute products were. Ethyl Corporation contended that the ban on MMT discriminated against the company in favor of producers of substitute products, and therefore violated Chapter 11’s most favored nation provisions. Ethyl also claimed that since banning the

additive reduced its business in Canada by about 50%, the effects on its goodwill, assets and expected earnings were the equivalent of indirect expropriation. (Public Citizen 1999)

One of the ingredients in MMT is manganese, and studies have indicated that manganese poisoning can cause serious neurological problems. Since no studies had been conducted specifically on the health effects of MMT, the use of MMT could not be banned under Canadian environmental laws. Because MMT was not produced in Canada, the Canadian government attempted to deal with the possible health risk by banning the importation and inter-provincial trade of MMT. Ethyl claimed that the ban constituted an illegal performance requirement in that it would force the company to build a factory in every Canadian province in order to service the market. (Public Citizen 1999)

This case was never ruled on by the arbitration panel, but was settled out of court. In the final settlement of the case, the Canadian government withdrew the legislation that banned imports of MMT, wrote a letter stating that MMT had no proven adverse effects on the environment or on public health, and paid Ethyl Corporation \$13 million. It is noteworthy that, through a combination of legal and voluntary restrictions, MMT has been eliminated from gasoline in the US and Canada because of public health concerns. (Minjares 2012).

A second case in which the Canadian government paid damages was filed by S. D. Myers, Inc., a toxic waste disposal company in Ohio, which claimed losses of \$30 million from an export ban imposed by the Canadian government on PCB (polychlorinated biphenyl) waste from 1995 to 1997. The ban reportedly was imposed by the Canadian government out of concern that PCBs might end up in less developed countries where they could not be disposed of properly, and also that disposal standards of United States companies were substandard. S.D. Myers claimed that the action was taken because it was not a Canadian company, and that the export ban prevented the company from operating in the same way that a Canadian company could have operated. It claimed further that the regulation was unfair and discriminatory, and that the losses suffered from disruption of its operations amounted to indirect expropriation. An unusual aspect of this case is that, while it was filed under the terms of NAFTA's investment chapter, S.D. Myers had no investment in Canada at the time that the alleged actions took place. Furthermore, at the time that the case was filed, S.D. Myers would not have been permitted to import PCBs into the United States because their importation was banned by the United States Environmental Protection Agency as of July 1997. (Public Citizen 1999)

A third case in which the Canadian government paid damages of \$0.5 million was filed by Pope and Talbot, Inc., a US timber company that is based in Oregon but operates sawmills in British Columbia. Pope and Talbot claimed damages of \$130 million for the way in which the Canada-United States Softwood Lumber Agreement was implemented. The company claimed that its export quotas under which it could export lumber duty free were cut disproportionately as compared to other producers. While the arbitrators ruled against the company on the merits of the case, they awarded a small amount of damages because the Canadian government had treated the company rudely in their attempts to verify the company's compliance with the agreement, and therefore had violated NAFTA's provision for a minimum standard of treatment of foreign investors. (Public Citizen 2015)

The fourth case against Canada in which damages were assessed was filed by Mobil Investments and Murphy Oil. These firms challenged new regulations, issued after their investments were made in Newfoundland and Labrador oil fields that required oil extraction firms to pay fees to support research and development in Newfoundland and Labrador. The arbitration panel ruled in favor of the companies, saying that the new rules amounted to a prohibited performance requirement, and awarded the companies \$13.7 million plus interest of the \$60 million of damages claimed.

The fifth case in which the Canadian government paid damages was filed by Abitibi-Bowater, Inc., a paper-producing company. This case is unusual in that the company is actually headquartered in Canada, but is also incorporated in Delaware and filed as a foreign investor on those grounds. The company charged that the government of Newfoundland and Labrador had expropriated its water and timber rights, and its equipment, after it shut down a paper mill that had employed 800 workers. The provincial government

argued that the rights were contingent on continued operation of the plant. The government of Canada agreed to pay Abiti-Bowater \$122 million of the claimed \$465.7 in damages to settle the case. (Public Citizen 2015)

The final case in which the Canadian government paid compensation was filed by St. Mary’s VCNA, a Brazilian company with a subsidiary in the US that owns a Canadian subsidiary. The company was seeking to conduct rock quarrying operations in Canada, and claimed \$275 million in damages from delays in the permitting process by subfederal government agencies in Canada. There was some question about the validity of the company’s use of NAFTA provisions in view of its minimal business activities in the US. Nevertheless, the government of Canada agreed to settle the case by paying the company \$15 million dollars. (Public Citizen 2015)

Nine cases are pending against Canada, almost as many as the total number either dismissed or for which Canada paid damages. These cases involve a variety of issues: an American mining company is claiming damages arising Canada’s environmental regulations that limit its mining in Nova Scotia; the owner of a major international bridge is claiming damages from a Canadian law that imposes safety and security measures on international bridges; a US-based energy company is challenging the buy local provisions of an Ontario province green jobs program; a US-based wood pulp company is claiming discrimination by the government of British Columbia in the setting of electricity rates; a US-based energy company is protesting its inability to participate in Ontario’s green energy program; a US-based pharmaceutical company is challenging Canada’s patent standards; a US-based oil and gas exploration and production company is challenging the province of Quebec’s moratorium on the practice of hydraulic fracturing; a group of US investors who own a logging company in Canada are claiming discrimination because of exclusion from a tax break that the province of Ontario extends to Canadian firms engaging in sustainable harvesting; and a US-based oil corporation is seeking damages for the requirement that oil producing firms in Newfoundland and Labrador contribute to research and development funds (the same issue as in the Mobil Investments and Murphy Oil case discussed above.) (Public Citizen 2015)

NAFTA Chapter 11 Cases and Claims Against the Mexico

As can be seen in Tables 5 and 6, a total of 22 Chapter 11 cases have been filed against Mexico. Of these, 11 have been taken to arbitration, and two are pending. Six of the cases taken to arbitration have been dismissed, while damages have been paid in 5 of them. The \$189 million of total damages paid amount to about 13% of the \$1,441 million in damages claimed.

Table 5
NAFTA Cases and Claims against Mexico

Cases Filed	Cases Taken to Arbitration	Cases Pending	Cases Dismissed	Cases Damages Paid
22	11	2	6	5

Table 6
For Cases against Mexico Taken to Arbitration

Damages Claimed	Damages Awarded
\$1,441 million	\$189 million

Source: Calculated by author from information in (Public Citizen, 2015)

In the first case in which Mexico paid damages, Metalclad Corporation sought \$90 million in damages because Mexican state and local governments prevented Metalclad's re-opening a hazardous waste landfill that it had purchased in the community of Guadalucazar in the state of San Luis Potosi. After Metalclad had invested in the facility, the government reportedly discovered that the landfill had the potential to damage underground streams and, consequently, declared the area an environmental zone and refused to allow the landfill to be re-opened. Metalclad claimed that the change in zoning was equivalent to expropriation or indirect expropriation of their property. (Public Citizen 1999) Metalclad was awarded \$16.2 million in damages, the award was upheld by a British Columbia court in May 2001, and Mexico's Economy Ministry paid the compensation in October 2001. (BRIDGES 2001) The arbitrators' decision in this case has been criticized as placing on the Mexican federal government an obligation to ensure consistency in the advice given by authorities at different levels of government in Mexico. (Public Citizen 2015)

A second case in which damages were assessed involved Feldman Karpa, a US cigarette exporter, who claimed discrimination because the Mexican government had refused to give an export tax rebate that had been extended to Mexican firms. The panel awarded \$1.9 million of the \$50 million of damages claimed. (Public Citizen 2015)

The other three cases in which the Mexican government paid damages all dealt with the same issue. The first was filed by Corn Products International, a producer of high fructose corn syrup, claiming damages of \$325 million from a tax imposed on beverages sweetened with high fructose corn syrup but not those sweetened by cane sugar. Mexico claimed that the tax was a countermeasure to US failure to open its market to cane sugar as agreed in NAFTA. The arbitration panel ruled that such countermeasures were not applicable to investor-state disputes, and that beverages sweetened by cane sugar and with high fructose corn syrup were close substitutes for each other. They therefore awarded \$58.4 million in damages. In separate cases dealing with the same issue, Archer Daniels Midland was awarded \$37 million of a claimed \$100 million in damages, and Cargill Corporation was awarded \$90.7 million of \$100 million of claimed damages. (Public Interest 2015) It is curious that these cases were not consolidated since they dealt with exactly the same issue, and that the awards ranged from 18% of the damages claimed in the Corn Products International case to 91% in the Cargill Corporation case.

The two pending cases against Mexico involve a US defense and energy contractor claiming damages in a dispute with Mexico's national oil company, PEMEX, and a group of US investors claiming interference of the Mexican government by its forcing closure of casinos in which they have a business interest. (Public Interest 2015)

Lessons for the TTIP Negotiations from NAFTA Experience with ISDS

A major concern to those opposed to the inclusion of investor-state dispute resolution in trade agreements is that, in an effort to improve the certainty of investment decisions for corporations, the procedure may increase uncertainty for regulators and administrative agencies charged with protecting the public interest. The notion that a change in a government regulation which reduces the expected profits of a corporation can be considered "tantamount to expropriation" has been particularly controversial. The specter of governments being assessed large sums to compensate corporations for having changed regulations to protect the public interest has caused considerable angst. Civil society groups, particularly in Western Europe but also to a lesser degree in the United States, have for this reason been outspoken opponents of including ISDS provisions in the TTIP agreement.

The experience with ISDS cases under NAFTA should provide some comfort to those who are concerned about this issue. Based on the 21-year experience with NAFTA, only an average of one case per

year has been filed against the United States. Of these, 11 have been taken to arbitration, and the US government has not been required to pay a single dollar in damages. Surprisingly, Canada has been the target of considerably more cases (36 in total,) of which 11 have proceeded to arbitration. In 6 of these cases Canada has paid damages totaling \$169.4 million, about 9% of the damages that claimants were seeking. A total of 22 cases have been filed against Mexico, one-half of which have proceeded to arbitration. Damages awarded have amounted to \$189 million, about 13% of the \$1.441 damages claimed.

In the NAFTA cases for which damages have been awarded, only three of them have claimed indirect expropriation of property. A total of four cases have challenged environmental regulations of the countries involved. In only one case, that of Ethyl Corporation's case against Canada, was there a possible weakening of an environmental regulation, and a combination of legal and voluntary restrictions on the use of the chemical in question have successfully eliminated its use. Two of the cases pending against Canada claim damages from changes in environmental regulations—one of them from regulations protecting endangered species in Nova Scotia, and the other from Quebec's placing a moratorium on hydraulic fracturing for oil production until the environmental effects of the practice can be studied in more detail. (Public Interest, 2015) Neither of these cases is likely to cause a change in environmental regulations in Canada, and their prospects for claiming damages are far from certain.

In the context of the massive trade and investment that occur among the countries of North America, the number of claims and the damages paid have been relatively insignificant. It is true that, worldwide, ISDS cases have increased significantly in recent years (Economist, 2015), but so has foreign investment and the number of increased cases is proportional to the increased investment (Miller and Hicks 2015). The number of ISDS cases arising from trade agreement provisions is dwarfed by those arising from the many bilateral investment treaties in existence, and by the number of investment disputes that are litigated in national courts. (Weisman 2015)

Conclusion

Some of the ISDS cases have raised fundamental questions concerning the appropriate relationship between trade policy and environmental policy, and also about how to provide legitimate protection of property rights to foreign investors while at the same time protecting the right of a sovereign state to make and enforce policies regulation what goes on within its borders. Since the ISDS provisions have been so controversial, it can reasonably be asked whether they could not be made less controversial.

The objection is sometimes raised that ISDS provisions extend protections to foreign investors that are superior to those enjoyed by domestic investors, and to an extent that is true. The rationale for this treatment is that foreign firms are often at a disadvantage in host country courts. Foreign investors need an extra measure of assurance that they will be treated objectively and fairly. And while commercial insurance is available for insuring against political risk, its coverage is not as complete as that afforded by ISDS arbitration.

Steps are beginning to be taken to address the concerns raised about ISDS arbitration. On the matter of transparency in ISDS cases, the United Nations Commission on International Trade Law adopted Rules of Transparency on 11 July 2013 to go into effect as of 1 April 2014. In December of 2014, the Commission adopted the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration and invited interested countries to sign the Convention. (United Nations 2015)

Recent free trade agreements are taking steps to address other concerns. For example, the Korea-Australia free trade agreement states in Annex 11-B:5 that "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations," and in Annex 11-E that "Within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered..." (KAFTA 2014) If the loophole "except in rare circumstances" were

eliminated and the remainder of the statement in Annex 11-B-5 included in the TTIP, this would go a long way toward allaying the fears of those concerning about the threat to domestic regulations from ISDS decisions. And an appellate body such as that envisioned in Annex 11-E would be useful to reconcile conflicting decisions on similar issues by different arbitral panels, or to correct mistakes of arbitral panels.

By addressing these concerns: transparency, threat to domestic regulations, and the need for appellate review, the TTIP agreement has the opportunity to preserve the benefits of ISDS arbitration while guarding against unintended costs.

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