Regulatory Flexibility under NAFTA, AUSFTA and TPP

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US is a latecomer to the BIT movement

Strong supporter of ISDS both to replace espousal and to expand respect for customary international law protecting foreign investment

NAFTA was a transformative experience, with the US Government acting as a Respondent for the first time in ISDS, on multiple occasions

BITs were seldom controversial but ISDS in trade agreements has been caught up in broader debates among proponents and opponents of trade agreements
Diplomatic Protection and its Discontents

- Pre-1980 investor-state disputes were resolved, if at all, through formal or informal espousal
- US government negotiated settlements, as in Peru and Ecuador, on a case by case basis
- Threats of sanctions (e.g., Hickenlooper Amendment) forced disputes to dominate bilateral (and often multilateral) relations
- State Department lawyers often decided whether investor claims were valid and became captive advocates
U.S. Embraces BITs, 1983-2000

- Reagan, Bush I and Clinton Administrations concluded more than 40 BITs, all with ISDS
- Process evolved over the negotiation of multiple model BITs, mostly with minor changes from one to the next
- Other parties were developing, mostly small, developing countries where the risk of reciprocal actions against the US government was small or nil
The NAFTA Chapter 11 Experience

- NAFTA negotiators apparently assumed that the vast majority of ISDS cases would be by U.S. and Canadian investors against the Mexican government.
- Chapter 11 was an integral part of an agreement designed to encourage regional trade and greater investment in Mexico.
- With some variation, Chapter 11 followed earlier model BIT and built on 1980s BIT negotiating experience.
- Convincing Mexico, long an advocate of the Calvo Clause, to accept ISDS was considered a major victor by U.S. government officials.
For government or private lawyers, nothing clears the mind like being sued

By 2000 multiple cases were pending against all three NAFTA parties

Concerns arose in particular with breadth of fair and equitable treatment and indirect expropriation/regulatory taking claims (e.g., Pope & Talbot, S.D. Myers, Methanex)

2002 TPA, as implemented in FTAs with Australia, Chile and Singapore, sought to redefine several key concepts:

Except in rare circumstances, nondiscriminatory 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 expropriation
[The concept of fair and equitable treatment] *prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments*. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

Along with greater transparency, rules designed to encourage arbitrators to decide jurisdictional issues at the outset, an explicit definition of customary international law, and language on takings from *Penn Central Transportation Co. v. City of New York*, appeared in all subsequent US FTAs.

After the Bipartisan Trade Deal (2007), FTAs stated that *foreign investors in the United States will not be accorded greater substantive rights with respect to investment protections than United States investors in the United States*. 
Despite a nearly three year negotiating process within the U.S. government, 2012 Model BIT made few major changes except to increase emphasis on environmental and labor protection.

May-June 2015 Congressional and civil society debate on renewing TPA saw a discourse that had not changed significantly since the NAFTA debate nearly 25 years earlier.

Many Democrats, labor unions and environmental groups challenged the wisdom of trade and investment agreements, criticizing not only ISDS but raising broader fears of job losses for American workers and degradation of the world environment.
A few scholars, including Bjorklund, Lester and Yackee, carried on a thoughtful debate

- Defenders reminded critics of the original objectives of BITs, including to provide U.S. investors abroad with legal protections similar to those they enjoy in the United States

- Critics suggested that businesses should simply assume the risks of investing in countries with weak rule of law or buy political risk insurance

- Few argued, “you can make ISDS better if you make changes.”

- No one really explained how in a world without BITs and FTA investment chapters the U.S. Government would avoid being pressured into providing diplomatic protection for U.S. citizen investors
TPP investment provisions reflect a continuing evolution (from NAFTA, to FTAs with Chile, Korea and others), in which it is somewhat more difficult for foreign investors to prevail. Key provisions include:

- The “in like circumstances determination” requires a broader inquiry to support a violation of national treatment.

- Investors’ “reasonable expectations” are more difficult to cite as a violation of “fair and equitable treatment,” which is still subject to minimum standards of customary international law.

- For pre-investment violations (which are covered) damages are effectively limited to actual costs incurred in making the investment.

- Where the investor’s claim is based on an investment authorization or investment agreement government counterclaims may be pursued.
Investment, Cont’d

- The investor has the burden of proof for all elements of its claim.
- As in past FTAs, non-discriminatory regulation for such objectives as preserving public health or the environment do not constitute indirect takings requiring investor compensation.
- The TPP code of conduct for state-to-state arbitration under Chapter 28 is to be applied to Chapter 9 arbitrations with modifications as needed.
- Parties may deny the benefits of the investment chapter to tobacco and tobacco products (art. 29.5).
- Scope of disciplines is extended explicitly to SOEs when they exercise government authority delegated to them.
With investment authorizations, governments are protected from ISDS liability where enforcing laws of general application.

Tribunals are encouraged to decide issues of jurisdiction or competence of the tribunal as preliminary matters.

Either disputing party may require the tribunal to provide the parties with the Tribunal’s proposed award for party review and comment (within a 60 day period).
Now and the Future

Whether the TPP Investment Chapter becomes the new standard for FTAs negotiated by the other TPP Parties depends in significant part whether the TPP is promptly brought into force by all of the Parties.

For most TPP Member governments the greater protection for non-discriminatory regulatory actions is likely to be desired in future FTAs.

That being said, the EU in its agreements with Canada and Vietnam, and its proposals the United States, has strongly pursued a new and even more state-friendly approach to ISDS.
EU Commission proposals for the TTIP:

- Broad “Clarification” of governments’ right to regulate
- Permanent court in place of ad hoc arbitrators, with judges chosen by the governments
- Appellate mechanism, with judges chosen by government
- Investor to choose between domestic courts and ISDS, without “U-turn”

Vietnam and Canada have already accepted similar language in their FTAs with the EU

Opposition among stakeholders in the United States is significant, but many other roadblocks make conclusion of the TTIP problematic in the foreseeable future
Now and the Future, Cont’d

- Broad opposition exists in both the Democratic and Republican Parties to further liberalization of international trade, and with the supporters of Bernie Sanders and Donald Trump in particular.

- Such opposition, expressed by all three remaining Presidential candidates, makes it very difficult to predict whether the United States will continue to support trade after January 20, 2017, either in Geneva or with FTAs.

- Even a Clinton Administration may find it difficult to endorse TPP in the near term, although without TPP the Clinton effectively would have no Asia policy.