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Issues in International Trade: A Legal Overview of Investor-State Dispute Settlement

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Summary

Ongoing trade negotiations among the United States and several Pacific Rim countries regarding the proposed Trans Pacific Partnership (TPP) agreement and between the United States and the European Union with respect to the proposed Transatlantic Trade and Investment Partnership (T-TIP) agreement have rekindled debate over the value of including investor-state dispute settlement (ISDS) provisions in bilateral investment treaties (BIT) and trade agreements. Congress plays an important role in the approval and implementation of U.S. international investment agreements (IIA), and, therefore, in the approval of ISDS provisions within those agreements.

ISDS provisions in IIAs enable an aggrieved investor, with an investment in the territory of a foreign host government, to bring a claim against that government for breach of an investment agreement before an international arbitration panel. The United States has negotiated a number of BITs and free trade agreements (FTA) that contain ISDS arbitration procedures for resolving investors' claims that a host country has violated substantive obligations intended to protect foreign investors and investments from discriminatory, unfair, or arbitrary treatment by the host government. Under U.S. IIAs, the investor and respondent country may agree that the tribunal will conduct the proceedings according to certain procedural rules, such as the International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings; the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules; or the ICSID Additional Facility Rules for disputes in which either the investor's home country or the host country, but not both, is a member of ICSID.

This report focuses on the legal implications of ISDS provisions in U.S. IIAs. Among other things, it discusses who may bring a claim under an IIA; how arbitrators conduct such proceedings; the remedies available to the disputing parties; and how tribunals have interpreted certain substantive obligations contained in U.S. IIAs. Furthermore, the report will discuss the interplay between IIAs containing ISDS provisions, investment arbitration decisions, and domestic law within the United States, as well as the recognition and enforcement of arbitral awards against countries in U.S. courts.

Notably, the ISDS provisions within one IIA may differ from the ISDS provisions in other agreements. This report will focus on the provisions contained in the investment chapter of the North American Free Trade Agreement (NAFTA) because nearly all ISDS cases brought by investors against the United States have been brought under that agreement. It will also focus on the investment provisions contained in the United States' 2012 Model BIT, which is the document that U.S. officials use to negotiate U.S. BITs, and the Korea-U.S. free trade agreement (KORUS), which has the most recent congressionally approved FTA investment chapter, to show the types of provisions U.S. diplomats may seek to include in the TPP and T-TIP.

Table 1 of this report contains summaries of ISDS cases brought against the United States. **Table 2** includes summaries of several ISDS cases under various IIAs that may be of interest to Congress.

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Investor-state dispute settlement (ISDS) provisions in international investment agreements (IIA) enable an aggrieved investor, with an investment located in the territory of a foreign host government, to bring a claim against that government for breach of an investment agreement before an international arbitration panel. The United States has negotiated a number of bilateral investment treaties (BIT) and free trade agreements (FTA) that contain ISDS arbitration procedures for resolving investors' claims that a host country has violated substantive obligations intended to protect foreign investors and investments from discriminatory, unfair, or arbitrary treatment by the host government.[1]

Although an investor submitting a claim under a U.S. IIA must typically consent to the mandatory procedural rules contained therein, the parties to an investment dispute generally may jointly choose the forum as well as many of the procedural rules under which the tribunal conducts the arbitration.[2] The primary forum for investment arbitration is the International Centre for Settlement of Investment Disputes (ICSID), which is affiliated with the World Bank.[3] The Centre was established by the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention).[4] Under most IIAs, the investor and respondent country may agree that the tribunal will conduct the proceedings according to certain procedural rules, such as the ICSID Rules of Procedure for Arbitration Proceedings;[5] the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules;[6] or the ICSID Additional Facility Rules for disputes in which either the investor's home country or the host country, but not both, is a member of ICSID.[7]

Ongoing trade negotiations among the United States and several Pacific Rim countries regarding the proposed Trans Pacific Partnership (TPP) agreement[8]—and between the United States and the European Union with respect to the proposed Transatlantic Trade and Investment Partnership (T-TIP) agreement[9]—have rekindled debate over the value of including ISDS provisions in BITs and trade agreements. Some commentators have argued that ISDS arbitration procedures, along with substantive protections for investors and investments in IIAs, facilitate foreign direct investment (FDI) by depoliticizing investment disputes and providing stability and predictability to investors

[1] *See, e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., Chapter 11, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

[2] *See, e.g.,* NAFTA, arts. 1121-22*;* 2012 Model BIT, arts. 25-26; *id.* art. 24(3)(d) ("[I]f the claimant and respondent agree," the parties may submit a claim "to any other arbitration institution or under any other arbitration rules."). For example, the parties to an investment dispute brought under a particular IIA may modify the UNCITRAL Arbitration Rules so long as this is consistent with the IIA. UNCITRAL Arbitration Rule 1.

[3] For information about ICSID, see https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx.

[4] ICSID Convention, *opened for signature* March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force October 14, 1966). As of November 1, 2013, the Convention had 150 members.

[5] A copy of the ICSID rules is located at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

[6] A copy of the UNCITRAL rules is located at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf.

[7] This report does not examine in detail the ICSID Additional Facility Rules. Other arbitration rules include those of the International Chamber of Commerce, the Stockholm Chamber of Commerce, and the Permanent Court of Arbitration.

[8] For more on the TPP negotiations, see CRS Report R42694, *The Trans-Pacific Partnership (TPP) Negotiations and Issues for Congress*, coordinated by (name redacted).

[9] For more on the T-TIP negotiations, see CRS Report R43387, *Transatlantic Trade and Investment Partnership (T-TIP) Negotiations*, by (name redacted), (name redacted), and (name redacted).

seeking to conduct business in a foreign nation.[10] Other observers have raised questions about the extent to which ISDS may affect a government's ability to regulate in the public interest.[11]

Scope of This Report

This report focuses on the legal implications of ISDS provisions in U.S. IIAs. Among other things, it discusses who may bring a claim under an IIA; how arbitrators conduct such proceedings; the remedies available to the disputing parties; and how tribunals have interpreted certain substantive obligations contained in U.S. IIAs.[12] Furthermore, the report will discuss the interplay between IIAs containing ISDS provisions, investment arbitration decisions, and domestic law within the United States, as well as recognition and enforcement of arbitral awards against countries in U.S. courts.

Notably, the ISDS provisions within one IIA may differ from the ISDS provisions in other agreements.[13] This report will focus on the provisions contained in the investment chapter of NAFTA because nearly all ISDS cases brought by investors against the United States have been brought under that agreement. It will also focus on the investment provisions contained in the United States' 2012 Model BIT, which is the document that U.S. officials use to negotiate U.S. BITs, and the Korea-U.S. free trade agreement (KORUS), which has the most recent congressionally approved FTA investment chapter, to show the types of provisions U.S. diplomats may seek to include in the TPP and T-TIP.

Role of Congress in ISDS Provisions

Congress plays an important role in the approval and implementation of U.S. IIAs, and, therefore, in the approval of ISDS provisions within those agreements. BITs are ratified through the treaty process established in the Constitution[14]—that is, the Senate must provide its advice and consent to ratification of any agreement reached between the executive branch and negotiators from a foreign country. Furthermore, FTAs, which typically will contain an investment chapter, are often approved as congressional-executive agreements.[15] Such agreements require approval from both houses of Congress prior to being signed into law by the President. Beyond voting on the

[10] K. Scott Gudgeon, "Arbitration Provisions of U.S. Bilateral Investment Treaties," *in* INTERNATIONAL INVESTMENT DISPUTES: AVOIDANCE AND SETTLEMENT (West Publishing, 1985). For further discussion on policy issues facing Congress with respect to ISDS and IIA negotiations, see CRS Report R43052, *U.S. International Investment Agreements: Issues for Congress*, by (name redacted) and (name redacted).

[11] *See, e.g,* Perry E. Wallace, *International Investment Law and Arbitration, Sustainable Development, and Rio+20: Improving Corporate Institutional and State Governance*, 12 Sustainable Dec. L. & Pol'y 22, 24 (2012) ("Furthermore, the true worry is that the specter of a hefty arbitral award against it might have a chilling effect on the healthy evolution of that country's regulatory evolution ...").

[12] As discussed below, a tribunal's interpretation of an investment obligation does not bind future tribunals. See "Whether Investment Arbitration Decisions Establish Legally Binding Precedent" below.

[13] *Compare* NAFTA, Chapter 11 *with* U.S.-South Korea Free Trade Agreement, Chapter 11, available at https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file587_12710.pdf.

[14] U.S. Const. art. II, § 2; *see e.g.* Senate Exec. Rept. 111-8 (December 22, 2010) (providing the Senate's advice and consent to ratification of the U.S.-Rwanda BIT).

[15] *See, e.g.,* United States-Korea Free Trade Agreement Implementation Act, P.L. 112-41, § 2 (2011) ("The purposes of this Act are—(1) to approve and implement the free trade agreement between the United States and Korea ...").

approval of a negotiated agreement between the U.S. and foreign states, Congress may seek to influence the negotiating objectives of the executive branch through statute,[16] by informal agreements with the executive branch,[17] and through the traditional oversight powers enjoyed by the legislative branch.[18]

Jurisdictional Issues in ISDS Cases

To hear and decide an ISDS case, a tribunal must have jurisdiction over the dispute between the investor and the respondent state. Although several requirements in IIAs could be considered "jurisdictional," this section focuses on the requirement that the claimant qualify as an "investor" with an "investment" in the respondent host country, as U.S. IIAs define these terms. This section also analyzes whether, and, if so, under what circumstances, investment agreements require a claimant to exhaust available administrative and judicial remedies in the host country prior to bringing an ISDS claim against that country. In addition, this section examines ISDS provisions potentially relevant to the investor practices of "forum shopping" (e.g., pursuing an ISDS case after losing in the host country's domestic courts) and "treaty shopping" (e.g., reincorporating in another country to take advantage of favorable ISDS provisions in that country's IIAs).

Definitions of "Investor" and "Investment" in ISDS Provisions

The definitions of "investor" and "investment" in U.S. IIAs play a key role in clarifying the scope of a tribunal's jurisdiction by indicating "who" may bring an ISDS claim under a particular agreement. One NAFTA tribunal referred to these definitions as the "gateway leading to the dispute resolution provisions."[19]

With respect to the definition of "investor," NAFTA limits the scope of investor-state arbitration by establishing that the dispute provisions apply only to "measures adopted or maintained by a Party relating to:[20] (a) investors of another Party; [and] (b) investments of investors of another Party in the territory of the Party ..."[21] NAFTA Articles 1116 and 1117 provide that in order to bring a claim, the claimant must be an "investor" from a nation that is a party to NAFTA, which the agreement defines as "a Party or state enterprise thereof, or a national or enterprise of such Party, that seeks to make, is making or has made an investment."[22] Under this definition, an investor of a party can be an individual; a corporation or other enterprise; or a state-owned

[16] *See, e.g.,* Bipartisan Trade Promotion Authority Act of 2002, P.L. 107-210, § 2102(3) (August 6, 2002).

[17] *See, e.g.,* Office of the United States Trade Representative, Bipartisan Trade Deal (May 2007), available at https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf.

[18] *See* CRS Report RL30240, *Congressional Oversight Manual*, by (name redacted) et al.

[19] Methanex Corp. v. United States, NAFTA/UNCITRAL, First Partial Award, ¶ 106 (Aug. 7, 2002).

[20] One tribunal has held that a measure must bear a "legally significant connection" to the investor and its investment in order for the measure to "relate to" the investor or its investment and for the tribunal to have jurisdiction. Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Chapter E, ¶ 22 (August 3, 2005). To "relate to" an investment, a measure may also have to produce a direct and immediate effect on the investment. Apotex Holdings Inc. v. United States (*Apotex III*), Award, ¶ 6.24 (August 25, 2014).

[21] NAFTA, art. 1101; 2012 Model BIT, art 2.

[22] NAFTA, art. 1139.

enterprise. Importantly, as numerous tribunals have pointed out, "in order to be an 'investor' ... one must make an investment in the territory of another NAFTA State, not in one's own."[23]

The definition of "investment" in U.S. IIAs also affects the scope of a tribunal's jurisdiction. The Model BIT provides the following definition of an "investment":

> "investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise;
>
> (c) bonds, debentures, other debt instruments, and loans;
>
> (d) futures, options, and other derivatives;
>
> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
>
> (f) intellectual property rights;
>
> (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
>
> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.[24]

Notably, the 2012 Model BIT provides a non-exhaustive list of property interests that may constitute "investments." By contrast, NAFTA sets forth a more limited and closed list of property interests that may constitute "investments."[25] Neither the 2012 Model BIT nor NAFTA's investment chapter considers goods exported by a foreign company into another NAFTA party's territory to be an "investment."[26] In addition, it appears that, at least under NAFTA, the costs of

[23] Bayview Irrigation v. Mexico, ICSID Case No. ARB(AF)/05/1, Award (on Jurisdiction), ¶ 105 (June 19, 2007); *see also* Canadian Cattlemen for Fair Trade v. United States, NAFTA/UNCITRAL, Award on Jurisdiction, ¶ 126 (Jan. 28, 2008); Grand River Enterprises Six Nations Ltd. v. United States, NAFTA/UNCITRAL, Award, ¶ 87 (Jan. 12, 2011) (holding that ISDS procedures are available only "to investors of one NAFTA Party who seek to make, are making, or have made an investment in another NAFTA Party: absent those conditions, both the substantive protection of Section A and the remedies provided in Section B of Chapter Eleven are unavailable to an investor").

One NAFTA tribunal set forth a test for determining whether an investment is "foreign" under NAFTA, quoting with approval another tribunal's holding that "a salient characteristic of an investment covered by the protection of NAFTA Chapter Eleven would be that the investment is primarily regulated by the law of a state other than the state of the investor's nationality, and that this law is created and applied by that state which is not the state of the investor's nationality." Grand River Enters. Six Nations, Ltd. v. United States, NAFTA/UNCITRAL, Award, ¶ 88 (January 12, 2011).

[24] 2012 Model BIT, art. 1 (footnotes omitted).

[25] NAFTA, art. 1139. At least one NAFTA tribunal has noted that NAFTA's definition of "investment" is not broad. Grand River Enters. Six Nations, Ltd. v. United States, NAFTA/UNCITRAL, Award, ¶ 82 (January 12, 2011).

[26] Apotex Inc. v. United States (*Apotex I and II*), Award on Jurisdiction and Admissibility paras. 143, 176 (June 14, 2003).

meeting regulatory requirements of the host country to sell products in that country do not constitute an investment.[27]

Exhaustion of Local Administrative and Judicial Remedies

Neither NAFTA nor the 2012 Model BIT requires exhaustion of local administrative or judicial remedies as a prerequisite to a tribunal's jurisdiction over an ISDS claim against a host country.[28] However, at least under NAFTA, it appears that, as a matter of *substantive law*, an investor seeking to establish a violation of the minimum standard of treatment obligation[29] based on "denial of justice" by a host country's judiciary must have first exhausted its judicial remedies (i.e., pursued all appeals) unless these remedies are not reasonably available.[30] Tribunals have deemed this requirement to be an element of a "denial of justice" claim under NAFTA Article 1105 (minimum standard of treatment) rather than a jurisdictional prerequisite.[31]

"Forum Shopping" and "Treaty Shopping"

An additional concern of some commentators is that foreign investors will engage in "forum shopping" and "treaty shopping" under ISDS provisions in IIAs.[32] "Forum shopping" generally refers to a practice in which an investor first pursues compensation in either the host country's local courts or before an ISDS tribunal and, if the investor is unhappy with the outcome, then pursues compensation in the other forum. "Treaty shopping" generally refers to a practice in which an investor (typically, a multinational corporation) attempts to benefit from more favorable substantive and procedural rules in a particular IIA by acquiring, establishing, or using an existing subsidiary in order to bring an ISDS claim against a host country under that IIA.

With respect to "forum shopping," U.S. IIAs typically provide that an investor cannot seek local remedies in the form of monetary compensation after consenting to arbitration under the agreement. For example, under the 2012 Model BIT, an investor must, as a condition of pursuing a claim under the ISDS provisions, agree to waive "the right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach ..." except to the extent that the investor seeks interim injunctive relief during the pendency of the arbitration.[33] However, this does not prevent an investor from seeking local remedies in the form

[27] *Id.* at ¶ 194.

[28] *See* Waste Management, Inc. v. Mexico, ICSID Case No. ARB/AF/00/3, Award, ¶ 116 (April 30, 2004) ("It is true that in a general sense the exhaustion of local remedies is a procedural prerequisite for the bringing of an international claim, one which is dispensed with by NAFTA Chapter 11.").

[29] For more details on this obligation, see "Minimum Standard of Treatment" below.

[30] Apotex Inc. v. United States (*Apotex I and II*), Award on Jurisdiction and Admissibility, ¶ 276 (June 14, 2003); The Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award paras. 215-17 (June 26, 2003).

[31] The Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award, paras. 215-17 (June 26, 2003). A recent decision by a NAFTA tribunal suggests that failure to pursue administrative remedies may also hurt a claimant's chances of establishing a violation of the minimum standard of treatment. *See* Apotex Holdings Inc. v. United States (*Apotex III*), Award, ¶ 9.58 (August 25, 2014).

[32] Katia Yannaca-Small, Organization for Economic Cooperation and Development, "Improving the System of Investor-State Dispute Settlement" 20 (2006), http://www.oecd.org/china/WP-2006_1.pdf.

[33] 2012 Model BIT, art. 26; *see also* NAFTA, art. 1121.

of monetary compensation *prior to* bringing a dispute before an international investment arbitration tribunal.

With regard to "treaty shopping," U.S. IIAs typically contain a provision allowing the host country to deny the benefits of the treaty to an investor of another party (and the investor's investments) if (1) the investor of the other party is an enterprise; (2) non-party investors (i.e., investors from a country not party to the treaty), or investors of the denying party, own or control the enterprise; and (3) the enterprise has "no substantial business activities" in the territory of the other party.[34] In a recent arbitration decision rendered under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) and the ICSID Arbitration Rules, the tribunal held that a party to the CAFTA-DR may deny benefits to investors and investments under this type of clause even after the investor's dispute arose, so long as such denial occurred prior to the expiration of the time limit for raising jurisdictional objections.[35] KORUS contains language specifically requiring the denying party to the agreement to notify the investor prior to denying it benefits if practicable.[36]

Procedural Issues in ISDS Cases

In addition to jurisdictional issues, ISDS proceedings have raised questions about the rules governing: (1) the independence and impartiality of arbitrators, including rules addressing their selection and disqualification; (2) the transparency of arbitral proceedings, including access to documents and hearings; (3) early dismissal of frivolous claims; and (4) participation of third parties as amicus curiae ("friends of the court"). This section addresses these questions, as well as whether investment arbitration decisions establish legally binding precedent and whether a party may appeal such decisions.

Selection and Disqualification of Arbitrators

Arbitration rules provide mechanisms to help ensure the independence and impartiality of the arbitrators that hear disputes between investors and states. The methods of selection and disqualification of arbitrators may differ depending on whether the arbitration is conducted under ICSID or UNCITRAL Arbitration Rules, NAFTA, or agreements based on the 2012 Model BIT. Furthermore, the parties may also contract to have the dispute governed by rules other than the ICSID and UNCITRAL Arbitration Rules.

The 2012 Model BIT and NAFTA contain nearly identical procedures for the appointment of arbitrators. The text from Article 1123 of NAFTA, which closely resembles the corresponding 2012 Model BIT provision, provides the following:

[34] *E.g.*, 2012 Model BIT, art. 17; *see also* NAFTA, art. 1113.

[35] Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, ¶ 4.83 (June 1, 2012) ("There is no express time-limit in CAFTA for the election by a CAFTA Party to deny benefits under CAFTA Article 10.12.2. In a different case under different arbitration rules, this [question] might have caused this Tribunal certain difficulties given the importance of investor-state arbitration generally and, in particular, the potential unfairness of a State deciding, as a judge in its own interest, to thwart such an arbitration after its commencement. In this case, however, no such difficulties arise ...").

[36] KORUS, art. 11.11.

> [U]nless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.[37]

Therefore, typically, the tribunal will consist of three arbitrators. Both NAFTA and the 2012 Model BIT also provide that the Secretary-General of ICSID will be the appointing authority if the disputing parties cannot agree on a presiding arbitrator or if a party fails to appoint an arbitrator within a certain amount of time after the claim is submitted for arbitration.[38] Under NAFTA, any arbitrator appointed by the Secretary-General must be chosen from a roster of potential arbitrators established by the parties to the agreement. Further, the appointed arbitrator should not be a national of the disputing parties.[39] However, under the 2012 Model BIT, the Secretary-General decides whom to appoint as the parties do not establish a list of potential arbitrators.[40]

ICSID and UNCITRAL Rules on Disqualification

Neither NAFTA nor the 2012 Model BIT addresses disqualification of arbitrators; however, the ICSID Arbitration Rules or the UNCITRAL Arbitration Rules address this issue.[41] Under the UNCITRAL Arbitration Rules, "[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."[42] Furthermore, arbitrators are required to disclose any reasons that may raise justifiable doubts as to their impartiality both prior to and, if such circumstances arise after the dispute has begun, during the proceedings.[43] In order to disqualify an arbitrator, the challenging party must provide notice of the challenge promptly after the circumstance calling into question the arbitrator's qualifications arises.[44] The notice must be provided to all other parties and all arbitrators on the panel.[45] If all parties agree to the challenge, the arbitrator shall be replaced; if the parties do not agree, then the appointing authority, which under NAFTA and the 2012 Model BIT is the Secretary General of ICSID, shall make a decision on the challenge.[46]

Under the ICSID Convention and ICSID Arbitration Rules, "a party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14."[47] Article 14, in turn, requires arbitrators to be "persons of high moral character and recognized competence ... who may be relied upon to exercise independent judgment."[48] Similar to the UNCITRAL Arbitration Rules, ICSID procedures require arbitrators to disclose to the disputing parties and the

[37] NAFTA, art. 1123; *see also* 2012 U.S. Model BIT, art. 27(1).

[38] NAFTA, art. 1124; 2012 U.S. Model BIT, art. 27(2).

[39] NAFTA, art. 1124.

[40] 2012 Model BIT, art. 27(3).

[41] *See* NAFTA chap. 11; 2012 Model BIT, Part B.

[42] UNCITRAL Arbitration Rules, art. 12.

[43] *Id.* art. 11.

[44] *Id.* art. 13(1).

[45] *Id.* art. 13(2).

[46] *Id.* art. 13(3), (4); NAFTA, art. 1124; 2012 Model BIT, art. 27(2).

[47] ICSID Convention, art. 57.

[48] *Id.* art. 14(1).

Secretary General any prior relationships with the disputing parties, and any other reason why a party may question the arbitrator's independence.[49] A party to the dispute challenges the qualification of an arbitrator by submitting its concerns to the Secretary General; the arbitrator in question has the right to respond to such a submission.[50] At that point, the remaining arbitrators vote on whether the arbitrator in question should be disqualified.[51] If they are unable to reach a determination, or if a majority of arbitrators are challenged, the Chairman of the Administrative Council makes the ultimate decision on disqualification.[52]

Tribunals' Interpretations of Arbitration Rules Concerning Disqualification

Grounds for removal vary from case to case and may appear inconsistent between cases on similar questions regarding an arbitrator's impartiality or independence. For example, while some panels have determined that an arbitrator's participation in a previous tribunal that found against a particular party is not grounds for disqualification,[53] others have reached the opposite conclusion under similar factual circumstances, finding that an arbitrator's participation in a panel that found against the respondent-state on an issue involving similar facts was grounds for disqualification.[54]

It appears that many challenges to an arbitrator's qualifications to sit on a tribunal arise from prior existing relationships between the arbitrators and the disputing parties.[55] For example, one arbitrator, in 2013, was disqualified from *Blue Bank v. Venezuela* because the arbitrator in question was a partner at a law firm that was representing the claimant in a different ISDS proceeding against Venezuela that dealt with issues similar to the case he was set to decide.[56] However, tribunals have also held that "the mere existence of some professional relationship with a party is not an automatic basis for disqualification of an arbitrator."[57] In one case, the arbitrator in question advised the disputing parties that one of the partners in his law firm had worked for the claimant-company's predecessor on an unrelated tax issue but the panel did not find this relationship warranted disqualification.[58]

However, prior relationships with disputing parties are not the only reason that an arbitrator can be disqualified. Arbitrators can also be removed from a panel if they have biases against the law in dispute or the specific subject at issue. One such example, involving a successful challenge,

[49] ICSID Arbitration Rule 6.

[50] *Id.* Rule 9(1), (3).

[51] *Id.* Rule 9(4).

[52] *Id.* Rule 9(5).

[53] Suez; Participaciones Inversiones Portuarias SARL v. Gabonese Republic, ICSID Case No. ARB/08/17, Regarding the Proposal to Disqualify an Arbitrator, ¶ 28 (November 12, 2009).

[54] Caratube Int'l Oil C. LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶ 91 (Mar. 20, 2014).

[55] Suez; Participaciones Inversiones Portuarias SARL v. Gabonese Republic, ICSID Case No. ARB/08/17, Regarding the Proposal to Disqualify an Arbitrator, ¶ 32 (November 12, 2009) ("Many, if not most, prior ICSID cases concerning challenges to arbitrators are based on some alleged professional or business relation between the challenged arbitrator or one of his or her associates and a party in the case.").

[56] Blue Bank International & Trust (Barbados) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal (November 12, 2013).

[57] Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, ¶ 28 (October 3, 2001).

[58] *Id.* at paras. 15, 28.

came when the United States, during a NAFTA arbitration conducted under the UNCITRAL Arbitration Rules, challenged the appointment of an arbitrator who had previously given a speech on the U.S. law at issue in the dispute.[59] The arbitrator, in his speech, referred to the U.S. law in question as "harassment."[60] The ICSID Secretary General, who was authorized to make the final determination on the issue as the appointing authority, informed the arbitrator that ICSID would be issuing an opinion upholding the challenge. In response, the arbitrator resigned and the ICSID did not issue a written opinion on the matter.[61]

In cases where the qualification of an arbitrator has been challenged under the ICSID rules, tribunals have held that the requirement that an arbitrator be able to provide "independent judgment" means that the arbitrator must "be both independent and impartial."[62] At least one tribunal has held that the analysis for independence and impartiality are separate questions.[63] An analysis of independence requires examination of whether the arbitrator has a relationship with one of the disputing parties, while the impartiality of an arbitrator concerns whether he or she is biased toward one of the disputing parties.[64] Therefore, despite differences in language, both the UNCITRAL and ICSID Arbitration Rules require arbitrator independence and impartiality.

Tribunals have differed in their interpretation of the ICSID Convention disqualification language "manifest lack of the qualities required."[65] Some tribunals have interpreted this in a way that imposes a high burden of proof on the party attempting to disqualify an arbitrator.[66] That tribunal noted that in order to show a "manifest lack" of impartiality, the party would have to show a clear or obvious inability for the arbitrator to judge impartially.[67] In a similar vein, another panel provided that "the party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made."[68] On the other hand, other tribunals appear to have interpreted the provision to impose less of a burden on the challenging party. One tribunal stated "if the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member ... a challenge by either party would have to be upheld."[69] This tribunal's use of a "reasonable doubt" standard appears to contradict other tribunals' requirement that a party "clearly" or "obviously" demonstrate that an

[59] *See* Canfor Corporation v. United States, Submission of United States of America in Support of Request for Consolidation of the Claims of Canfor Corp. 3 (June, 3, 2005), available at http://www.state.gov/documents/organization/51402.pdf.

[60] *Id.*

[61] *Id.* Under UNCITRAL Arbitration Rules, an arbitrator's resignation does not imply that the arbitrator agrees with the grounds on which he or she was challenged. UNCITRAL Arbitration Rule 13.

[62] Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, paras. 28-29 (October 22, 2007) [Hereinafter Suez Disqualification Decision].

[63] *Id.*

[64] *Id.*

[65] ICSID Convention, art. 57.

[66] Suez Disqualification Decision at ¶ 34.

[67] *Id.*

[68] SGS Societe Generale de Suveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator, ¶ 40 (December 19, 2002).

[69] Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, ¶ 25. (October 3, 2001).

arbitrator would be biased. However, even that tribunal held that the mere appearance of partiality is not enough to disqualify an arbitrator—nor is any mere speculation or inference.[70]

Transparency of ISDS Proceedings

A common concern regarding ISDS relates to the level of transparency to which arbitration disputes are subject. Similar to the rest of the discussion involving ISDS, the level of public access to tribunal decisions depends on the IIA that the dispute is brought under, and the set of arbitration rules the tribunal follows when presiding over the dispute.

Commentators have noted that NAFTA contains some of the strongest transparency requirements among IIAs that have been entered into over the past decades.[71] The United States, Canada, and Mexico released, through the Free Trade Commission, an interpretation of the NAFTA investment chapter. The interpretation provides:

> Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of: (i) confidential business information; (ii) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and (iii) information which the Party must withhold pursuant to the relevant arbitral rules, as applied.[72]

Further, NAFTA hearings are often open to the public as the United States has agreed to allow such hearings to be open, subject to exceptions that protect confidential information.[73] Accordingly, the public has some access to the oral and written submissions by the disputing parties, challenges to arbitrators, interim decisions of the tribunals, and awards under NAFTA. These documents are available on the U.S. Department of State website.[74]

The 2012 Model BIT also contains provisions relating to transparency. Article 29 of the 2012 Model BIT, entitled Transparency of Arbitral Proceedings, provides that "pleadings, memorials, and briefs submitted to the tribunal," along with "orders, awards, and decisions of the tribunal" shall be made available to the public.[75] Furthermore, amicus curiae submissions, submissions provided by non-disputing parties to the agreement, and transcripts of hearings may also be made publicly available.[76] Finally, the 2012 Model BIT provides for hearings to be open to the public.[77]

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[70] *Id.*

[71] Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, in TRANSPARENCY IN INTERNATIONAL LAW (Andrea Bianchi and Anne Peters, eds., 2013), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5840&context=faculty_scholarship.

[72] Notes of Interpretation of Certain NAFTA Chapter 11 Provisions, NAFTA Free Trade Commission (July 31, 2001), Part A, available at http://www.state.gov/documents/organization/38790.pdf.

[73] *See* Statement on Open Hearings In NAFTA Chapter Eleven Arbitrations, United States Trade Representative (October 7, 2003) available at https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf.

[74] *See* NAFTA Investor-State Arbitrations, U.S. Department of State website, http://www.state.gov/s/l/c3439.htm.

[75] 2012 Model BIT, art. 29(1).

[76] *Id.*

[77] *Id.* art. 29(2).

All of these transparency provisions are subject to exceptions to protect confidential information, such as trade secrets or essential security interests.[78]

Under the ICSID Arbitration Rules, the transparency provisions are less robust than what the United States has negotiated in recent IIAs, such as the KORUS[79] and CAFTA-DR investment chapters.[80] ICSID provides basic information on its website with regard to each dispute, including the fact that a dispute is being heard, the names of the arbitrators hearing the case, and whether the dispute is ongoing or completed. However, ICSID awards are only made publicly available if both disputing parties consent.[81] Importantly, if the disputing parties do not consent to the publication of the full award decision, ICSID Arbitration Rules still provide for publication of "excerpts of the legal reasoning of the Tribunal."[82] However, commentators have noted that "oral and written submissions of the disputing parties and their experts and witnesses ... almost always remain confidential."[83] It is worth noting that if the United States enters into a dispute that is governed by specific transparency provisions set forth in an IIA, the IIA's transparency provisions would control even if the arbitration is conducted under the ICSID Arbitration Rules.

UNCITRAL amended its Arbitration Rules in 2013 by adding Rules on Transparency in Treaty-Based Investor-State Arbitration (Rules on Transparency).[84] The Rules on Transparency will apply to all arbitrations conducted under treaties governed by UNCITRAL Arbitration Rules that were entered into after April 1, 2014, "unless the Parties to the treaty have agreed otherwise."[85] In order to facilitate states to agree to follow these new transparency rules, states can sign the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, known as the Mauritius Convention on Transparency (Mauritius Convention).[86] The Mauritius Convention opened for signature on March 17, 2015 and provides for the Rules on Transparency to apply to IIAs entered into by both parties prior to April 1, 2014 by stipulating that if both parties have signed the Mauritius Convention, they will be deemed to have agreed to apply the Rules on Transparency to such IIAs.[87] The United States signed the Mauritius Convention on March 17, 2015, but the Senate has yet to ratify it and the Mauritius Convention has yet to enter into force.[88]

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[78] *Id.* arts. 18, 19, 29(3).

[79] *E.g.*, KORUS, art. 11.21(1) (requiring the respondent country to make available to the public various documents related to the proceedings, including the disputing parties' pleadings and briefs submitted to the tribunal; hearing transcripts of the tribunal if available; and awards and decisions of the tribunal, subject to protections for confidential information).

[80] CAFTA-DR, art. 10.21 (imposing a similar requirement on the respondent country).

[81] ICSID Arbitration Rule 48(4).

[82] *Id.*

[83] Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, in TRANSPARENCY IN INTERNATIONAL LAW (Andrea Bianchi and Anne Peters, eds., 2013), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5840&context=faculty_scholarship.

[84] United Nations General Assembly Resolution, G.A. Res. 68/109 (Dec. 18, 2013).

[85] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, art. I(1) [hereinafter UNCITRAL Rules on Transparency].

[86] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, *opened for signature* March 17, 2015, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html [hereinafter Mauritius Convention on Transparency].

[87] Mauritius Convention on Transparency, art. 1.

[88] *See* Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, UNCITRAL website, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html. To date, Canada, Finland, France, Germany, Mauritius, Sweden, (continued...)

The new UNCITRAL Rules on Transparency contain requirements similar to NAFTA and the 2012 Model BIT. The Rules on Transparency require that written statements of the disputing parties, written statements by non-disputing state parties to the treaty, amicus submissions, transcripts of hearings, orders, decisions, and awards be made available to the public.[89] Hearings are also required to be open to the public under the new rules.[90] Importantly, there are exceptions to the publication requirements for confidential information.[91] Prior to the Rules on Transparency, UNCITRAL provided for hearings to be closed to the public, unless the parties agreed otherwise, and did not provide for publication of arbitral materials.[92]

"Frivolous" Claims

A claim in an ISDS case might be considered "frivolous" when "it is clearly insufficient on its face ... and is presumably interposed for mere purposes of delay or to embarrass ..."[93] Frivolous claims may present a concern in investment arbitration because, even if a host country wins an ISDS case, it may spend millions of dollars in costs and attorneys' fees on its defense. Thus, a tribunal should arguably dismiss frivolous claims at an early stage of the proceedings.

Recent U.S. IIAs contain provisions addressing dismissal of frivolous claims and the shifting of costs and attorneys' fees to parties that bring such claims. For example, the 2012 Model BIT sets forth an expedited procedure by which a tribunal may determine as a "preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made ..."[94] The tribunal must assume the truth of the claimant's factual allegations in support of its claim, as set forth in its notice of arbitration or statement of claim, but may consider "any relevant facts not in dispute."[95] The 2012 Model BIT states that the tribunal may award reasonable costs and attorneys' fees to the prevailing party after considering whether the claimant's claim or the respondent's objection was "frivolous."[96] Two recent cases under U.S. IIAs that contain similar language to the 2012 Model BIT regarding "preliminary questions" (CAFTA-DR and the U.S.-Peru Trade Promotion Agreement) suggest that a tribunal may be reluctant to dismiss the investor's claims under these provisions at such an early stage of the proceedings.[97]

(...continued)

Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, and the United States have signed the treaty. *Id.*

[89] UNCITRAL Rules on Transparency, art. 3.

[90] *Id.* art. 6.

[91] *Id.* art. 7.

[92] *See* UNCITRAL Arbitration Rules, art. 28(3).

[93] *See* Black's Law Dictionary Online, http://thelawdictionary.org/frivolous/.

[94] 2012 Model BIT, art. 28(4).

[95] *Id.* The tribunal may also follow expedited procedures to decide a respondent's objection to its competence to hear the dispute. *Id.* art. 28(5).

[96] *Id.* art. 28(6).

[97] The Renco Group, Inc. v. Republic of Peru, UNCT/13/1, Decision as to the Scope of Respondent's Preliminary Objections Under Article 10.20.4, ¶ 255 (December 18, 2014) (rejecting all but one of the respondent's preliminary objections); Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, paras. 244-54 (August 2, 2010) (rejecting all of the respondent's preliminary objections).

Aside from provisions in IIAs, the ICSID and UNCITRAL Arbitration Rules contain certain provisions that may allow for early dismissal of frivolous claims. ICSID Rule 41(5) provides that, unless the parties otherwise agree to a different procedure, a party may raise a preliminary objection "no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal" that a claim is "manifestly without legal merit."[98] The rule states that "[t]he Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection."[99] The UNCITRAL Arbitration Rules do not specifically address frivolous claims but do provide the tribunal with broad authority to "conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."[100]

Furthermore, as discussed below, the ICSID and UNCITRAL Arbitration Rules leave tribunals with a large degree of discretion in apportioning costs and attorneys' fees, which may allow tribunals to require an investor bringing a frivolous claim to bear most or all of the costs of the arbitration.[101] However, some commentators have argued that the current rules for disposing of frivolous claims are insufficient. They have proposed the creation of a diplomatic screening mechanism in which officials of the investor's home country and the respondent host country could agree to dismiss an investor's claim.[102]

Amicus Curiae Submissions in an ISDS Arbitration

Similar to submissions of amicus briefs to the United States Supreme Court, ISDS arbitration tribunals may allow interested persons, who are not parties to the dispute, to present their views to the tribunal. The rules governing the submission of third-party statements vary depending on whether the arbitration is governed by the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules, or some other arbitration provision. NAFTA is generally silent on amicus submissions but provides that NAFTA parties, even when they are not involved in the particular dispute in question, may "make submissions to a Tribunal on a question of interpretation of this Agreement,"[103] while the 2012 Model BIT provides that a non-disputing state that is a party to the treaty "may make oral and written submissions to the tribunal regarding interpretation" of such treaty.[104] The 2012 Model BIT further provides that the presiding arbitration tribunal "shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party."[105]

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[98] ICSID Arbitration Rule 41(5). Under the ICSID Convention, the Secretary-General of ICSID may refuse to register a dispute if it is "manifestly outside the jurisdiction of the Centre." ICSID Convention, art. 36(3). However, it does not appear that the Secretary-General may exercise this authority to dismiss claims that are "frivolous" but nevertheless within the Centre's jurisdiction.

[99] ICSID Arbitration Rule 41(5).

[100] UNCITRAL Arbitration Rules, art. 17(1).

[101] See "Apportionment of Costs and Attorneys' Fees by Investment Tribunals" below.

[102] House Ways and Means Committee, Ranking Member Sander M. Levin, TPP in Focus: Investment and Investor-State Dispute Settlement–The Need for Reform (March 30, 2015), http://democrats.waysandmeans.house.gov/blog/tpp-focus-investment-and-investor-state-dispute-settlement-%E2%80%93-need-reform; *cf.* 2012 Model BIT, art. 21(2) (setting up a similar mechanism for claims alleging that a tax measure is an expropriation); NAFTA, art. 2103(6).

[103] *Id.* art. 1128.

[104] 2012 Model BIT, art. 28(2).

[105] *Id.* art. 28(3).

In contrast, KORUS provides more discretion to the tribunal regarding amicus curiae submissions. It states that, "[a]fter consulting the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written amicus curiae submission with the tribunal regarding a matter within the scope of the dispute."[106] It also provides a set of factors to be considered in determining whether to permit an amicus curiae filing including, the extent to which:

- the submission would assist the tribunal in determining a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that differs from that of the disputing parties;
- the submission would address a matter within the scope of the dispute; and
- the third party has a significant interest in the proceeding.

Further, KORUS requires the tribunal to ensure that the submission does not disrupt the proceeding or unduly burden or unfairly prejudice either disputing party, and that the disputing parties are given an opportunity to present their observations on the amicus curiae submission.

Under the ICSID and UNCITRAL Arbitration Rules, allowing submission of amicus briefs seems to be a relatively recent development. It appears that the first instance of an arbitration tribunal accepting amicus briefs during an investor-state arbitration occurred in 2001 in *Methanex Corp. v. United States*, which was a NAFTA dispute conducted under the UNCITRAL Arbitration Rules.[107] In that case, the tribunal determined that it had the power to allow submission of third-party briefs pursuant to the tribunal's authority under Article 15(1) of the UNCITRAL Arbitration Rules to "conduct the arbitration in such manner as it considers appropriate."[108] Since that case, there have been significant changes to both the ICSID and UNCITRAL Arbitration Rules to provide for third-party submissions.

The ICSID Arbitration Rules were amended in 2006 to permit submission of amicus briefs expressly.[109] ICSID arbitration tribunals have interpreted the ICSID Arbitration Rules in a manner that requires a third-party to ask for leave to provide written statements for the tribunal's consideration.[110] Pursuant to Rule 37, the tribunal must consult with the disputing parties prior to permitting the submission.[111] However, notably, the disputing parties do not have a "veto" power

[106] KORUS, art. 11.20.5.

[107] Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, ¶ 13 (January 15, 2001) ("Further, after a careful search the Claimant stated that it had been unable to find any precedent where a tribunal had granted *amicus curiae* status to non-parties in an arbitration under the UNCITRAL Arbitration Rules.") [hereinafter *Methanex Corp.*, Amici Decision].

[108] *Methanex Corp.*, Amici Decision at paras. 26, 47.

[109] *See* ICSID Convention, Regulations, and Rules, Introduction (April 2006), available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/basic-en.htm.

[110] Though Rule 37 does not explicitly state that a third-party must seek leave to submit an amicus brief, tribunals have functioned in this manner because the tribunal, under the rule, must make a decision as to whether to allow the third-party submission. *See* ICSID Arbitration Rule 37; Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (May 19, 2005) ("The Tribunal will ... only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case. In order for the Tribunal to make that determination, each nonparty wishing to submit an *amicus curiae* brief must first apply to the Tribunal for leave to make an *amicus* submission.").

[111] ICSID Arbitration Rule 37.

– that is, the tribunal may allow third-party submissions over the objection of a party to the dispute. For example, in *Biwater Gauff Ltd. v. United Republic of Tanzania*, one of the first tribunals to consider Rule 37 granted permission to five amicus petitioners over the objection of the claimant, Biwater Gauff.[112] When considering whether to grant the petition, the tribunal must consider if the non-party has a significant interest in the proceeding, if the submission would assist the panel in deciding factual or legal issues related to the proceeding, and if the submission would address an issue within the scope of the case.[113] At least some tribunals have held a broad view with regard to the requirement that the submission be within the scope of the dispute at issue.[114] Notably, under the ICSID Arbitration Rules, the grant of permission to provide amicus submissions does not permit the nonparty to attend closed hearings or get access to documents that have not been made publicly available.[115]

The new UNCITRAL Rules on Transparency provisions on third-party submissions, discussed above, are similar to the ICSID rules. The UNCITRAL Rules on Transparency provide clear authority and procedural requirements for accepting written statements from third-parties and non-disputing states that are parties to the treaty in question.[116] A third-party must apply to the tribunal to make a submission, the tribunal must consult with the disputing parties, and the tribunal must consider whether the submission would be able to assist the tribunal in making a determination on the dispute.[117] A notable difference between the UNCITRAL Rules on Transparency and the ICSID Arbitration Rules is that the UNCITRAL Rules on Transparency require third-party submissions to be made public.[118]

Whether Investment Arbitration Decisions Establish Legally Binding Precedent

When rendering decisions in ISDS cases, investment arbitration tribunals do not establish legally binding precedent.[119] Thus, investment arbitration tribunals do not have to follow the decisions of prior tribunals in the way that, for example, U.S. federal courts must adhere to the decisions of the U.S. Supreme Court. However, arbitrators serving on ISDS tribunals have noted that a tribunal departing from a holding of a prior tribunal (particularly, in a case brought under the

[112] Biwater Gauff Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5. (February 2, 2007).

[113] ICSID Arbitration Rule 37(2).

[114] *See, e.g.* Biwater Gauff Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5. (February 2, 2007) (accepting that the petitioners' statements would be within the scope of the dispute despite the claimant's arguments to the contrary and noting that the tribunal "reserves the right to disregard any submission that does not" fall within the scope of the proceeding).

[115] *See* ICSID Arbitration Rule 32(2); Biwater Gauff Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5, ¶ 46 (February 2, 2007).

[116] *See* UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, arts. 4,5. As discussed above, the UNCITRAL Rules on Transparency are only applicable to IIAs entered into after April 1, 2014, unless the parties agree otherwise. *See supra* discussion on UNCITRAL Rules on Transparency. However, as noted above, UNCITRAL tribunals have accepted third-party submissions under their authority to conduct proceedings as appropriate. *Methanex Corp.*, Amici Decision at paras. 26, 47.

[117] UNCITRAL Rules on Transparency, art. 4.

[118] *Id.* art. 3.

[119] *E.g.*, NAFTA, art. 1136(1) ("An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.").

same IIA) may feel inclined to explain its reasoning in detail.[120] As the NAFTA tribunal in the case of *Glamis Gold v. United States* wrote:

> The fact that any particular tribunal need not live with the challenge of applying its reasoning in the case before it to a host of different future disputes (the challenge faced by standing adjudicative bodies) does not mean such a tribunal can ignore that challenge. A case-specific mandate is not license to ignore systemic implications. To the contrary, it arguably makes it all the more important that each tribunal renders its case-specific decision with sensitivity to the position of future tribunals and an awareness of other systemic implications.[121]

Thus, the extent to which investment arbitration tribunals follow precedent remains within each tribunal's discretion. However, some commentators would argue that arbitrators should still take into account the holdings of prior tribunals. As the *Glamis Gold* tribunal put it, a NAFTA tribunal, "while recognizing that there is no precedential effect given to previous decisions, should communicate its reasons for departing from major trends present in previous decisions, if it chooses to do so."[122] Other commentators argue that there may be some value in evaluating each case on its own merits without being tied to precedent.[123]

Whether Investment Arbitration Decisions May Be Appealed

Currently, U.S. IIAs lack a mechanism under which a disputing party may appeal a decision of an investment arbitration tribunal. Under ICSID Arbitration Rules,[124] a committee may be established to consider annulment of an award on five limited grounds.[125] However, these committees are not supposed to serve as appellate bodies.[126] In addition, in cases in which an

[120] Glamis Gold, Ltd. v. United States, Award ¶ 6 (June 8, 2009).

[121] *Id.*

[122] Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits Part IV, Chapter D, ¶ 8 (August 3, 2005).

[123] Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 Colum. J. Transnat'l L. 418, 471 (2013).

[124] Under UNCITRAL rules, a party may request that a tribunal interpret, correct, or supplement an award. UNCITRAL Arbitration Rules, arts. 37-39. However, the rules do not mention annulment of an award.

[125] Either party may request annulment of an award rendered under ICSID Arbitration Rules within 120 days of the tribunal rendering the award (or, with respect to requests based on corruption of an arbitrator, 120 days after the corruption is discovered but no more than three years after the tribunal renders the award) on one of five grounds:

> (a) that the Tribunal was not properly constituted;
>
> (b) that the Tribunal has manifestly exceeded its powers;
>
> (c) that there was corruption on the part of a member of the Tribunal;
>
> (d) that there has been a serious departure from a fundamental rule of procedure; or
>
> (e) that the award has failed to state the reasons on which it is based.

ICSID Convention, art. 52; ICSID Arbitration Rule 50. To consider a request for annulment, the Chairman appoints a new three-person tribunal from the panel of arbitrators. ICSID Convention, art. 52. The tribunal may not include members of the previous tribunal and must meet other requirements (e.g., they cannot be nationals of either disputing party). *Id.* The annulment committee may stay enforcement of the award until it reaches a decision. ICSID Convention, art. 52; ICSID Arbitration Rule 54. If the committee annuls an award, either party may request that the dispute be submitted to a new tribunal. ICSID Convention, art. 52.

The ICSID Convention and related arbitration rules also provide for the supplementation, interpretation, or revision of an award, upon request of either party and under certain limited circumstances. ICSID Convention, arts. 49(2), 50, 51(4); ICSID Arbitration Rule 49.

[126] *E.g.*, Vivendi v. Argentine Republic (*Vivendi II*), ICSID Case No. ARB/97/3, Decision on the Argentine Republic's (continued...)

investor seeks enforcement of the award in a national court against the host country, it is possible that the court might refuse to recognize or enforce the award, although U.S. law generally permits such refusal only in limited circumstances when, for example, an international treaty governs enforcement of an arbitral award.[127]

The United Nations Conference on Trade and Development (UNCTAD), ICSID, and other commentators have suggested that establishing an international appellate system for ISDS arbitral decisions could improve the overall operation of investment agreements.[128] For example, an appellate mechanism might bring some coherence to inconsistent tribunal decisions, resulting in greater certainty for investors and host countries regarding their rights and obligations under IIAs.[129] However, to date, there does not appear to have been any concrete progress toward establishing such a body. Some observers have noted that including an appeals process could lead to additional delays and costs for disputing parties.[130] In addition, some commentators have questioned whether a *global* appellate body would be able to reconcile inconsistent decisions based on numerous investment treaties that provide different substantive and procedural rights to investors.[131]

While NAFTA does not mention an appeal process, the 2012 U.S. Model BIT provides that if "an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism."[132] The Model BIT also provides that the parties should "strive to ensure" that any appellate process agreed to is transparent.[133]

(...continued)

Request for Annulment of the Award Rendered on 20 August 2007, ¶ 247(i) (August 10, 2010) ("It is agreed by all that Article 52 does not introduce an appeal facility but only a facility meant to uphold and strengthen the integrity of the ICSID process. In the Treaty, the possibility of annulment is in this connection based on specific and limited grounds."); *see also* ICSID, Background Paper on Annulment for the Administrative Council of ICSID 30-35 (August 10, 2012), available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment_English.pdf.

[127] See "Recognition and Enforcement of Investment Arbitration Awards Against State Parties by U.S. Courts" below.

[128] *See, e.g.,* UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (June 25, 2013) available at http://unctad.org/en/publicationslibrary/webdiaepcb2013d4_en.pdf; *see also* ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion paper Part VI (Oct. 22, 2004), available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf.

[129] *See* Katia Yannaca-Small, Organization for Economic Cooperation and Development, "Improving the System of Investor-State Dispute Settlement" (2006), http://www.oecd.org/china/WP-2006_1.pdf.

[130] *E.g.*, Organization for Economic Cooperation and Development, Improving the System of Investor-state Dispute Settlement: An Overview 194 (2006), http://www.oecd.org/investment/internationalinvestmentagreements/40079647.pdf

[131] Glamis Gold, Ltd. v. United States, Award, ¶ 8 (June 8, 2009); Karin L. Kizer & Jeremy K. Sharpe, *Reform of Investor-State Dispute Settlement: The U.S. Experience*, Transnat'l Dispute Mgmt. 1, 173-74 (2014).

[132] 2012 Model BIT, art. 28(10). The 2004 Model BIT contained stronger language regarding negotiations on an appeal mechanism, requiring the parties to an investment treaty to enter into negotiations within three years of a BIT's entry into force to determine whether to establish a "bilateral appellate body or similar mechanism." *See* 2004 Model BIT, Annex D.

[133] 2012 Model BIT, art. 28(10).

Interpretations of Substantive Investment Agreement Obligations by Arbitral Tribunals

In addition to establishing some of the procedural rules governing ISDS proceedings, IIAs also set forth substantive obligations that a host country has agreed to undertake with respect to foreign investors and investments within the country's territory. These obligations include (1) according foreign investors a "minimum standard of treatment" under customary international law; (2) expropriating an investment only in limited circumstances and upon payment of adequate compensation; and (3) refraining from discrimination against foreign party investors or investments as compared to domestic investors or investments (or non-party investors or investments).

This section discusses how tribunals deciding cases under U.S. IIAs have interpreted these obligations, which account for most of the claims brought against the United States under U.S. IIAs (see **Table 1**). Notably, U.S. IIAs typically contain other obligations for a host country such as limitations on trade-distorting performance requirements and rules regarding transfer of funds into and out of the host country.[134] In addition, recent U.S. IIAs may also contain obligations pertaining to labor and the environment, as well as exceptions for prudential financial measures, taxation measures, and national security.[135]

Minimum Standard of Treatment

The inclusion of a "minimum standard of treatment" (MST) obligation in IIAs is intended to establish a floor for the standard of treatment accorded by a host country to foreign investments.[136] The MST generally requires "treatment in accordance with international law, including fair and equitable treatment and full protection and security."[137] Scholars analyzing decisions regarding the MST under NAFTA have suggested that the MST may impose obligations on host countries similar to those imposed on the U.S. federal and/or state governments under the Procedural Due Process Clause, Substantive Due Process Clause, Ex Post Facto Law Clause, Equal Protection Clause, Contracts Clause, Administrative Procedure Act, and various constitutional rights confirmed in Supreme Court decisions.[138]

NAFTA Free Trade Commission Interpretation of July 31, 2001

A series of early NAFTA tribunal awards in investment cases caused concerns that tribunals had too quickly found violations of the MST.[139] To address these concerns, the NAFTA Free Trade

[134] For more on these obligations, see CRS In Focus IF10052, *U.S. International Investment Agreements (IIAs)* , by (name redacted) and (name redacted).

[135] *Id.*

[136] *See* S.D. Myers, Inc. v. Canada, Partial Award, ¶ 259 (November 13, 2000).

[137] NAFTA, art. 1105.

[138] Parvan P. Parvanov & Mark Kantor, *Comparing U.S. Law and Recent U.S. Investment Agreements: Much More Similar than You Might Expect*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY: 2010-2011 803 (Ed. Karl P. Sauvant 2011).

[139] *E.g.*, S.D. Myers, Inc. v. Canada, Partial Award ¶ 266 (November 13, 2000) ("[A] majority of the Tribunal determines that on the facts of this particular case the breach of Article 1102 essentially establishes a breach of Article (continued...)

Commission, which may act on behalf of the three NAFTA parties, issued a binding interpretation on July 31, 2001, under Article 2001 of NAFTA.[140] The interpretation provided the following with regard to the MST:

> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. 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 the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[141]

The interpretation sought to clarify and reaffirm that the host country's MST obligations depend on the content of customary international law, which, in this case, looks to how other countries have treated aliens in the past out of a sense of legal obligation (*opinio juris*).[142] However, tribunals appear to disagree over what constitutes an authoritative source of customary international law, including whether prior arbitral awards or provisions of other investment treaties may represent authoritative sources.[143] The 2012 Model BIT includes language similar to the NAFTA Free Trade Commission's interpretation.

(...continued)

1105 as well."). Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award ¶ 99 (August 30, 2000) ("Mexico failed to ensure a transparent and predictable framework for Metalclad's investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an Investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.").

[140] NAFTA Free Trade Commission, Decision of July 31, 2001, available at http://www.state.gov/documents/organization/38790.pdf. Under NAFTA Article 1131(2), such interpretations bind future tribunals; *e.g.*, ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award, ¶ 176 (January 9, 2003) ("An interpretation of a NAFTA provision rendered by the FTC is under Article 1132(2) binding on this and any other Chapter 11 Tribunal.").

In addition, concerns that foreign investors were receiving greater substantive rights under IIAs with ISDS provisions than U.S. investors obtained under U.S. law prompted Congress to include a provision in the investment negotiating objectives set forth in the 2002 Bipartisan Trade Promotion Authority Act stating that the investment protections in future IIAs should ensure that "foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States." Bipartisan Trade Promotion Authority Act of 2002, P.L. 107-210, § 2102(3) (August 6, 2002).

[141] NAFTA Free Trade Commission, Decision of July 31, 2001.

[142] Grand River Enterprises Six Nations, Ltd. v. United States, Award, ¶ 174 (January 12, 2011). 2012 Model BIT, art.5; *id.* Annex A.

[143] Grand River Enterprises Six Nations, Ltd. v. United States, Award, paras. 174, 176 (January 12, 2011) ("Thus, the content of the [MST obligation] must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law."); Glamis Gold, Ltd. v. United States, Award, paras. 354-55 (June 8, 2009) (naming as possible authoritative sources of customary international law "treaty ratification language, statements of governments, treaty practice (e.g., Model BITs), and sometimes pleadings" but stating that arbitral awards "do not constitute State practice and thus cannot create or prove customary international law"); Mondev Int'l Ltd. v. United States, Award, paras. 121, 125 (October 11, 2002) (stating that authoritative sources include concluded BITs and treaties of friendship and commerce); Clayton/Bilcon v. Canada, Award on Jurisdiction and Liability, ¶ 441 (March 17, 2015) ("In interpreting the international minimum standard, the tribunal also drew guidance from earlier NAFTA Chapter Eleven decisions.").

Thus, despite attempts to clarify the MST obligation by state parties to IIAs and tribunals, its precise content remains unclear, even under NAFTA.[144] For example, tribunals disagree over whether the customary international law standard remains "frozen in time" at the high threshold established in the 1926 case of *Neer v. United Mexican States*,[145] or whether the standard has evolved over time.[146] However, NAFTA tribunals seem to agree that to violate the MST, a host country does not necessarily have to act in bad faith.[147] It also appears that violations of an investor's "legitimate expectations" regarding host country treatment of its investment may result in a breach of the MST only if the host country created the expectations to induce the investment and the investor relied on the host country's representations.[148] Although NAFTA tribunals appear to be reluctant to find violations of the MST when a host country's regulations protect public health, they may issue inconsistent statements regarding whether it is appropriate to scrutinize the decisions of domestic regulatory agencies with expertise.[149]

[144] *E.g.*, Cargill, Inc. v. Mexico, ICSID Case No. ARB(AF)/05/2, Award, ¶ 266 (September 18, 2009) ("The content of this obligation has been difficult to define with precision and the statements of various NAFTA tribunals are difficult to apply to particular facts.").

[145] *See* Apotex Holdings Inc. v. United States (*Apotex III*), Award, ¶ 9.49 (August 25, 2014). In the *Neer* case, the General (American-Mexican) Claims Commission held that:

> the proprietary of governmental acts should be put to the test of international standards, and ... that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.

Neer v. United Mexican States, General Claims Commission, Award, ¶ 4 (October 15, 1926). Tribunals disagree about the continuing significance of the *Neer* case, which actually concerned the physical security of aliens rather than the protection of investments. Mondev Int'l Ltd. v. United States, Award, ¶ 115 (October 11, 2002).

[146] *E.g.*, Glamis Gold, Ltd. v. United States, Award ¶ 22 (June 8, 2009) ("It thus appears that, although situations presented to tribunals are more varied and complicated today than in the 1920s, the level of scrutiny required under *Neer* is the same."); Mondev Int'l Ltd. v. United States, Award, ¶ 116 (October 11, 2002) ("[I]t is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms—had they been current at the time—might have meant in the 1920s when applied to the physical security of an alien.").

[147] *E.g.*, ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award, ¶ 179 (January 9, 2003); Mondev Int'l Ltd. v. United States, Award, ¶ 116 (October 11, 2002) ("To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.").

[148] Glamis Gold, Ltd. v. United States, Award, ¶ 621 (June 8, 2009).

[149] Apotex Holdings Inc. v. United States (*Apotex III*), Award, ¶ 9.37 (August 25, 2014) ("This Tribunal, by inclination, qualification and training, cannot possibly act as a drug regulator; and, indeed, the Claimants do not suggest that it could."). *But see* Glamis Gold, Ltd. v. United States, Award, ¶ 23 (June 8, 2009) ("The Tribunal disagrees that domestic deference in national court systems is necessarily applicable to international tribunals, particularly where a measure of deference is already present in the standard to be applied.").

Selected Excerpts from Post-2001 Statements by NAFTA Tribunals Regarding Government Acts That Violate the "Minimum Standard of Treatment"

Waste Management v. Mexico (*Waste Management II*) (April 30, 2004)	"Taken together, the *S.D. Myers, Mondev, ADF and Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice , or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."
Glamis Gold v. United States (June 8, 2009)	"[A]n act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of [NAFTA] Article 1105(1). Such a breach may be exhibited by ... the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations. ... [A]lthough bad faith may often be present in such a determination and its presence will certainly be determinative of a violation, a finding of bad faith is not a requirement for a breach of [NAFTA] Article 1105(1). ... [T]he tribunal further finds that although the standard for finding a breach of the [MST] therefore remains as stringent as it was under *Neer*, it is entirely possible that, as an international community, we may be shocked by State actions now that did not offend us previously."
Cargill, Inc. v. Mexico (September 18, 2009)	"The Tribunal holds that the current customary international law standard of 'fair and equitable treatment' at least reflects the adaptation of the agreed *Neer* standard to current conditions.... If the conduct of the government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, bad faith or the willful neglect of duty, whatever the particular context the actions take in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment."
Apotex Holdings Inc. v. United States (*Apotex III*) (August 25, 2014)	"In the Tribunal's view, the state practice available to the Tribunal in the specific context presented here, namely the regulation of imported drug products, weighs heavily against the assertion that the claimed protections are required by customary international law. ... This proceeding has not addressed the diversity in NAFTA jurisprudence on the relationship between due process and the [MST] under NAFTA Article 1105. However, assuming (without here deciding) that some element of due process figures in Article 1105's customary minimum standard, the Tribunal finds, on the facts of this case, that the Respondent's conduct impugned by the Claimants does not approach the 'high threshold of severity and gravity' required to establish a violation of Article 1105(1)."
Clayton/Bilcon v. Canada (March 17, 2015)	"The [*Waste Management II* standard] conveys that there is a high threshold for the conduct of a host state to rise to the level of a NAFTA Article 1105 breach, but that there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behavior. The [*Waste Management II*] formulation also recognises the requirement for tribunals to be sensitive to the facts of each case, the potential relevance of reasonably relied-on representations by a host state, and a recognition that injustice in either procedures or outcome can constitute a breach."

"Denial of Justice" Claims

Tribunals determining whether a host country's domestic court decision violates the MST may examine whether a "denial of justice" occurred in which the court's decision "shock[ed] or surprise[d]" the tribunal regarding the "judicial propriety" of the outcome.[150] As noted above,[151] in order to succeed on a claim alleging a MST violation due to a "denial of justice," an investor may have to demonstrate that it exhausted all "reasonably available" judicial remedies in the host country.[152]

Direct and Indirect Expropriation

As noted above, U.S. IIAs protect a variety of property interests.[153] For example, under the 2012 Model BIT, an "investment" may include an enterprise; stock; derivatives; construction contracts; or intellectual property rights.[154] The 2012 Model BIT and other U.S. IIAs prohibit the expropriation of covered investments except: (1) for a public purpose; (2) in a non-discriminatory manner; (3) upon payment of prompt, adequate, and effective compensation; and (4) in accordance with due process of law and the MST.[155] Direct expropriation of an investment occurs when the host country deprives the investor of the value of its investment by, for example, transferring title in the investment to the state.[156] By contrast, an indirect expropriation occurs when the investor retains title to the investment but cannot make economic use of the investment for a significant period of time because, for example, of government regulations that substantially interfere with the investor's use of the investment.[157]

As with tribunals' interpretations of the MST, some observers raised concerns about early NAFTA decisions interpreting the legal standard for indirect expropriation.[158] For example, in *Metalclad Corp. v. Mexico*, the tribunal wrote that an indirect expropriation includes "not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour 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 significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious

[150] Mondev Int'l Ltd. v. United States, Award, ¶ 127 (October 11, 2002).

[151] See "Exhaustion of Local Administrative and Judicial Remedies" above.

[152] The Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award, paras. 207-17 (June 26, 2003).

[153] See "Definitions of "Investor" and "Investment" in ISDS Provisions" above.

[154] 2012 Model BIT, art. 1 (defining "investment"). In *Methanex*, the tribunal suggested that loss of customer base, goodwill, and market share may increase an investor's damages in an expropriation case, but that these attributes standing alone would not appear to amount to property interests that a host country could expropriate. Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Chapter D, ¶ 17 (August 3, 2005).

[155] 2012 Model BIT, art. 6.

[156] Glamis Gold, Ltd. v. United States, Award, paras. 354-55 (June 8, 2009).

[157] *Id.* at paras. 355-356. Indirect expropriation generally requires a "radical diminution in the value" of the investment. *Id.* at ¶ 366. If an investor can make some other economic use of the investment, even a less valuable one, and retains ownership and control, an expropriation is unlikely to have occurred. Grand River Enterprises Six Nations, Ltd. v. United States, Award, paras. 147-50 (January 12, 2011). In addition, the investor must have suffered "actual present harm" for an expropriation claim to be ripe for arbitration. Glamis Gold, Ltd. v. United States, Award, paras. 328-29, 332 (June 8, 2009).

[158] *E.g.,* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine*, 78 NYU L. Rev. 30, 59 (2003).

benefit of the host State."[159] To address concerns raised by these decisions, the 2012 Model BIT contains an annex that specifically spells out the factors a tribunal must consider when determining whether an indirect expropriation has occurred.[160] These factors mirror those in the U.S. Supreme Court decision in *Penn Central*, a case that determined the test for regulatory takings under the Fifth Amendment of the U.S. Constitution. The factors consist of:

> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
>
> (iii) the character of the government action.[161]

An investor's reasonable expectations have played a key role in the outcome of arbitral decisions on expropriation. As with many of the NAFTA tribunal decisions involving the MST, for an indirect expropriation claim to succeed, an investor's reasonable investment-backed expectations must generally result from "targeted" promises made by the host state to the investor regarding treatment of its investment.[162] However, when the law in a particular field is uncertain, the investor may have difficulty establishing that it had reasonable investment-backed expectations regarding regulation of its investment.[163] In addition, when an investor enters a heavily regulated field (e.g., manufacture and sale of tobacco products), it may expect that its investment will be further regulated.[164]

Recent U.S. IIAs have specifically provided that nondiscriminatory regulatory measures generally do not result in indirect expropriations.[165] For example, the 2012 Model BIT states 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.[166]

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[159] Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (August 30, 2000).

[160] In addition, concerns that foreign investors were receiving greater substantive rights under IIAs with ISDS provisions than U.S. investors obtained under U.S. law prompted Congress to include a provision in the investment negotiating objectives in the 2002 Trade Act stating that the investment protections in future IIAs should ensure that "foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States." Bipartisan Trade Promotion Authority Act of 2002, P.L. 107-210, § 2102(3) (August 6, 2002).

[161] 2012 Model BIT, Annex B(4)(a); *see also* Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

[162] Grand River Enterprises Six Nations, Ltd. v. United States, Award, paras. 139-41 (January 12, 2011).

[163] Grand River Enterprises Six Nations, Ltd. v. United States, Award, ¶ 139 (January 12, 2011).

[164] Grand River Enterprises Six Nations, Ltd. v. United States, Award, ¶ 145 (January 12, 2011); Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Chapter D, ¶ 9 (August 3, 2005).

[165] KORUS, Annex 11-B.

[166] 2012 Model BIT, Annex B(4)(b); *see also* Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Chapter D, ¶ 8 (August 3, 2005) ("But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the (continued...)

National Treatment and Most-Favored Nation Treatment

Nondiscrimination provisions are a common feature of international trade agreements.[167] Generally, such provisions prohibit discrimination against foreign entities as compared to similarly situated domestic entities (national treatment) and proscribe discrimination against foreign entities as compared to similarly situated foreign entities of another country (most favored nation or "MFN" treatment). A measure of a host country (e.g., a law, regulation, or practice) may discriminate against a foreign investor or investment on its face (*de jure* discrimination) or when applied to the investor or investment (*de facto* discrimination).[168] Some U.S. IIAs require that a host country provide the investor or investment with the better of national treatment or MFN treatment for the full life cycle of the investment.[169]

To establish a national treatment violation under an IIA, one NAFTA tribunal has indicated that a claimant must show that the investors or investments "(i) were accorded *treatment* by the Respondent with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments; (ii) were *in like circumstances* with the identified *domestic* investors or investments; and (iii) received treatment *less favourable* than that accorded to the identified domestic investors or investments."[170] Similarly, to prove a violation of MFN treatment, the claimant must establish the same criteria, except that "the applicable comparator in step (ii) above is a *foreign* (non-US based) investor or its investments."[171]

As indicated above, a key element in establishing a violation of these nondiscrimination provisions involves identifying a comparator "in like circumstances" with the claimant or its investment. A tribunal determining whether a comparator is "in like circumstances" with the investor or investment must typically engage in a fact-specific inquiry.[172] At least one NAFTA tribunal has held that the host country must regulate a comparator in the same manner as the claimant or its investment.[173]

One controversy involving the MFN treatment standard is whether an investor may claim that it deserves treatment accorded to foreign investors under provisions in another IIA in force for the host country. In *ADF Group Inc*., a Canadian investor argued that it should be able to import the

(...continued)

government would refrain from such regulation.").

[167] *E.g.*, General Agreement on Tariffs and Trade, arts. I, III.

[168] *See* ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award, ¶ 157 (January 9, 2003).

[169] *E.g.*, NAFTA, art.1104 ("Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.").

[170] Apotex Holdings Inc. v. United States (*Apotex III*), Award, ¶ 8.4 (August 25, 2014). Determining whether NAFTA claimants are "in like circumstances" with certain investors or investments may involve an examination of whether the entities "(i) are in the same economic or business sector; (ii) have invested in, or are businesses that compete with the investor its investments in terms of goods or services; or (iii) are subject to a comparable legal regime or regulatory requirements as the Claimants and their investments." Apotex Holdings Inc. v. United States (*Apotex III*), Award, ¶ 8.15 (August 25, 2014).

[171] Apotex Holdings Inc. v. United States (*Apotex III*), Award, ¶ 8.4 (August 25, 2014).

[172] *Id.* at ¶ 8.15.

[173] Grand River Enterprises Six Nations, Ltd. v. United States, Award, ¶ 167 (January 12, 2011) ("The reasoning of these cases shows the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of [NAFTA] Articles 1102 and 1103.").

purportedly more favorable MST from the U.S.-Albania BIT and U.S.-Estonia BIT into NAFTA.[174] The tribunal appeared to acknowledge that the investor was entitled to the MST in these BITs; however, it disagreed with the investor that these BITs established a more favorable standard for the investor.[175] In a more recent NAFTA arbitration, a tribunal declined to decide the issue but noted that the NAFTA parties agree that the MFN clause cannot be used in this manner.[176] However, the tribunal proceeded to examine whether the United States' treatment of the NAFTA party investor satisfied U.S. obligations in the U.S.-Jamaica BIT.[177]

ISDS Arbitration Decisions and Their Interplay with U.S. Law

The Constitution governs how federal statutes may be enacted, amended, or repealed.[178] Therefore, in order to amend a duly enacted statute, Congress must follow the processes established in Article I of the Constitution.[179] Because the Constitution is superior to ISDS provisions in BITs and investment chapters in FTAs, such ISDS provisions cannot alter federal law.[180] Although, to date, the United States has yet to lose a claim brought against it under an IIA, if it were to lose a claim in the future, the arbitration panel would not be able to amend, void the application of, or repeal the laws of the United States.

Moreover, the United States has negotiated agreements that limit the remedies that an arbitration tribunal may award. For example, in both NAFTA and the 2012 Model BIT, the ISDS provisions state that a tribunal may award only monetary damages and/or restitution of property.[181] Furthermore, if a tribunal elects to award restitution of property, the respondent state has the option of paying monetary damages in lieu of such restitution.[182] NAFTA and the 2012 Model BIT also provide that an arbitration panel cannot award punitive damages.[183] In addition, by limiting the available remedies, these provisions preclude an arbitration tribunal from requiring amendment, repeal, or passage of any statute or regulation in U.S. law.

[174] ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award, paras. 76-80, 196 (January 9, 2003).

[175] *Id.* at ¶ 196.

[176] Apotex Holdings Inc. v. United States (*Apotex III*), Award, ¶ 9.71 (August 25, 2014).

[177] *Id.*

[178] *See* U.S. Const. art. I; *see also* INS v. Chadha, 462 U.S. 919, 951 (1983) (holding the Article I of the Constitution "represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure").

[179] U.S. Const. art. I

[180] *See* Reid v. Covert, 354 U.S. 1 (1957) (Black, J., plural) ("It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe [the Supremacy Clause] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions."); Doe v. Braden, 57 U.S. 635, 657 (1853) ("The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States.").

[181] NAFTA, art. 1135(1); 2012 Model BIT, art. 34(1).

[182] NAFTA, art. 1135(1); 2012 Model BIT, art. 34(1).

[183] NAFTA, art. 1135(3); 2012 Model BIT, art. 34(3).

However, a tribunal's inability to change the laws or regulations of the United States directly does not mean that arbitration awards cannot be substantial. For example, in *Occidental Petroleum Corp. v. Ecuador*, the tribunal ordered Ecuador to pay Occidental $1,769,625,000—over 1 billion dollars—in damages.[184] The tribunal rendered that award, which is one of the largest awards in favor of a claimant under ISDS arbitration, after finding that Ecuador violated an investment agreement by expropriating Occidental's property in response to Occidental transferring some of its economic interests under an oil production contract in contravention of Ecuador law.[185] Therefore, although a tribunal lacks authority to alter a U.S. statute directly, some commentators believe that the possibility for such large monetary damages potentially could influence lawmakers and regulators when they consider proposed laws or regulations that may run afoul of IIA obligations.[186] However, other commentators counter that the federal government faces potential monetary damages under its own domestic legal system for claims filed against the government and that most would not consider this practice a threat to democratic principles.[187]

Apportionment of Costs and Attorneys' Fees by Investment Tribunals

Because the costs and fees associated with investment arbitration may amount to millions of dollars, the manner in which a tribunal apportions costs and fees among the disputing parties can have a significant impact on them. ICSID and UNCITRAL rules provide different methods for the apportionment of the tribunal's costs and the parties' fees. Under the ICSID Convention, the tribunal and Secretary-General of ICSID determine the apportionment of the fees and costs borne by the arbitrators, ICSID Secretariat, and disputing parties.[188] The tribunal sets forth in the award the proportion of costs and fees that each party will bear.[189] The ICSID rules do not express a preference for requiring the losing party to bear more of the costs and fees.

By contrast, the UNCITRAL rules establish a more detailed framework for apportionment of arbitration costs and attorneys' fees. Article 40 provides an exhaustive list of the types of expenses that may be eligible for apportionment.[190] Article 41 sets out the rules for determining the fees and expenses of the arbitrators.[191] Attorneys' fees must be "reasonable."[192] With respect

[184] Occidental Petroleum Corporation Occidental Exploration and Production Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 876 (Oct. 5, 2012).

[185] *Id.* at paras. 199-200, 453-55. In 2012, Ecuador initiated an annulment proceeding, challenging the decision of the tribunal, which is currently pending. *See* Case Details, Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, available at https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/06/11&tab=PRO.

[186] *See, e.g,* Perry E. Wallace, *International Investment Law and Arbitration, Sustainable Development, and Rio+20: Improving Corporate Institutional and State Governance*, 12 Sustainable Dec. L. & Pol'y 22, 24 (2012) ("Furthermore, the true worry is that the specter of a hefty arbitral award against it might have a chilling effect on the healthy evolution of that country's regulatory evolution ...").

[187] Parvan P. Parvanov & Mark Kantor, *Comparing U.S. Law and Recent U.S. Investment Agreements: Much More Similar than You Might Expect*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY: 2010-2011 834-35 (Ed. Karl P. Sauvant 2011).

[188] ICSID Convention, art. 60.

[189] ICSID Convention, art. 61; ICSID Arbitration Rule 28.

[190] UNCITRAL Arbitration Rules, art. 40.

[191] *Id.* art. 41.

to allocation of costs, the UNCITRAL Arbitration Rules appear to leave the tribunal with a large amount of discretion in apportioning the costs of the arbitration. Article 42 of the UNCITRAL rules states the following:

> (1) The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> (2) The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.[193]

Tribunals apportioning costs under ICSID rules have indicated an inclination to award half of the costs of arbitration to each party when the case presented complex and novel questions.[194]

Recognition and Enforcement of Investment Arbitration Awards Against State Parties by U.S. Courts

Once an investment tribunal has rendered an award in an ISDS case, a respondent state may decide to compensate the investor voluntarily. However, if the state does not do so, an investor may seek to enforce the award against the respondent state in a court with jurisdiction over the state's assets. This section analyzes international treaties and U.S. laws pertaining to the recognition, enforcement, and execution of investment arbitration awards against foreign countries and the United States in U.S. courts.

For purposes of this section, "recognition" of an arbitral award rendered by an investment tribunal under a U.S. IAA involves a U.S. court's domestication of the award so that it is equivalent to a judgment of the courts of the United States.[195] "Enforcement" of an award refers to a court "converting the [award] into a judicial judgment that orders an award debtor to comply with the award, including paying any monetary sum due."[196] "Execution" of a judgment refers to

(...continued)

[192] *Id.* art. 40.

[193] *Id.* art. 42.

[194] ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award, ¶ 200 (January 9, 2003) (ICSID Additional Facility Rules); The Loewen Group Inc. v. United States, ICSID Case No ARB(AF)/98/3, Award, ¶ 240 (June 26, 2003) (ICSID Arbitration Rules) ("[T]he Tribunal is of the view that the dispute raised difficult and novel questions of far-reaching importance for each party, and the Tribunal therefore makes no award of costs.").

[195] *See* New York City Bar, Report by the Committee on International Commercial Disputes, Recommended Procedures for Recognition and Enforcement of International Arbitration Awards Rendered Under the ICSID Convention 6-7 (July 2012), available at http://www2.nycbar.org/pdf/report/uploads/20072262-ProceduresforAwardsunderICSID.pdf.

[196] *Id.*

measures taken by the investor when the host country declines to pay compensation in accordance with the judgment.[197]

Recognition and Enforcement of ICSID Convention Awards

The ICSID Convention would appear to limit the ability significantly of an ICSID-member country, such as the United States, to refuse to recognize and enforce an award rendered under the ICSID Convention (i.e., when the investor's home state and the host country are both members of the ICSID Convention and the dispute falls under that Convention).[198] Under ICSID Convention Article 54:

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.[199]

Furthermore, Article 53 of the ICSID Convention states that the award binds the parties and "shall not be subject to any appeal or to any other remedy except those provided for in this Convention" (e.g., interpretation, revision, or annulment).[200]

When implementing the ICSID Convention in federal law, Congress provided that the award of a tribunal under Chapter IV of the ICSID Convention "shall create a right arising under a treaty of the United States."[201] Any requirement that a party pay compensation under an award "shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."[202] As commentators have noted, this would appear to establish a limited role for a U.S. court to review an ICSID Convention award.[203]

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[197] *Id.*

[198] NAFTA provides that a disputing party may not seek enforcement of a final award made under the ICSID Covention until: (1) 120 days have passed since the tribunal rendered the award and no disputing party has requested revision or annulment of the award; or (2) revision or annulment proceedings have concluded. NAFTA, art. 1136(3)(a). Article 34(6)(a) of the 2012 Model BIT provides similar language. The ICSID Convention's provisions on the binding force of arbitral awards do not apply in cases brought under the ICSID Additional Facility Rules (i.e., cases in which either the investor's home country or the host country, but not both, is a member of the ICSID Convention).

[199] ICSID Convention, art. 54.

[200] ICSID Convention, art. 53. For a discussion of the limited grounds upon which an ICSID Convention tribunal may annul an award, see "Whether Investment Arbitration Decisions May Be Appealed" above.

Moreover, Article 27 of the ICSID Convention appears to allow an investor's home country to bring a state-state dispute settlement case against a host country that refuses to comply with an arbitral award rendered under the ICSID Convention. ICSID Convention, art. 27. Disputes between states under ICSID may also be submitted to the International Court of Justice unless the states agree to a different manner of settlement. ICSID Convention, art. 64. In addition, the IIA itself may provide recourse to state-state dispute settlement when a host country fails to comply with an award. *E.g.* NAFTA, art. 1136(5).

[201] Convention on the Settlement of Investment Disputes Act of 1966, P.L. 89-532, § 3 (August 11, 1966) (codified at 22 U.S.C. § 1650(a)). Federal district courts have jurisdiction over proceedings in which a party seeks to enforce an ICSID Convention arbitral award against a foreign state. 22 U.S.C. § 1650(b).

[202] 22 U.S.C. § 1650(a). "The Federal Arbitration Act ... shall not apply to enforcement of awards rendered pursuant to the [ICSID Convention]." *Id.*

[203] *See* New York City Bar, Report by the Committee on International Commercial Disputes, Recommended (continued...)

Recognition and Enforcement of Non-ICSID Convention Awards

For those arbitrations that do not take place under the ICSID Convention (i.e., either the investor's home country, the host country, or both, is not a party to the ICSID Convention), an investor might be able to pursue recognition and enforcement of an award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in states party to the convention.[204] There are 154 countries party to this convention, according to UNCITRAL.[205]

The New York Convention, which Congress has implemented in the Federal Arbitration Act (FAA),[206] applies only to recognition and enforcement of awards: (1) "made in the territory of a state" different from the one in which a party seeks recognition and enforcement of the award; or (2) that are considered to be "foreign" awards in the state in which recognition and enforcement is sought.[207] The New York Convention provides that contracting states shall recognize the awards

(...continued)

Procedures for Recognition and Enforcement of International Arbitration Awards Rendered Under the ICSID Convention 11-12 (July 2012), http://www2.nycbar.org/pdf/report/uploads/20072262-ProceduresforAwardsunderICSID.pdf. Commentators have argued that Federal Rule of Civil Procedure 60(b) may allow a federal court to decline to enforce a judgment on certain limited grounds. *See* Edward Baldwin, Mark Kantor & Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23 J. Int'l Arb. 1, 9-10 (2006).

[204] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force June 7, 1959) [hereinafter New York Convention]. U.S. IIAs typically require the arbitration to be held in "the territory of a Party that is a party to the New York Convention." *E.g.*, NAFTA, art. 30. UNCITRAL Arbitration Rules Article 34 states that awards bind the parties, who must carry out the award "without delay."

NAFTA provides that a disputing party may not seek enforcement of a final award made under the ICSID Additional Facility Rules or UNCITRAL Rules until: (1) three months have passed since the tribunal rendered the award and no disputing party has requested the revision, setting aside, or annulment of the award; or (2) "a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal." NAFTA, art. 1136(3)(b). Article 34(6)(b) of the 2012 Model BIT provides similar language.

[205] UNCITRAL, Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[206] 9 U.S.C. §§ 1 *et seq*. A party that loses an ISDS case that does not fall under the ICSID Convention might also seek to vacate an award rather than attempt to prevent enforcement of an award in U.S. courts. Under section 10 of the FAA, a federal court may vacate an award *made in the United States* upon application by a party to the arbitration:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. §§ 10, 201, 208 (emphasis added). Whether a court considers an award of an investment arbitration panel to be "made in the United States" or, rather, a "foreign" award, may depend on the location of the seat of arbitration agreed to by the disputing parties, the source of the procedural rules for recognition and enforcement of the award, and which federal court considers the petition to vacate, among other things. *See* Catherine A. Giambatiani, *Lex Loci Arbitri and Annulment of Foreign Arbitral Awards in U.S. Courts*, 20 Am. U. Int'l L. Rev. 1101, 1112 (2005).

The Act of State Doctrine, in which a court will not render judgment on another sovereign country's acts done within its own territory, does not apply to enforcement of awards under the FAA. 9 U.S.C. § 15 ("Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.").

[207] New York Convention, art. I.

"as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon," subject to certain conditions.[208] The New York Convention supplies somewhat broader means of challenging recognition and enforcement of an award on the grounds that the party seeking to prevent enforcement can show that, for example, the arbitrator exceeded its powers, the responding party was unable to present its case, or recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought.[209]

Execution of Arbitral Awards

Although the ICSID and New York conventions, as implemented in federal law, would appear to limit the grounds on which a U.S. court may refuse to recognize and enforce an arbitral award, neither convention purports to affect contracting states' laws regarding the *execution* of judgments.[210] With respect to execution of a judgment (resulting from recognition and enforcement of an arbitral award) on the assets of a country located in the United States, the ICSID Convention defers to each member-country's laws, which may provide sovereign immunity from execution on certain assets of a foreign country located in the United States. The ICSID Convention provides that "[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."[211] Moreover, Article 55 of the ICSID Convention provides that "[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."[212]

Thus, in the case of parties seeking to obtain execution of a judgment on a foreign country's assets in the United States, the protections of the Foreign Sovereign Immunities Act of 1976 (FSIA) could potentially apply.[213] FSIA places limits on the types of property that a federal or state court may order to be seized in satisfaction of a judgment against a foreign country.[214] It also may require the entity seeking execution of a judgment to serve notice on the foreign country prior to execution and to wait until a certain amount of time has elapsed before execution on the country's assets.[215] Generally, enforcement of an arbitral award by execution against U.S. assets of a foreign country is limited to assets of the country used for a "commercial activity in the

[208] New York Convention, art. III.

[209] New York Convention, art. V.

[210] This section assumes that a foreign country against which a party seeks to enforce an award has waived its immunity from suit pursuant to the Foreign Sovereign Immunities Act by agreeing to arbitrate the dispute. *See* 28 U.S.C. § 1605(a)(1), (6). It also assumes that any constitutional prerequisites for the court's exercise of personal jurisdiction over the country have been met.

[211] ICSID Convention, art. 54.

[212] ICSID Convention, art. 55.

[213] 28 U.S.C. §§ 1609-1611.

[214] 28 U.S.C. § 1610(c).

[215] *Id.*

United States."[216] In addition, certain foreign military and central bank or monetary authority property may retain immunity from execution.[217]

Recognition, Enforcement, and Execution of an ISDS Award Rendered Against the United States

As noted above, an ISDS tribunal has never ordered the United States to pay compensation to an investor in an ISDS case. If the United States lost a case, it seems unlikely that it would refuse to compensate a foreign investor. However, in the unlikely event that it did refuse to pay, an investor could potentially seek recognition of an investment arbitration award rendered against the United States in federal court on the grounds that the United States has waived its sovereign immunity from suit under the Tucker Act and the relevant investment treaty.[218] Assuming that the award qualified for recognition and enforcement under the ICSID Convention, New York Convention, or other relevant treaty, then, as discussed above, it appears that the court would have limited grounds on which to refuse recognition and enforcement of the award.[219] However, even if the investor obtained recognition and enforcement of an award, the United States has not waived its sovereign immunity from execution of the award (now a judgment) under the Tucker Act, and thus the investor would appear to be unable to collect on the judgment if Congress has not appropriated funds for payment of the judgment.[220] However, the United States would still have an international obligation to comply with the judgment.

[216] *See* 28 U.S.C. § 1610(a). A "commercial activity" means "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). A "commercial activity carried on in the United States by a foreign state" means "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e).

[217] 28 U.S.C. § 1611.

[218] *See, e.g.*, 18 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."); 19 U.S.C. § 3311(a) (approving NAFTA); ADF Group Inc. v. United States of America, Procedural Order No. 2, ICSID Case No. ARB(AF)/00/1, ¶ 15 (July 11, 2001) (arguing that "the United States has waived its sovereign immunity with respect to the enforcement of NAFTA Arbitral Awards under the Tucker Act [18 U.S.C. 1491(a)] in conjunction with NAFTA [19 U.S.C. 3311(a)]"). Although the Tucker Act contains an exception from waiver of sovereign immunity for "any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations," the act provides that Congress may, by enacting a law, void this exception. 28 U.S.C. § 1502. It is unclear whether congressional approval of a trade agreement with an applicable investment chapter (or the Senate's ratification of a BIT) or congressional enactment of the ICSID Convention Act and the Federal Arbitration Act would be sufficient to overcome this exception to the U.S. Court of Federal Claims' jurisdiction.

[219] See "Recognition and Enforcement of ICSID Convention Awards" and "Recognition and Enforcement of Non-ICSID Convention Awards" above.

[220] *See* United States v. Country of Cook, 167 F.3d 381, 386 (7th Cir. 1999) ("Although the raw power of Congress to withhold appropriations means that a given judgment requiring the United States to pay money may be unenforceable, this remote possibility does not render all judgments advisory.") (citation omitted).

Table 1. Investor-State Dispute Settlement Cases Brought Against the United States

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
October 30, 1998	The Loewen Group, Inc. v. United States	NAFTA	A commercial contract dispute between various funeral-related businesses owned by the O'Keefe family of Mississippi and a competing U.S. subsidiary of the Loewen Group, a Canadian corporation, led to civil litigation in Mississippi state court. A jury awarded O'Keefe $500 million in damages after a trial in which the state judge allowed O'Keefe's attorneys to make references to distinctions in Loewen Group's (and its chief executive officer's) nationality, race, and wealth. Loewen declined to appeal the verdict after the Mississippi Supreme Court refused to reduce the amount of the $625 million bond it would require Loewen to post as a condition of staying execution of the judgment, and instead settled the state court case for $175 million. Loewen claimed the Mississippi state court system's conduct violated NAFTA Articles 1102 (national treatment), 1105 (minimum standard of treatment).	In June 2003, the NAFTA tribunal issued its decision dismissing all of the claims against the United States on jurisdictional grounds. The tribunal found that the Loewen Group had assigned its NAFTA claims to a Canadian corporation owned and controlled by a U.S. corporation, and that there was no evidence that the individual claimant, Raymond Loewen, had an interest in Loewen Group. On the merits, the tribunal wrote that it would have held for the United States. Despite finding the conduct of the Mississippi trial to be a "miscarriage of justice," the tribunal noted that Loewen settled the case instead of pursuing an appeal of the Mississippi court decision before the U.S. Supreme Court.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
August 31, 1999	Mondev International Ltd. v. United States	NAFTA	A Canadian company owned an interest in a U.S. subsidiary that entered into a real estate development and construction contract with the City of Boston and the Boston Redevelopment Authority (BRA). The subsidiary filed a lawsuit alleging various tort and contract claims in Massachusetts state court against the City and BRA. A jury initially returned a verdict against the City and redevelopment authority. Ultimately, however, the Massachusetts Supreme Judicial Court dismissed all of the investor's claims on various technical grounds. The U.S. Supreme Court denied *certiorari*. The claimant alleged before a NAFTA tribunal that the Massachusetts court decisions and actions of the City of Boston violated NAFTA Articles 1102 (national treatment), 1105 (minimum standard of treatment), and 1110 (expropriation and compensation).	The NAFTA tribunal dismissed the expropriation claim after determining that the relevant events constituting an expropriation took place prior to the date that NAFTA entered into force, and thus NAFTA did not apply. With respect to claimant's allegations regarding breach of the minimum standard of treatment, the NAFTA tribunal, interpreting the broadly worded standard in NAFTA Chapter 11, held that the actions of the Massachusetts courts did not "shock or surprise" the tribunal regarding the "judicial propriety" of the outcome in Massachusetts state court.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
December 3, 1999	Methanex Corp. v. United States	NAFTA	The Canadian investor, which produced a feedstock for a gasoline additive known as "MBTE" asserted that California's ban on the sale and use of "MTBE" violated U.S. NAFTA obligations. The company alleged violations of NAFTA Articles 1102 (national treatment), 1105 (minimum standard of treatment) and 1110 (expropriation and compensation).	The tribunal held that it lacked jurisdiction over Methanex's claims because the California ban did not "relate to" Methanex's investment. The tribunal found that the ban was not intended to harm or even address methanol producers. Thus, no "legally significant connection" existed between the ban, Methanex, and its investments. On the merits, the tribunal would have found no violation of national treatment because the ban affected the U.S. and Canadian MTBE and methanol industries equally. It found no expropriation because neither the United States nor California had induced Methanex to invest by representing that regulatory requirements pertaining to chemicals (a highly regulated field) would not change.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
July 19, 2000	ADF Group Inc. v. United States	NAFTA	A Canadian company became a subcontractor on a highway construction project in Northern Virginia. The Federal Highway Administration of the U.S. Department of Transportation (DOT) gave a grant to Virginia to assist in the state's procurement of construction services, which involved the use of steel girders that ADF would supply. A "Buy America" clause in the subcontract required the use of U.S.-produced steel in accordance with federal law and regulations. ADF intended to perform certain fabrication work on the steel in Canada. However, because of the clause and federal law, it had to perform the work in the United States at increased cost instead. ADF alleged violations of NAFTA Articles 1102 (national treatment), 1103 (most-favored nation treatment), 1105 (minimum standard of treatment), and 1106 (performance requirements).	The tribunal dismissed all of the investor's claims. It found no violation of national treatment obligations because U.S. construction and steel manufacturing companies "in like circumstances" with the investor also could not use steel fabricated outside of the United States in construction projects partially funded by federal grants. It also found a lack of sufficient evidence that the requirement discriminated *de facto* against Canadian investors. Although the tribunal found that the Buy America provisions amounted to a prohibited performance requirement, the tribunal found no violation of NAFTA because of the agreement's exception in Article 1108(8)(b) for "procurement by a Party." The tribunal determined that, for purposes of this exception, the Virginia Department of Transportation's procurement of construction services amounted to "procurement by a Party" even though U.S. states were not subject to the procurement disciplines in NAFTA Chapter 10. The tribunal found no violation of the minimum standard of treatment due in part to the fact that the existence of domestic content requirements in the government procurement context is a common feature in many countries.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
Canfor filed its notice of arbitration on July 9, 2002, Tembec Forest Products on December 2, 2003, and Terminal Forest Products on March 31, 2004	Softwood Lumber Consolidated Proceedings (*Canfor Corp., Terminal Forest Products Ltd., and Tembec Forest Products Ltd.*)	NAFTA	Three Canadian lumber companies alleged that U.S. laws and practices involving the imposition of antidumping and countervailing duties on their softwood lumber exports violated NAFTA Articles 1102 (national treatment), 1103 (most-favored nation treatment), 1105 (minimum standard of treatment), and 1110 (expropriation and compensation).	A consolidation tribunal granted the United States' request to consolidate the claims. Subsequently, a tribunal dismissed all of the claims, except for one based on Congress' passage of the Continuing Dumping and Subsidy Offset Act of 2002, because NAFTA Article 1901 bars investor-state claims that would impose an obligation on a party with respect to its antidumping or countervailing duty laws. Subsequently, the United States and Canada reached an agreement to settle the softwood lumber dispute in 2006 and the proceedings were terminated.
August 2, 2002	Kenex Ltd. v. United States	NAFTA	The claimant, a Canadian company, produced, marketed, and distributed industrial hemp products. The company sought to expand its operations in the United States. However, its products contained trace amounts of tetrahydrocannabinol (THC), which allegedly made them illegal under 2001 rules promulgated by the U.S. Drug Enforcement Administration. The investor alleged violations of NAFTA Articles 1102 (national treatment), 1103 (most-favored nation treatment), 1104 (standard of treatment), and 1105 (minimum standard of treatment).	Kenex abandoned its claim after winning a U.S. federal court case against the Drug Enforcement Administration in 2004. The Ninth Circuit ruled that the agency had exceeded its authority in banning the sale or possession of certain hemp items.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
December 9, 2003	Glamis Gold, Ltd. v. United States	NAFTA	A Canadian mining company that owned rights to mine gold on federal land in California alleged that the United States had expropriated these rights and denied the company fair and equitable treatment with respect to the company's attempt to exercise the rights. The investor argued that the federal government delayed its consideration of the project and that California passed legislation making the project "economically infeasible." The investor alleged violations of NAFTA Articles 1105 (minimum standard of treatment) and 1110 (expropriation and compensation).	The tribunal declined to find an indirect expropriation as a result of the federal and state regulatory measures because Glamis retained its mining rights, which had a reduced but still significantly positive value. The tribunal denied the investor's claim under the minimum standard of treatment, holding that the conduct of the U.S. federal and state governments was not "sufficiently egregious and shocking."

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
March 12, 2004	Grand River Enterprises Six Nations, Ltd. v. United States	NAFTA	Claimants, who professed to be members of American Indian tribes, manufactured cigarettes in Canada for export to the United States. Claimants alleged that actions of states of the United States to give effect to the 1998 Master Settlement Agreement (MSA) resolving claims brought by various state attorneys general against various U.S. cigarette manufacturers violated U.S. NAFTA obligations. In particular, the claimants argued that the states' treatment of them as "non-participating members" in the MSA violated Articles 1102 (national treatment), 1103 (most-favored nation treatment), 1105 (minimum standard of treatment), and 1110 (expropriation and compensation). The states required non-participants in the MSA to contribute money to an escrow fund for 25 years to approximate the company's payment obligations had the company accepted the MSA. There was a provision in the states' laws, characterized as a loophole, that the investors initially used to significantly decrease their payments. However, the states subsequently modified this provision.	The tribunal found that it did not have jurisdiction over all but one of the claimants (except one individual) because they lacked an "investment" within the United States. With respect to the individual over whom the tribunal decided it had jurisdiction, the tribunal determined that the claims failed on the merits because there was not a serious enough deprivation of his business to constitute an expropriation. He retained ownership of the business, which appeared to remain profitable. The tribunal also rejected the investor's claims for violations of most-favored nation treatment, national treatment, and the minimum standard of treatment.
March 16, 2005	Canadian Cattle Claims	NAFTA	More than 100 Canadian nationals engaged in the cattle business alleged that the U.S. ban on Canadian-origin livestock and certain beef products due to concerns about bovine spongiform encephalopathy violated NAFTA Article 1102 (national treatment).	The tribunal dismissed all of the claims for lack of jurisdiction because the claimants did not have an "investment" in the United States and were not seeking to make one.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
April 16, 2007	Domtar Inc. v. United States	NAFTA	A Canadian paper products company alleged that U.S. laws and practices involving the imposition of antidumping and countervailing duties on its softwood lumber exports violated NAFTA Articles 1102 (national treatment), 1103 (most-favored nation treatment), 1104 (standard of treatment),1105 (minimum standard of treatment), and 1109 (transfers of investments). The investor argued that it had not been made whole by a refund of cash deposits pursuant to the 2006 Softwood Lumber Agreement between Canada and the United States.	The dispute does not appear to have moved beyond the early stages.
April 2, 2009	CANACAR v. United States	NAFTA	An organization representing independent Mexican trucking companies alleged that the United States had refused entry of the companies, who wanted to provide certain trucking services in the United States. It also alleged that the United States had prevented the claimants from investing in U.S. companies providing these services. Claimants argued that U.S. carriers' applications were considered on their individual merits but Mexican applications were automatically rejected. The Department of Transportation stated that it implemented this practice due to safety concerns. CANACAR argued that the United States had violated NAFTA Articles 1102 (national treatment), 1103 (most-favored nation treatment), and 1105 (minimum standard of treatment).	The dispute does not appear to have moved beyond the early stages. The United States and Mexico later decided to settle the trucking dispute.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
December 10, 2008 (the "Sertraline Claim") and June 4, 2009 (the "Pravastatin Claim")	Apotex Inc. v. United States (*Apotex I and II*)	NAFTA	A Canadian generic drug developer and manufacturer sought approval from the U.S. Food and Drug Administration to market and sell its drugs in the United States. It alleged that a series of U.S. federal court decisions denied it access to the generic market and hurt its efforts to obtain market share. Apotex alleged breaches of NAFTA Articles 1102 (national treatment), 1105 (minimum standard of treatment), and 1110 (expropriation and compensation).	The tribunal held that Apotex lacked an "investment" in the United States and therefore dismissed the investor's claims for lack of jurisdiction. The tribunal found that all of Apotex's development, testing, and manufacturing activities took place in Canada. The company then exported drugs to separate U.S. distributors. The tribunal also rejected the argument that Apotex's applications to market and sell drugs in the United States were an "investment." Nor, in the view of the tribunal, were the costs incurred by the company in preparing its applications (in Canada) to export drugs to the United States an "investment."

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
March 6, 2012	Apotex Holdings Inc. v. United States (*Apotex III*)	NAFTA	A Canadian generic drug development and manufacturing company (and its holding company) filed a claim on behalf of its affiliated U.S. distributor. The claim alleged that the U.S. Food and Drug Administration (FDA)'s refusal to admit its products into the United States through issuance of an "import alert" without sufficient process hurt its U.S. distributor's sales and market share. The FDA issued the alert following the agency's determination that two Canadian drug manufacturing facilities had violated U.S. laws. The claimant alleged breaches of NAFTA Articles 1102 (national treatment), 1103 (most-favored nation treatment), and 1105 (minimum standard of treatment).	The tribunal held that no violation of national treatment had occurred because none of the comparable domestic companies identified by the claimants were "in like circumstances" to the claimants or their investments. The claimants were not subject to the same regulatory regime as a result of their choice to export products to the U.S. market rather than invest in U.S. drug manufacturing companies. The tribunal declined to find a most-favored-nation violation because the alleged comparable foreign company made numerous drugs that were medically necessary. The FDA had apparently determined that the alleged comparable foreign company should not be subject to an import alert because it would hurt U.S. patients. Thus, the foreign comparator was not "in like circumstances" to the claimants and their investments. The tribunal found no violation of the minimum standard of treatment because other countries implementing measures blocking the import of adulterated drugs did not require that strict procedures be followed.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
December 2012	"Stanford Ponzi Scheme" Cases	U.S.-Peru Trade Promotion Agreement (*Peruvian Victims v. United States*), U.S.-Chile Free Trade Agreement (*Mordehai Moor v. United States*), U.S.-Uruguay BIT (*Fleitas v. United States*), and CAFTA-DR (*Guatemalan, Costa Rican, and Dominican Victims v. United States*)	Investors in U.S. companies brought claims under various U.S. FTAs alleging that the United States failed to protect their investments from a Ponzi scheme. In particular, the investors alleged that the U.S. Securities and Exchange Commission did not "act with due diligence" in enforcing federal law against the companies. Claimants allege violations of national treatment, most-favored nation treatment, and the minimum standard of treatment as set forth in various U.S. FTAs.	The disputes do not appear to have moved beyond the early stages.

Source: Congressional Research Service. Information obtained from the texts of decisions by international investment tribunals and filings by the parties to investment disputes.

Note: The NAFTA cases summarized in this chart are those listed on the U.S. State Department website at http://www.state.gov/s/l/c3741.htm.

Table 2. Summaries of Selected Investor-State Dispute Settlement Cases

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
October 2, 1996	Metalclad Corp. v. Mexico	NAFTA	Metalclad, a U.S. corporation, acquired a Mexican company that sought to develop and operate a hazardous waste transfer station and landfill in Guadalcázar, San Luis Potosi. The Mexican federal government authorized the subsidiary to construct and operate the landfill. Allegedly, officials of the Mexican government assured Metalclad that it would be able to obtain any additional necessary state or local permits. Subsequently, the local government denied a construction permit to Metalclad's subsidiary without prior notice after the company had already built the landfill. The governor of San Luis Potosí later issued a decree declaring the landfill and its environs as a "natural area" for the protection of a rare cactus. Therafter, Metalclad was unable to operate the landfill. The company alleged that Mexico's state and local governments interfered with its development and operation of the landfill. It claimed a violation of NAFTA Articles 1105 (minimum standard of treatment) and 1110 (expropriation and compensation).	The tribunal held that the actions of Mexico's state and local governments did not accord Metalclad fair and equitable treatment, and that Mexico "failed to ensure a transparent and predictable framework for Metaclad's business planning and investment." The panel also held that Mexico had taken a measure "tantamount to expropriation" of Metalclad's property in violation of NAFTA because the Mexican federal government represented that Metalclad's subsidiary did not need additional permits and allowed it to build the landfill, but the local government later denied the company a construction permit after a lengthy delay. The tribunal awarded Metalclad $17 million in compensation.
April 14, 1997	Ethyl Corp. v. Canada	NAFTA	Ethyl Corp., a U.S. corporation, manufactured and distributed a fuel additive known as "MMT" used to provide octane enhancement for unleaded gasoline. Canada enacted a law banning the interprovincial trade in, and import of, MMT. Ethyl's Canadian subsidiary argued the law breached NAFTA Articles 1102 (national treatment), 1106 (performance requirements), and 1110 (expropriation and compensation). Canada argued that the arbitral panel lacked jurisdiction over the case, among other things.	The tribunal rejected Canada's objections to its jurisdiction. However, a Canadian court later held the act to be invalid under Canadian law. The parties settled the NAFTA Chapter 11 claim.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
October 30, 1998	S.D. Myers, Inc. v. Canada	NAFTA	S.D. Myers, Inc. (SDMI), a U.S. corporation, engaged in remediation and disposal activities involving polychlorinated biphenyls (PCBs). The company incorporated a Canadian subsidiary in order to obtain equipment containing PCB wastes for treatment in its U.S. facility. Canada banned the export of PCBs for a period of time. SDMI alleged that this was done to assist Canadian waste disposal companies. SDMI claimed that Canada's actions breached NAFTA Articles 1102 (national treatment), 1105 (minimum standard of treatment), and 1106 (performance requirements).	In a November 2000 Partial Award, the tribunal determined that Canada implemented the export ban in order to protect Canadian industries. It found no "legitimate environmental reason" for the ban. It held that the ban discriminated against SDMI in favor of Canadian industries in violation of NAFTA's national treatment and minimum standard of treatment obligations. In an October 2002 Second Partial Award, the tribunal awarded SDMI about $6 million Canadian dollars(approx.. $4.75 million) plus interest.
March 20, 2001	Vivendi Universal S.A. v. Argentine Republic	France-Argentina BIT	A French company and its Argentine affiliate (Viviendi) entered into a concession contract with Tucumán, an Argentine province, to provide water and sewage system services. The contract contained a forum-selection clause requiring contract disputes to be submitted to the administrative courts of Tucumán. The investor subsequently submitted a contract dispute to an arbitration panel under ICSID rules, which awarded the investor $300 million. Argentina argued that it had not consented to submission of the dispute under the ICSID convention. The claimants alleged that Tucumán Province in Argentina violated France-Argentina BIT Articles 3 (fair and equitable treatment) and 5 (expropriation and compensation).	The tribunal held that it had jurisdiction over Vivendi's claims. However, it held for Argentina on the merits, stating the claimants should have pursued their claims against Tucumán in the province's administrative courts. A panel later annulled the tribunal's determination and held that the investor did not have to pursue these claims in the province's administrative courts in order for the tribunal to consider whether Tucumán's actions violated the BIT. After Vivendi submitted its claims a second time, a second tribunal awarded Viviendi $105 million plus interest based on findings that the province's actions amounted to expropriation without compensation and violation of fair and equitable treatment.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
November 11, 2002	Occidental Petroleum Corp. v. Republic of Ecuador	U.S. – Ecuador BIT	Occidental filed a dispute against Ecuador concerning its termination of a participation contract for oil exploration and extraction in the Amazon rainforest. Occidental had entered into the contract with PetroEcuador, a state-owned oil company. The contract barred Occidental from assigning its production rights under the contract without obtaining the state's approval. Ecuador declared the contract void after Occidental allegedly breached the non-assignment provision. Occidental alleged that Ecuador had violated the U.S.-Ecuador BIT, including Articles II.3(a) (fair and equitable treatment) and III.1 (expropriation and compensation). Ecuador filed counterclaims alleging malicious prosecution, among other things.	The tribunal determined that Ecuador had not accorded Occidental's investment fair and equitable treatment because its termination of the participation contract in response to claimants' breach was not "proportionate." It also found that Ecuador had expropriated the claimants' investment. The tribunal reduced the amount of its Award to the claimants because they had breached provisions in the participation contract requiring Ecuador's approval prior to assignment of contract rights. The tribunal awarded Occidental $1.8 billion dollars plus interest.
June 14, 2007	Railroad Development Corp. v. Republic of Guatemala	Dominican Republic-Central American FTA (CAFTA)	The claimant, a U.S. railway investment and management corporation, filed a dispute on behalf of itself and its Guatemalan subsidiary related to its contractual rights to use infrastructure and rail assets to provide railway services in Guatemala (the "usufruct"). Subsequently, the executive branch of the Guatemalan government declared the usufruct "injurious to the interests of the State (*lesivo*)" in a resolution. The Attorney General then filed a *lesivo* claim with the Administrative Tribunal, which essentially sought to have the contract declared void. RDC argued that Guatemala had indirectly expropriated its investment under CAFTA Article 10.7, discriminated against it in violation of the country's national treatment obligations under CAFTA Article 10.3, and breached the minimum standard of treatment under CAFTA Article 10.5.	The tribunal noted in its analysis that RDC's contract remained in effect and the Administrative Tribunal, or the Guatemalan Supreme Court on appeal, could ultimately reject the state's declaration. Thus, the tribunal determined that the *lesivo* declaration did not affect RDC's contractual and property rights so severely that an expropriation had occurred. Nor did Guatemala's conduct constitute discrimination in violation of national treatment obligations. However, the arbitrators found that the "manner in which and the grounds on which [Guatemala] applied the *lesivo* remedy in the circumstances" violated the minimum standard of treatment in CAFTA. The tribunal awarded RDC more than $10 million plus interest on the condition that RDC forfeit its rights in the usufruct and transfer its shares in its subsidiary to Guatemala.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
November 1, 2007	Mobil Investments Inc. and Murphy Oil Corp. v. Canada	NAFTA	Two U.S. corporations with interests in Canadian off-shore oil development projects filed a dispute against Canada after a provincial board issued new "Guidelines for Research and Development Expenditures." The guidelines allegedly required the claimants to contribute millions of dollars in funding for research projects in the Province of Newfoundland and Labrador. The claimants alleged that Canada had breached NAFTA Articles 1106 (performance requirements) and 1105 (minimum standard of treatment).	The tribunal determined that Canada had not breached its obligation to accord the investors fair and equitable treatment because there was no evidence that the Canadian government induced the claimants to invest in the projects by representing that the regulatory framework would not change. Nor did the tribunal find that Canada had engaged in other grossly unfair conduct. However, the tribunal found a violation of the NAFTA investment chapter's provision on performance requirements. It asked the parties to submit evidence on the amount of damages incurred by the investor.
April 2, 2009	Vattenfall AB v. Germany	Energy Charter Treaty	Vattenfall, a Swedish energy utility, challenged German environmental restrictions imposed on a coal-fired power plant under construction along the Elbe river. Vattenfall applied for the required permits in late 2006, but they were allegedly delayed and when they were issued in 2008, imposed severe limitations on Vattenfall's operations. Vattenfall claimed that the combined effects of the delay of the administrative procedure and the restrictions imposed amounted to an indirect expropriation and a breach of the Energy Charter Treaty's fair and equitable treatment provision.	The parties to the dispute reached an undisclosed agreement to suspend the ICSID proceedings on August 27, 2010.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
April 23, 2009	AbitibiBowater Inc. v. Canada	NAFTA	After AbitibiBowater, a U.S. corporation, announced that it would close part of its operations in Canada, the Newfoundland and Labrador House of Assembly enacted a bill that expressly expropriated various property, rights, and other interests held by the company through its Canadian subsidiaries. These included rights in land, water, timber, and other rights established in a variety of legal instruments. AbitibiBowater claimed that this conduct violated NAFTA Articles 1110 (expropriation and compensation), 1105 (minimum standard of treatment), 1102 (national treatment), and 1103 (most-favored nation treatment).	In August 2010, the parties entered into a settlement agreement which the tribunal subsequently incorporated into a consent award. AbitibiBowater agreed to withdraw its NAFTA claims and not bring them again at a later time. In exchange, Canada agreed to pay 130 million Canadian dollars (approx.. $104 million) to the investor.
April 30, 2009	Pac Rim Cayman LLC v. Republic of El Salvador	Dominican Republic–Central America FTA	Pacific Rim Cayman LLC, a U.S. corporation wholly owned by a Canadian corporation, asserted that El Salvador failed to act upon applications by its subsidiaries for gold and silver mining exploitation concessions and environmental permits, among other things. The claimant alleged violations of CAFTA Articles 10.3 (national treatment), 10.4 (most-favored nation treatment), 10.5 (minimum standard of treatment), 10.7 (expropriation and compensation), and 10.16.1(b)(i)(B) (investment authorizations).	The tribunal held that it lacked jurisdiction over the claims. It found that El Salvador had properly denied Pacific Rim benefits under CAFTA's investment chapter because the company lacked substantial business activities in the United States and was owned by a Canadian corporation.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
September 23, 2009	Chevron Corp. v. Republic of Ecuador	U.S.-Ecuador BIT	Chevron and its subsidiary, Texaco Petroleum Co. (TexPet), brought an investor-state dispute settlement case against Ecuador after the country's courts in the *Lago Agrio* case found claimants liable for billions of dollars in environmental damages stemming from earlier crude oil exploration and production operations in which TexPet participated. Chevron/TexPet claimed that the Ecuadorian courts handling of the earlier cases violated their due process. Claimants also argued that several settlement agreements between Ecuador and Chevron/TexPet had released the claimants from liability upon completion of certain remediation projects.	The tribunal issued interim awards ordering Ecuador to "take all measures necessary" to prevent the enforcement and recognition of the judgment in the *Lago Agrio* case. In February 2013, the tribunal declared that Ecuador had violated the interim awards by not preventing enforcement and recognition of the judgment prior to the tribunal's decision on the merits. In September 2013, the tribunal issued a Partial Award, holding that Ecuador had released the claimants from liability for environmental claims not involving harm to an individual. The case remains ongoing.
April 4, 2011	Renco Group, Inc. v. Republic of Peru	U.S. – Peru FTA	Renco asserted that Peru and its state-owned mining company violated various investment agreements entered into with the claimant's subsidiary. The claimant had acquired a mining complex that had been heavily contaminated on the condition that Peru would clean it up and assume nearly all liability for claims from third parties stemming from the contamination. The claimant alleged unfair treatment by Peru, which refused to defend lawsuits brought against the claimant and allegedly engaged in a smear campaign attempting to blame the claimant for the site's environmental problems. The claimant alleged several violations of the U.S.-Peru FTA including Articles 10.7 (expropriation and compensation), 10.5 (fair and equitable treatment), and 10.3 (national treatment), as well as a violation of the country's contractual agreement to defend environmental lawsuits brought by third parties against the claimant.	The tribunal has not issued an award on the merits, and the dispute remains ongoing.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
November 21, 2011	Philip Morris Asia Limited v. Australia	Australia-Hong Kong BIT	In November 2011, Philip Morris Asia Limited (PM Asia), a subsidiary of Philip Morris International, brought a claim against Australia under the Australia-Hong Kong BIT. PM Asia alleged that Australia's enactment and enforcement of its Tobacco Plain Packaging Act expropriated its intellectual property (e.g., its trademarks and copyrights) that it used to brand its tobacco products and packaging, significantly reducing the value of its investments without compensation. The claimants alleged violations of BIT Articles 6(1) (expropriation and compensation) and 2(2) (minimum standard of treatment). The claimants also alleged a violation of Article 2(2) of the BIT based on purported breaches of other international agreements: Australia's World Trade Organization (WTO) obligations under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Technical Barriers to Trade (TBT) agreements and the country's obligations under the Paris Convention for the Protection of Intellectual Property. In its response, Australia argued that the tribunal lacked jurisdiction over PM Asia's claims because PM Asia acquired shares in its Australian subsidiary after Australia had announced its intent to introduce plain packaging regulations for public health reasons.	The tribunal has not yet issued a decision on jurisdiction or the merits in the dispute.
May 31, 2012	Vattenfall AB v. Germany	Energy Charter Treaty	Vattenfall, a Swedish energy utility, is seeking compensation from Germany of losses that result from Vattenfall having to phase-out its nuclear plants in Germany as result of the German government's decision to phase-out nuclear power in the wake of the 2011 disaster in Fukushima, Japan.	This case has not yet been decided.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
September 6, 2013	Lone Pine Resources Inc. v. Canada	NAFTA	In September 2013, Lone Pine Resources Inc. submitted a notice of arbitration against Canada on behalf of its Canadian subsidiary. The claimants argued that the government of Quebec had engaged in "arbitrary, capricious, and illegal" conduct when it revoked the subsidiary's rights to drill for shale gas under the St. Lawrence River using horizontal drilling and hydraulic fracturing without payment of compensation. The claimants alleged violations of NAFTA Articles 1105 (minimum standard of treatment) and1110 (expropriation and compensation). The claimants have sought more than $250 million Canadian dollars in damages.	The dispute does not yet appear to have moved beyond the early stages.

Date of Filing	Case Name	Applicable Investment Treaty	Facts	Status/Outcome
September 12, 2013	Eli Lilly and Company v. Canada	NAFTA	The investor, a U.S. pharmaceutical company, brought a claim against Canada, arguing that the country had failed to protect the investor's patent rights when its courts used a new common law doctrine to invalidate two of the investor's patents for medicines on the grounds of lack of utility (i.e., broadly speaking, the invention must do what the applicant's patent specification says it will do). Lilly claims that this standard is discriminatory, contrary to utility standards in other countries and in NAFTA itself, and is adverse to Canada's own interpretation of utility at the time of NAFTA signing. The claimants alleged violations of NAFTA Article 1105 (minimum standard of treatment) and Article 1110 (expropriation and compensation). In its defense, Canada argued that the court decisions invalidating Lilly's patents did not amount to a "denial of justice," and that Canadian courts had provided Lilly with sufficient due process. Nor, in Canada's view, could the court's violation of the alleged "expectations" the investor had with regard to Canada's patent law breach the minimum standard of treatment. With respect to Lilly's expropriation claim, Canada argued that a court's invalidation of an initial patent grant does not amount to an expropriation. Instead, it constitutes a determination that the investor has no property rights in the alleged invention. Canada also argued that the court decisions were consistent with NAFTA Chapter 17.	The tribunal has not yet issued an award on jurisdiction or the merits in the dispute.

Source: Congressional Research Service. Information obtained from the texts of decisions by international investment tribunals and filings by the parties to investment disputes.

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