



INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW

IILJ Working Paper 2016/3
MegaReg Series

**Is the Trans-Pacific Partnership’s Investment Chapter
the New “Gold Standard”?**

José E. Alvarez



MEGAREG
IILJ / NYU LAW

MegaReg Project Directors

Benedict Kingsbury & Richard B. Stewart

MegaReg Fellows

Paul Mertenskötter & Thomas Streinz

Faculty Advisory Committee

Philip Alston, José Alvarez, Eyal Benvenisti, Kevin Davis, Gráinne de Búrca, Rochelle Dreyfuss, Franco Ferrari, Robert Howse, Mattias Kumm, Linda Silberman, Richard Stewart & Joseph H. H. Weiler

MegaReg Online

megareg.iilj.org | [@megareg_iilj](https://twitter.com/megareg_iilj)

Institute for International Law and Justice
Wilf Hall, 139 MacDougal Street, 3rd Floor
New York, NY
www.iilj.org | [@nyu_iilj](https://twitter.com/nyu_iilj)

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

ISSN: 1552-6275
© José E. Alvarez

*Working Papers are issued at the responsibility of their authors, and do not
reflect views of NYU, the IILJ, or associated personnel.*

New York University School of Law
New York, NY 10012
U.S.A.



Version of 27 March 2016

Cite as:
IILJ Working Paper 2016/3
(MegaReg Series)

IS THE TRANS-PACIFIC PARTNERSHIP'S INVESTMENT CHAPTER THE NEW "GOLD STANDARD"?

José E. Alvarez*

US Presidential candidate Hillary Clinton has answered the question posed by my title in two different ways. A few years ago, as US Secretary of State, she argued that the Trans-Pacific Partnership (TPP) was the new "gold standard" in Free Trade Agreements or FTAs.¹ Most recently, as presidential candidate attentive to US democratic primary voters, she has said that its final text reveals that it simply does not make US workers better off and that she opposes its ratification. The agreement, she now says, gives US workers something less than gold.² Now it could be that Secretary Clinton has been talking about the TPP as a whole and not its investment chapter. But that is doubtful insofar as the investment chapter is far too integral to this agreement and more importantly to debates about the merits of the TPP. It is probably fair to say that Secretary Clinton has changed her mind about the TPP's investment chapter. This contribution attempts to put her quandary in context.

Some time ago, trade and investment regimes were distinct economically and certainly legally. The regulation of trade in goods was governed by the WTO and state-to-state dispute settlement, and the trans-national capital flows by some 3200 bilateral and regional international investment agreements which generally provided foreign investors protected by them with direct access to suing their host states under investor-state dispute settlement governed by the World Bank's ICSID rules or UNCITRAL. Over time this changed. Increasingly—and especially as the WTO's capacity for generating new liberalization commitments has stagnated—much of the world, including to some extent New Zealand, has turned to FTAs that combine trade and investment liberalization even while keeping the forms of dispute settlement

* Herbert and Rose Rubin Professor of Law. This is an expanded version of a speech originally delivered at the University of Victoria, Wellington, New Zealand on December 8, 2015.

¹ See Hillary Rodham Clinton, Sec'y of State, *Remarks at Techport Australia* (Nov. 15, 2012), available at <http://www.state.gov/secretary/20092013clinton/rm/2012/11/200565.htm>.

² Lauren Carroll, *What Hillary Clinton really said about TPP and the "gold standard,"* POLITIFACT (Oct. 13, 2015), <http://www.politifact.com/truth-o-meter/statements/2015/oct/13/hillary-clinton/what-hillary-clinton-really-said-about-tpp-and-gol>.

for each distinct. Much of the reason responds to changes in the world economy—and helps to explain why the TPP is a “mega-agreement” in both geographic and substantive scope.

The TPP’s investment chapter (itself over 50 pages long including 9 annexes) is only 1 chapter (of 30). It is only a part of a treaty whose “mega” ambitions are as vast as its economic scale.³ According to the Office of the United States Trade Representative (USTR), the TPP will provide Americans a fair shot at the world’s fast-growing region, the place where 1/2 to 2/3 of world trade occurs.⁴ By reducing tariffs, replacing “red tape with the red carpet,” enhancing secure payment systems, requiring state-owned enterprises to compete fairly with US businesses, keeping the internet “open and free,” US businesses—including small and medium sized ones—will be better able to set up shop, make things, and sell them to what will be, by 2030, an Asian middle class of some 3.2 billion.⁵ New Zealand’s Ministry of Foreign Affairs and Trade is only a tad less effusive: the TPP will safeguard New Zealand’s longer term trading interests, is a platform for wider regional economic integration, levels the playing field where more than 70 percent of the country’s trade and investment flows and among 5 of its top 10 trading partners, achieves greater access to the US market for New Zealand services and increases the prospects for US tourism and investment, while doing much the same with respect to TPP partners (Japan, Peru, Canada, and Mexico) with which New Zealand did not previously have an FTA.⁶

The TPP’s “mega” scope covers market access in trade in goods, customs administration, sanitary and phytosanitary measures, financial services, intellectual property, labor and environment and much else. Its chapter 25, which pursues the goal of regulatory convergence, will provide grist for administrative lawyers for years to come to the extent it shifts regulatory decision-making to global institutions; that chapter seeks to reduce barriers to integrating rules on such matters as the marketing for certain food

³ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (USTR), THE TRANS-PACIFIC PARTNERSHIP, *available at*: <https://ustr.gov/tpp/#text> [hereinafter TPP].

⁴ Office of the United States Trade Representative (USTR), *The Trans-Pacific Partnership: Overall U.S. Benefits*, <https://ustr.gov/sites/default/files/TPP-Overall-US-Benefits-Fact-Sheet.pdf>.

⁵ *Id.*

⁶ NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS AND TRADE, TRANS-PACIFIC PARTNERSHIP NATIONAL INTEREST ANALYSIS (2016), *available at* <https://www.tpp.mfat.govt.nz/assets/docs/Trans-Pacific%20Partnership%20National%20Interest%20Analysis,%2025Jan2016.pdf>.

stuffs which now hamper trade simply because they differ from jurisdiction to jurisdiction.⁷ That section of the treaty, along with much else including its investment chapter, is responsive to the emergence of an increasingly integrated international production system: corporate networks of foreign and domestic firms that specialize in the production of various parts and components eventually assembled in locations around the world.⁸ This is a system of wealth generation based on the sale of products of mixed national parentage and increasingly reliant on the digital economy along with world-wide consumer demands for cheap products. The TPP corresponds to a market where corporate nationality, as well as distinctions between “host” and “home” countries of foreign investors, lose their sharpness. These “global value chains” are often regionally centered, as is suggested by the TPP’s focus on so-called “Asian value chains,” and include both equity (mergers and acquisitions and greenfield investments) and non-equity arrangements (contracts).⁹ These transactions combine tangible and intangible assets (such as R and D or brand names). The TPP responds in substantial part to the needs expressed by these value chains—where the role of corporate headquarters is more likely to be that of coordinating and deciding where various production activities take place.

The TPP is, from this perspective, an agreement to reduce the costs of firms that engage in cross-border transactions involving both trade and goods and cross-border capital flows. As one knowledgeable observer put it: “As natural market imperfections continue to fall in the digital economy (frictionless, virtual trade), the barriers to trade and foreign direct investment (FDI) flows generated by government policies become more visible and important.”¹⁰ The TPP seeks to harmonize regulation on everything from investment to customs, e-commerce, and pharmaceuticals while setting standards that supposedly will avoid races to the bottom for labor and the environment. This is not to suggest that the TPP is entirely about global supply chains and the goods these produce. Some support the treaty—including

⁷ See generally, Richard B. Stewart, State Regulatory Capacity and Administrative Law and Governance Under Globalization (unpublished draft) (on file with author).

⁸ See Karl Sauvant, *The Evolving International Investment Law and Policy Regime: The Way Forward* (E15 Task Force on Investment Policy Options Paper, Jan. 2016), available at <http://e15initiative.org/publications/evolving-international-investment-law-policy-regime-ways-forward>.

⁹ *Id.*

¹⁰ *Id.* at 14 (quoting Eden).

many in New Zealand—principally because it is likely to expand the markets for old fashioned New Zealand exports.¹¹

Apart from those economic drivers, the TPP also responds to geopolitics. For the current New Zealand government, it signals the country's leadership in the Asian region and situates the country as a potential conduit to reaching out to China, with which New Zealand has a FTA agreement with many of the same investment guarantees, along with the same access to investor-state dispute settlement (ISDS) as exists in the TPP.¹² The TPP also has the potential to facilitate the path towards an eventual New Zealand-EU FTA.¹³ For the Obama Administration, the TPP, although originally proposed during the Bush Administration, concretizes Obama's "tilt towards Asia" while simultaneously enabling leverage to convince Europe to conclude the Trans-Atlantic Partnership (TTIP) between the EU and the US, putting pressure on China to join the global marketplace on the basis of reciprocity, and providing a backup plan for advancing trade/investment liberalization should either the TTIP or the US's other overtures to China (such as on-going negotiations for a US-China Bilateral Investment Treaty) fail. Not surprisingly, Secretary Clinton once called the two mega-regionals, the TPP and the TTIP, an "economic NATO."¹⁴ To the US, the TPP's goal—to spread and deepen the capitalist marketplace—advances the United States' collective security interests no less than its global counter-terrorism efforts. Indeed, the TPP is part of the United States' (and perhaps the world's)¹⁵ never-ending war on terror. The current US administration, like the ancient empire of Athens which was also driven by concerns for security, material self-interest, and

¹¹ See, e.g., David Snell, *NZ had most to gain from TPP deal*, THE NEW ZEALAND HERALD (Oct. 15, 2015), available at http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11526982.

¹² NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS AND TRADE, *supra* note 7.

¹³ For one account of the economic benefits of that prospective agreement from a New Zealand business perspective, see NEW ZEALAND INTERNATIONAL BUSINESS FORUM, TOWARDS A NEW ZEALAND-EUROPEAN UNION FTA: A BUSINESS PERSPECTIVE (July 2015), available at <http://www.tradeworks.org.nz/wp-content/uploads/2015/09/NZIBF-NZ-EU-FTA-9-SEPT-2015.pdf>. For a more geo-political perspective of the benefits of closer New Zealand-European ties, see Statement of the Presidents of the European Council and the European Commission and the New Zealand Prime Minister (Oct. 29, 2015), available at http://europa.eu/rapid/press-release_STATEMENT-15-5947_en.htm.

¹⁴ Eyal Benvenisti, *Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law* (GlobalTrust Working Paper 08/2015), at 2 (quoting Clinton), available at <http://dx.doi.org/10.2139/ssrn.2646882>. See also Clinton, *supra* note 2.

¹⁵ See, e.g., U.N. Security Resolution 2249 (November 20, 2015).

self-confidence to spread its way of life,¹⁶ sees the TPP as an essential part of “rule of law” efforts to, as Vice President Biden immodestly put it, “help shape the character of the global economy.”¹⁷

The TPP, and particularly its investment chapter, has not been as enthusiastically embraced elsewhere. For some the TPP is part of the US’s “divide and conquer” global strategy: to engage simultaneously in negotiations that reduce the power of weaker trading partners to shape the world in its image. To critics like Eyal Benvenisti, the TPP and TTIP negotiations are part of a broader effort by the world’s economic hegemon to encourage fragmentation; a turn to regionalism over reliance on global institutions like the WTO or those of the UN system where US power is now much diminished.¹⁸ As he sees it, the two ongoing mega-regional negotiations pose a direct challenge to the horizontal equality of states; the respective negotiations pressure those privileged to be included as well as those excluded from each negotiation.¹⁹ Critics charge that the pressures also extend internally, to alternatively silence or empower distinct interests within states. The secrecy of the negotiations challenge democratic decision-making within the participating states by excluding the voices of civil society while embracing those commercial interests included in state delegations whose interests are served by these treaties.²⁰ Benvenisti and others see investor-state dispute settlement (ISDS) as the perfect tool for perpetuating sovereign inequality by enabling hand-picked arbitrators to displace national judges. To critics, ISDS is the poster child for by-passing the principal mechanism that democracies have for checking the power of their executive branches: namely administrative or constitutional courts.²¹

The evident differences between the global hegemon, the United States, and New Zealand as potential TPP partners, would suggest that public reactions to the TPP, pro and con, might differ

¹⁶ José E. Alvarez, *Contemporary International Law: An “Empire of Law” or the “Law of Empire”?*, 24 AM. U. INT’L L. REV. 811 (2009).

¹⁷ Benvenisti, *supra* note 15, at 3 (quoting Biden).

¹⁸ *Id.* at 4.

¹⁹ *Id.*

²⁰ *Id.* at 5. The lack of transparency with respect to the TPP negotiations has been a recurring complaint. *See, e.g.*, Donna Miles-Mojab, *TPA Debate: We need a Free Trade of Opinions* (Nov. 16, 2015), <http://www.stuff.co.nz/the-press/opinion/73912264/tppa-debate-we-need-a-free-trade-of-opinions>; Jane Kelsey, *Govt Spin Won’t Stop TPP Facts Emerging*, THE NEW ZEALAND HERALD (Oct 13, 2015), *available at* http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=11528392.

²¹ Benvenisti, *supra* note 15, at 6–7. *See generally*, GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007).

considerably within the two countries. In terms of the relative levels of inward and outgoing capital flows and stock, New Zealand has more in common with fellow TPP partners Chile, Vietnam, or Peru than it does with the US.²² New Zealand's inward FDI stock and capital flows far outpace its outward flows.²³ It is more of a host than a home country for FDI. At the same time, New Zealand has been in the past far more amenable than has the US to supranational scrutiny of its laws through international adjudication. While the US is not a party to any regional human rights court, the compulsory jurisdiction of the ICJ, or the optional protocols of UN human rights treaty enabling the filing of individual human rights complaints to UN human rights treaty bodies, New Zealand has in force a declaration recognizing the

²² According to the Treasury's Economic and Financial Overview for 2015, New Zealand was host to \$97.4 billion of foreign direct investment, and was a source of \$23.2 billion of direct investment abroad. This is a measure of FDI stock, not of FDI flows. See <http://www.treasury.govt.nz/economy/overview/2015/21.htm>. These figures are roughly similar to the 2011 figures, which stood at, respectively, \$93.8 billion and \$22.9 billion. See <http://www.treasury.govt.nz/economy/overview/2012/23.htm>.

FDI flows in TPP countries and direct investment abroad by TPP countries are as follows:

Country:	FDI inflows	FDI outflows
Brunei	\$568,000,000	-
Chile	\$22,949,000,000	\$12,999,000,000
New Zealand	\$3,391,000,000	-\$4,000,000**
Singapore	\$67,523,000,000	\$40,660,000
Australia	\$51,854,000,000	-\$351,000,000***
Canada	\$53,684,000,000	\$52,620,000,000
Japan	\$2,090,000,000	\$113,629,000,000
Malaysia	\$10,799,000,000	\$16,445,000,000
Mexico	\$22,795,000	\$5,201,000,000
Peru	\$7,607,000,000	\$84,000,000
United States	\$92,397,000,000	\$336,943,000,000
Vietnam	\$9,200,000,000	\$1,150,000,000

UNCTAD, *World Investment Report 2015*, Annex at 3.

FDI Stock in and originating from TPP countries is as follows:

Country:	FDI inward stock	FDI outward stock
Brunei	\$6,219,000,000	\$134,000,000
Chile	\$207,678,000,000	\$89,733,000,000
New Zealand	\$76,791,000,000	\$18,678,000,000
Singapore	\$912,355,000,000	\$576,396,000,000
Australia	\$564,608,000,000	\$443,519,000,000
Canada	\$631,316,000,000	\$714,555,000,000
Japan	\$170,615,000,000	\$1,193,137,000,000
Malaysia	\$133,767,000,000	\$135,685,000,000
Mexico	\$337,974,000,000	\$131,246,000,000
Peru	\$79,429,000,000	\$4,205,000,000
United States	\$5,509,884,000,000	\$6,318,640,000,000
Vietnam	\$90,991,000,000	\$7,490,000,000

²³ *Id.*

compulsory jurisdiction of the ICJ and is a party to at least some of the UN human rights optional protocols.²⁴ It is not a party to a regional human rights court, one suspects, only because no Asian court exists. One could assume that New Zealanders are far more used to having their local laws “second-guessed” by supranational authorities.

Yet, despite the vast differences in economic power and perhaps ideological inclinations, the concerns about the TPP’s investment chapter and especially its recourse to ISDS are strikingly similar in both countries.²⁵ In both countries many worry about lessening the scrutiny of those seeking to enter the country as investors. In both places many policymakers would like to be able to distinguish among foreign investors with respect to admission. In both, critics of free trade agreements would like to retain the capacity to block foreign investment with respect to certain sectors or enterprises or with respect to investors of some nationalities. In both places some would like to retain the power to accord entry only as conditioned by certain performance requirements (e.g., such as achieving a certain level of exports).²⁶

In the US, fears of the unrestricted entry of foreign investors have, over time, been prompted by waves of Japanese, Middle Eastern, and most recently, Chinese investors. In New Zealand, comparable fears are exacerbated by the relative amount of its much smaller economy that is already in foreign hands. Although the TPP leaves undisturbed New Zealand’s Overseas Investment Act and permits the continued screening of foreign investors according to its terms, critics note that the treaty seems to preclude the

²⁴ New Zealand has in force a declaration recognizing the compulsory jurisdiction of the ICJ under Art. 36(2): see Ministry of Foreign Affairs and Trade, *Declarations Recognising as Compulsory the Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court*, available at <http://www.treaties.mfat.govt.nz/search/details/t/1895>. New Zealand is a party to the First Optional Protocol of the International Covenant on Civil and Political Rights Dec. 16, 1966, 999 U.N.T.S. 172 (ICCPR) and the First Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment or Punishment, 24 I.L.M. 535 (1985).

²⁵ In both countries, anti-TPP advocacy groups express similar concerns. See, e.g., *It’s Our Future, The Trans-Pacific Partnership*, <http://itsourfuture.org.nz/what-is-the-tppa>; PUBLIC CITIZEN, *TRANS-PACIFIC PARTNERSHIP (TPP): MORE JOB OFFSHORING, LOWER WAGES, UNSAFE FOOD IMPORTS*, available at <http://www.citizen.org/TPP>. In both countries, pro-business groups have undertaken pro-TPP efforts to counter the criticisms. See, e.g., *New Zealand International Business Forum, TPP Unwrapped*, <http://www.tradeworks.org.nz/tpa-unwrapped> (stressing the benefits to be “growth and jobs”).

²⁶ Compare TPP, Investment Chapter, Art. 9.9 (prohibiting or restricting a variety of performance requirements), available at <https://medium.com/the-trans-pacific-partnership/investment-c76dbd892f3a#.30ukzld20>.

addition of new protected sectors that some would like to see, such as residential housing, at least to the extent changes to the Act are seen as detrimental to foreign investors.²⁷

Both countries have faced criticisms with respect to specific foreign investments, particularly to the extent these are seen as threatening “strategic assets” variously defined. In the US, controversy emerged in Congress over the contemplated Dubai Ports deal, leading to amendments to the national security screening mechanisms in place.²⁸ Most recently some members of Congress objected to allowing a Chinese enterprise to purchase Smithfield Farms, a leading pork producer.²⁹ In New Zealand, comparable doubts were expressed about the wisdom of allowing a Chinese entity, Shanghai Pengxin, to purchase a major farm, Lochinver Station.³⁰ In both countries, the prospect of alien land ownership has been especially controversial. In New Zealand, such worries are attributed to a “settlement culture” that goes back to the country’s origins and reflects cultural and indigenous rights concerns.³¹ Similarly, the usual US exception from national treatment, retained in the TPP, that permits states of the United States to maintain restrictions on agricultural land holdings by aliens, also go back to the US founding.³²

Critics of investment protection treaties in both places worry about other forms of “regulatory chill.” In the US, fears that the NAFTA impinges on environmental regulation reached their zenith when California’s state wide restrictions on a gasoline additive seen as threatening drinking water were challenged by a Canadian maker of the additive.³³ In New Zealand, many watched with alarm as Australia’s efforts to enforce brown paper packaging for cigarettes faced an ISDS challenge.³⁴ In both

²⁷ See generally, Amokura Kawharu, *The Admission of Foreign Investment under the TPP and RCEP*, 16 J. WORLD INV. & TRADE 1058 (2015).

²⁸ Stephen Heifetz, *A Brief History of the Committee on Foreign Investment in the United States*, <http://www.steptoec.com/assets/htmldocuments/Heifetz%20Brief%20History%20of%20CFIUS%202011.pdf>.

²⁹ Shihoko Goto, *Why U.S. Angst Over Chinese Buyouts is Warranted* (Jan. 27, 2014), <http://blogs.reuters.com/great-debate/2014/01/27/why-u-s-angst-over-chinese-buyouts-is-warranted/>.

³⁰ See, e.g., Gerald Piddock, Aimee Gulliver & Tao Lin, *Shanghai Pengxin Purchase of NZ’s Lochinver Station Rejected by Government* (Sept. 17, 2015), <http://www.stuff.co.nz/business/farming/agribusiness/72135607/Shanghai-Pengxin-purchase-of-NZs-Lochinver-Station-rejected-by-Government>.

³¹ See, e.g., Kawharu, *supra* note 28, at 1078.

³² TPP, Annex I, Schedule of the United States (exception for non-conforming measures by US states). See James R. Mason, Jr., *Psst, Hey Buddy, Wanna Buy a Country? An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate*, 27 VAND. J. TRANSNAT’L L. 453 (1994).

³³ *Methanex Corp. v. United States*, Final Award on Jurisdiction and Merits (Aug. 3, 2005), 44 I.L.M. 1345 (2005).

³⁴ A plain packaging proposal similar to that enacted in Australia which was the subject of an ISDS challenge has been pending in New Zealand. See Ministry of Health, *Plain Packaging*, <http://www.health.govt.nz/our->

countries, there are fears that even the rulings of national courts can be challenged or displaced by a single investor claimant—as was suggested by a NAFTA claim brought to challenge a jury verdict rendered by a Mississippi court.³⁵ Critics in both countries point to TPP provisions that appear to go “too far” in favor of international arbitration, such as its provision enabling foreign investors to have recourse to arbitration even in the face of clause accepting the jurisdiction of national courts in an investor-state contract.³⁶

The concerns about the investment chapter of the TPP expressed in a letter circulated by US Senator Elizabeth Warren and signed by 100 US law professors, are similar to those made by some of New Zealand’s legal academics.³⁷ That letter argued that ISDS violates the rule of law insofar as it grants foreign corporations a special legal privilege that they will use to challenge government policies, actions, or decisions that merely reduce the value of their investments and force these to be heard in tribunals of private lawyers that enable only foreign companies to sue (and not either the state or anyone else hurt by corporate malfeasance). The letter also argued that ISDS is flawed insofar as it lacks the basic protections of national courts such as truly independent adjudicators and a full-fledged appeals process.³⁸ US critics of ISDS, like their New Zealand counterparts, see it as not only an affront to sovereignty and democratic governance, but as a tool to weaken the rule of law by removing procedural protections while turning to an unaccountable, unreviewable system of “private justice.”³⁹

These concerns are not limited, of course, to the United States and New Zealand. European critics of ISDS have expressed similar concerns, even in a continent that is no stranger to submitting local

work/preventative-health-wellness/tobacco-control/plain-packaging. The Philip Morris challenge to Australia’s plain packaging law was dismissed on jurisdictional grounds in December 2015 but that ruling remains unavailable as of February 2016. Daniel Hurst, *Australia Wins International Legal Battle with Philip Morris over Plain Packaging*, THE GUARDIAN (Dec. 17, 2015), <http://www.theguardian.com/australia-news/2015/dec/18/australia-wins-international-legal-battle-with-philip-morris-over-plain-packaging>.

³⁵ See *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), 7 ICSID Rep. 421 (2005).

³⁶ See, e.g., Amokura Kawharu, *TPPA: Chapter 9 on Investment, Trans-Pacific Partnership Agreement* (New Zealand Expert Paper Series, No. 2), available at <https://tpplegal.files.wordpress.com/2015/12/ep2-amokura-kawharu.pdf>.

³⁷ Compare Alliance for Justice, Letter to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi, and Ambassador Froman, available at <http://www.afj.org/press-room/press-releases/more-than-100-legal-scholars-call-on-congress-administration-to-protect-democracy-and-sovereignty-in-u-s-trade-deals>, to Kelsey, *supra* note 21 and Kelsey, *infra* note 71.

³⁸ Alliance for Justice, *supra* note 38.

³⁹ See, e.g., PUBLIC CITIZEN, NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY (2001), <http://www.citizen.org/documents/ACF186.PDF>.

laws to the scrutiny of international courts. Indeed, as many as 250,000 people came out in October 2015 on the streets of Berlin to protest the prospective TTIP.⁴⁰ In response to public consultations by the European Commission, some 150,000 comments on the TTIP's investment chapter were received; many expressed ire at the prospect that the TTIP might include ISDS.⁴¹ Whether or not in response, the EU recently tabled a proposal that would, among other things, replace ISDS in the TTIP with an international investment court with judges appointed for up to 12 year terms and a process for appeals.⁴² To many Europeans that proposal, not the TPP's old-fashioned reliance on ISDS, constitutes the real “gold standard.”

To summarize, there are five general complaints against treaties like the TPP and against ISDS:

1. Such treaties and ISDS as its enforcement tool threaten the sovereign right to regulate. Even the threat of an investor claim—such as the tobacco industry's investor-state claims against the plain packaging of cigarettes in a number of jurisdictions⁴³—and, of course, the harsh reality of arbitral awards that may set the losing state back millions of dollars, can prompt “regulatory chill.”
2. These agreements are not needed to make rich countries richer. Economists differ on whether concluding a BIT or FTA actually increases the amount of FDI such treaty parties receive or that these treaties otherwise contribute positively to GDP.⁴⁴ There is little evidence that, for example, the existence of these treaties influence the decisions of CEOs on

⁴⁰ *Thousands protest in Berlin against EU-US trade deal*, AL JAZEERA (Oct. 11, 2015), <http://www.aljazeera.com/news/2015/10/thousands-protest-berlin-eu-trade-deal-151011021526252.html>.

⁴¹ European Commission, *Report on Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)* (Jan. 13, 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf (henceforth Draft TTIP Text).

⁴² For the rationales for the EU proposal, see *Concept Paper, Investment in TTIP and Beyond—the Path to Reform*, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF. See also discussion at text and notes 146-149.

⁴³ See, e.g., Tania Voon & Andrew Mitchell, *Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia*, 14 J. INT'L ECON. L. (2011).

⁴⁴ For one collection of studies, see THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT (Karl Sauvant & Lisa Sachs, eds., 2009). For a more recent update, see UNCTAD, Issues Note, *The Impact of International Investment Agreement on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014* (Sept. 2014), <http://investmentpolicyhub.unctad.org/Upload/Documents/unctad-web-diae-pcb-2014-Sep%2024.pdf>.

where to invest.⁴⁵ It is said that CEOs go where the consumers or where their inputs are (e.g., oil or other natural resources); they go where the profits, not treaties, are. To some, entering into a BIT does not only fail to guarantee FDI flows, it can sometimes hinder them. This can happen, for example, if they result in adverse investor-state rulings (as against Argentina) whether or not justified on the merits, which send adverse signals to foreign investors waiting in the wings.

3. The investment regime does not help lesser developed countries develop in a more holistic sense. It is said that even if the enactment of treaty protections for foreign investors does promote the entry of foreign capital (along with more favorable assessments of political risk by credit agencies), this does little to enhance the contribution that foreign capital may make to the host state or to overall improvements in the national rule of law.⁴⁶ One form of this critique reflects a more chastened view of the merits of the ostensible model for economic development encouraged by strongly investor-protective treaties, such as the US-Argentina BIT and others concluded in the post-Cold War euphoria of the 1990s.⁴⁷ Such treaties are seen as part and parcel of the IMF's apparent turn to the trifecta of deregulation, respect for property rights, and divestment of state enterprises—the so called and (much maligned) “Washington Consensus” or its slightly reformed version, the “post Washington Consensus.”⁴⁸ A more extreme form of this critique has been expressed by Ecuador's President Rafael Correa, among others. As Correa put it in his 2014 Prebisch lecture, investment treaties are an open and shut case of neocolonialism insofar as they put the needs of capital above those of human beings, displace sovereign concerns with arbitration, ignore

⁴⁵ See, e.g., Jason W. Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence* (University of Wisconsin Legal Studies Research Paper No. 1114, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594887.

⁴⁶ See, e.g., Yackee, *supra* note 46. For a skeptical view of the impact of such treaties on the national rule of law, see Tom Ginsburg, *International Substitutes for Domestic Institutions: bilateral investment treaties and governance*, 25 INT'L REV. OF L. & ECON. 107 (2005).

⁴⁷ See José E. Alvarez, *The Evolving BIT*, in INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW, at 13–14 (Ian A. Laird & Todd J. Weiler, eds., 2010).

⁴⁸ *Id.*

the need to exhaust local remedies (unlike, for example, the Inter-American system for human rights), and prevent reforms in favor of the public interest.⁴⁹

4. ISDS violates the rule of law. Ad hoc arbitral tribunals from which there is no full scale appeal to correct errors of law, are said to produce inconsistent, ill-reasoned, and sometimes incoherent arbitral awards that fail to provide the certainty demanded by either investors or states.⁵⁰ ISDS rulings may also be inconsistent with law produced elsewhere (including by UN human rights treaty bodies or regional human rights courts). Critics charge that ISDS caselaw tends to reproduce partisan and political divides that are replicated through repeated recourse to party-appointed arbitrators many of whom can be identified as either pro-investor or pro-state and not as the truly impartial judges they were intended to be.⁵¹ To the extent ISDS was intended to de-politicize the investor-state conflicts, that effort, critics charge, has failed. Rule of law critics include my NYU colleague Benedict Kingsbury who, as head of a scholarly movement that describes global forms of administrative law (or GAL), sees ISDS as a form of global governance desperately in need of greater transparency, participation, enhanced reason-giving, and forms of correction or review.⁵² More vehement critics, like Public Citizen's Lori Wallach, contend that ISDS is a rigged or biased forum in favor of capital since its arbitrators, many of whom are arbitrators one day and claimants' lawyers the next, need to keep investor claimants happy to secure repeated business.⁵³ Rule of law concerns are also fed by the absence of ethical rules for those involved in these disputes, as well as the perceived inadequacy of the rules that do exist for challenging arbitrators on the basis of conflicts of interest or because of evidence that they are not inclined to hear a claim

⁴⁹ Rafael Correa Delgado, Prebisch Lecture (Oct. 24, 2014), *available at* http://unctad.org/es/paginas/newsdetails.aspx?OriginalVersionID=869&Sitemap_x0020_Taxonomy=UNCTAD%20Home.

⁵⁰ *See, e.g.*, Alliance for Justice, *supra* note 38.

⁵¹ *See, e.g.*, VAN HARTEN, *supra* note 22.

⁵² Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, NYU School of Law, Public Law Research Paper No. 09-46 (Sept. 2, 2009).

⁵³ Lori Wallach & Todd Tucker, *Public Interest Analysis of Leaked Trans-Pacific Partnership (TPP) Investment Text* (June 13, 2012), <https://www.citizen.org/documents/Leaked-TPP-Investment-Analysis.pdf>.

impartially.⁵⁴ These latter complaints target ICSID's outdated rules requiring those who challenge an arbitrator to prove a "manifest lack of qualities" and which leave decisions on such challenges to the challenged arbitrator's fellow arbitrators.⁵⁵ The combination of an inappropriately demanding standard in order to disqualify an arbitrator and reliance on inappropriate decision-makers to undertake that judgment may explain why such challenges are rarely successful.⁵⁶

5. Regime reform efforts have been inadequate. The increased precision and narrowing of investor rights in some more recent BITs and FTAs have not eliminated the risk that investor-state arbitrators will "second guess" sovereign decisions taken in the public interest, such as agency decisions with respect to a private investor's involvement in water delivery services, health care delivery, or mining. Despite reforms to restore "sovereign policy space," states' environmental review procedures, pollution controls or safety standards continue to be challenged under ISDS.

The result is substantial "sovereign backlash" against investment protection treaties like the TPP's investment chapter. The adverse reaction to the investment regime and to its enforcement tool, ISDS in particular, is particularly evident in countries that have been respondents to investor-state complaints that they deem unwarranted, including Argentina (which at least under the government of President Kirchner refused to comply with ISDS awards), and Ecuador and Venezuela (which have sought to terminate BITs and/or exit from the ICSID convention).⁵⁷ Many other countries, including the US, have reacted with less vehemence—by striving to reform existing model texts for BITs/FTAs and ISDS rather than exiting both. At the same time, other countries, including pairs of LDCs concluding BITs, continue to conclude treaties that are as protective of investors' rights as those concluded in the 1990s, when countries embraced the market as the only possible alternative with the end of the Cold War. The result is today's

⁵⁴ See generally, Chiara Giorgetti, *Towards a Revised Threshold for Arbitrators' Challenges Under ICSID?* (July 3, 2014), <http://kluwerarbitrationblog.com/2014/07/03/towards-a-revised-threshold-for-arbitrators-challenges-under-icsid/>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See generally, CLAIRE BALCHIN ET AL., EDs., *THE BACKLASH AGAINST INVESTMENT ARBITRATION* (2010).

“spaghetti soup” of BITs and FTAs of varying complexions—where countries have reacted to opportunities to exercise Albert Hirschman’s exit and voice options in very different ways.⁵⁸

Investment regulation—however it is undertaken and whether or not it involves ISDS—inevitably involves five sets of competing choices:

1. Tensions between the goals of global corporate capital versus those of national businesses. The latter will not always be in favor of an ‘open door’ policy towards foreign investors, particularly to the extent those investors are perceived as getting “better” than national treatment, including privileged access to international arbitration.
2. Tensions between government policies that are needed to encourage or send “positive signals” to foreign investors and those that are thought necessary to protect certain “sensitive” (or “infant” or “strategically significant”) domestic enterprises.⁵⁹
3. Tensions between policies to attract foreign capital versus policies to maximize its domestic benefits once it arrives in the host country.⁶⁰
4. Tensions between a country’s interest as host state to foreign capital flows versus the needs of home countries of investors needing to protect those investors abroad.⁶¹

⁵⁸ See, e.g., UNCTAD, Recent Trends in IIAS and ISDS, No. 1, Feb. 2015, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf. See also UNCTAD, Issues Note: Reform of the IIA Regime: Four Paths of action and a Way Forward, No. 3 (June 2014), available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d6_en.pdf. On the general concept of exit and voice as applied to the investment regime, see, e.g., Kathryn Gordon & Joachim Pohl, *Investment Treaties over Time—Treaty Practice and Interpretation in a Changing World* (OECD Working Papers on International Investment 2015/02), available at <http://www.oecd.org/investment/investment-policy/WP-2015-02.pdf> (drawing on the concept originated by ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970)).

⁵⁹ See generally, Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VIRG. J. INT’L L. 639 (1998). For a concrete manifestation of New Zealand’s efforts to balance these competing goals, see, e.g., its 38 page schedule of detailed exceptions from many portions of the TPP, including specific guarantees in its investment chapter.

⁶⁰ Notably, one tool that some countries use to maximize the benefits of incoming FDI, performance requirements, are severely restricted under the TPP. See TPP, Art. 9.9.

⁶¹ See generally, Alvarez, *supra* note 48. As noted, both New Zealand and the US are capital exporting as well as capital importing states although not in the same proportion; whereas the US remains the world’s largest recipient of foreign capital as well as its leading capital exporter, New Zealand’s incoming FDI vastly eclipses its outgoing capital. See *supra* note 23. Of course, a state that avoids all treaty obligations involving investments or investors and chooses to regulate only through domestic law or regulation could avoid making this choice but given that some 180 countries

5. Tensions between needs for harmonized transnational regulatory standards versus needs to preserve “policy space” in pursuit of legitimate country-specific public policy objectives.⁶²

These tensions or aspects of them may exist irrespective of the type of investment regulation that occurs; that is, irrespective of whether a country turns to investment protection treaties and ISDS. The tensions may be exacerbated by the legal regimes established for protecting foreign property rights but these regimes do not cause them. Notably, these tensions may emerge with respect to either passive capital flows or foreign direct investment—even though much of the prominent policy debates focus only on the most prominent manifestation, in physical form, of an “alien” presence in a country by way of foreign mergers or acquisitions or greenfield investment.⁶³

Countries have generally had a love and hate relationship with FDI. Their reactions have often resembled Woody Allen’s character in Annie Hall’s memorial response to a restaurant: “such horrible food—and such small portions.”⁶⁴ Countries have long sought more FDI but have also long had second thoughts once they received some. There is no mystery about why this is so. The anticipated benefits of foreign enterprises—increased competitiveness, technological spillovers, job promotion, lower consumer prices, the prospect of greater economic growth and enhanced exports—may come in all too small portions. Worse still, these limited benefits may be accompanied by negative externalities, namely threats to the host state’s economy, its politics, and even its national security.⁶⁵ Even countries that believe in David Ricardo’s theory of comparative advantage fear that foreign enterprises will always be looking for other opportunities (lower wages, lower environmental standards) and therefore be able to extract unattractive concessions by threatening to leave; in the interim, they may buy up valuable assets at “fire sale” prices, put “infant” local businesses out of business, monopolize certain sectors, import more than

are parties to at least one investment protection agreement such as BIT, that policy option is not commonly available.

⁶² See generally, Johnson, Sachs & Sachs, *infra* note 71.

⁶³ Although the TPP’s definition of covered investment emphasizes that the treaty protects tangible “assets,” see TPP, Art. 9.1, many international investment treaties extend their protections to passive forms of investment. Particularly after the Asian economic crisis, there was renewed attention to the risk posed by foreign capital flows not involving FDI, and the possibility of economic harm produced by rapidly changing flows of even passive capital.

⁶⁴ ANNIE HALL (Metro-Goldwyn-Mayer Studios 1977).

⁶⁵ See JOSE E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 16–24 (2011).

they export, or refuse to provide the host state with the anticipated technological or knowledge spillovers. Incoming FDI generates political worries. These include fears that foreign enterprises—whose economic power may dwarf a small country’s GDP—will unduly influence or corrupt politicians, otherwise meddle in local affairs, violate cultural norms, disrespect the environment, or undermine domestic constituencies (such as the power of local labor unions). Incoming foreign enterprises may generate national security concerns, including fears that foreigners will end up controlling or compromising access to technology needed for the national defense. Such security concerns are only exacerbated when FDI comes in the form of state-owned enterprises or sovereign wealth funds. These forms of FDI, it is feared, may advance the goals of their parent states and not necessarily those of the market.

Our love/hate relationship with foreign capital—and the policy tensions it entails—is often hard to disentangle from critiques of or fears generated by the international legal regimes constructed to protect it. Defenders of the TPP’s investment chapter argue that the legitimate concerns about the negative externalities of FDI are taken care of through each of its prospective party’s schedules. These state specific schedules include sector-specific exceptions from the treaty’s guarantees of entry or national treatment.⁶⁶ TPP critics are likely to see the treaty, including the limited exceptions permitted in its schedules, as being insufficiently sensitive to the needs to enhance FDI’s positive externalities while reducing its negative ones.

The TPP’s investment chapter is in the “reform it, don’t end it” mode that has been followed by the US for the past 20 years, as the promises and hazards of ISDS have become clearer. Its form and essential content follows the outlines set by the US-Argentina BIT.⁶⁷ Like that treaty and US investment treaties since, it too contains the same essential investor protections against discrimination, along with the

⁶⁶ Some of the more finely grained critiques of the TPP’s investment chapter question whether New Zealand’s schedules go far enough in the direction of protecting the government’s discretion with respect to the entry of foreign capital. *See* Kawharu, *supra* note 28.

⁶⁷ Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, 31 I.L.M. 124 [hereinafter U.S.-Argentina BIT].

“absolute” (non-relative) right of FET, free transfers, and limitations on performance requirements.⁶⁸ But, like investment protection treaties concluded by the United States since it became a leading respondent state under the NAFTA, with some 18 investor claims (all unsuccessful) under its belt,⁶⁹ the TPP’s investment chapter, as noted in more detail below, narrows most of the rights accorded foreign investors, expands the room for “sovereign policy space” for respondent states, and restricts the delegation of power accorded to investor-state arbitrators as compared to the earliest US BITs. Whether one thinks that this reform-minded investment chapter constitutes a new “gold standard” or something a great deal less wonderful may turn on where one sits on the relative merits of incoming capital flows to begin with. It is also likely to turn on where priorities lie with respect to balancing each of the five tensions enumerated above.

Mainstream economists, members of the US Business Roundtable or the New Zealand International Business Forum respectively, and market oriented politicians (like the newly elected President of Argentina) are likely to see the reform-minded TPP as satisfying a new golden mean with respect to these tensions. Those far more skeptical of the virtues of the international marketplace and of the place of ISDS within it, such as President Correa of Ecuador, Professors Jane Kelsey or Eyal Benvenisti, dissenting economists like Jeffrey Sachs or Joseph Stiglitz of Columbia University, or NGO critics like Lise Johnson of the Columbia Center on Sustainable Development, see the TPP’s investment chapter, as Ms. Johnson has already indicated, as “entrenching” rather than truly reforming the “flawed” international investment system.⁷⁰ In terms of the five tensions enumerated above, critics of the TPP’s

⁶⁸ Indeed, the TPP’s limitations on performance requirements are the considerably more developed prohibitions contained in more recent US treaties, rather than the extremely limited limitation contained in the original US-Argentina BIT, art. II(5). This is one of the few instances where the TPP provides investors greater protections than were extended under early US BITs.

⁶⁹ For a listing of the claims filed against the US under the NAFTA, see U.S. Department of State, Cases Filed Against the United States of America, available at <http://www.state.gov/s/l/c3741.htm>.

⁷⁰ Lise Johnson & Lisa Sachs, The TPP’s Investment Chapter: Entrenching, Rather than Reforming, a Flawed System (Columbia Center on Sustainable Investment Policy Paper, Nov. 2015), available at <http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf>. Those who express skepticism of the benefits of the TPP are likely to be critical of free trade agreements generally or at least of those that incorporate ISDS. See, e.g., Jane Kelsey, *Trade negotiations with EU, just as fraught as TPP*, THE NEW ZEALAND HERALD, (Nov 5, 2015), at http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11540404; JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002); Lise Johnson, Lisa Sachs, & Jeffrey Sachs, Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law (Columbia Center on Sustainable

investment chapter see it as skewed in favor of global corporate capital, as promoting FDI at the expense of protecting national business, as extending protections to FDI (and FDI home states) rather than attempting to maximize the benefits they offer to host states, and as encouraging a race to the bottom in terms of host country policy space. This is what TPP critics mean when they charge the treaty with showing greater respect for property rights than for democratic principles or the principle of sovereign equality.

One's stance towards the TPP may turn on whether one is, by nature or nurture, disposed to be a "little Conservative" or a "little Liberal."⁷¹ But whether one thinks the TPP's investment chapter is the "gold standard," may also be the product of expectations. If one expected the TPP negotiations to produce a "state of the art" investment treaty, that goal was achieved. The TPP's is the latest thing in a traditional investment protection treaty. As is further elaborated below, it is the latest word in treaty texts that have gone from the exceptionally strong investor rights of the US Model BIT's of 1984 and 1987 to the more complex regional package deals struck by the three NAFTA parties to the more "sovereign-sensitive" provisions of the US Model BIT of 2012 and contemporary US FTAs.⁷² The NAFTA trimmed some investor rights and restored the capacity of the state parties to reexamine those rights through joint "commission" interpretations binding on investor-state arbitrators.⁷³ The more cautionary stance taken in the NAFTA—the first investment protection treaty concluded between two capital exporting nations—began a process of adaptation in US investment protection agreements as the US encountered challenges brought by Canadian investors under the NAFTA and in response to other ISDS rulings involving other states. The TPP replicates many of the provisions of the latest generation of US (and to some extent Canadian) investment protection treaties. Its contents reflect that of the 2004 and 2012 US Model BIT

Investment Policy Paper, May 2015), *available at* <http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf>.

⁷¹ See WILLIAM SCHWENCK GILBERT & ARTHUR SEYMOUR SULLIVAN, IOLANTHE (1882) ("I often think its comical . . ./How Nature always does contrive . . ./That every boy and every gal/That's born into the world alive/ Is either a little Liberal/Or else a little Conservative"). For a more intellectual exploration of how "nature" may influence ideology, see, e.g., ALFORD HIBBING, PREDISPOSED: LIBERALS, CONSERVATIVES, AND THE BIOLOGY OF POLITICAL DIFFERENCES (2013).

⁷² See Alvarez, *supra* note 48.

⁷³ *Id.* at 10.

texts and treaties concluded under their influence, including the investment chapters of recent US FTAs.⁷⁴ Some of these textual changes have appeared in New Zealand's investment treaties prior to the TPP, such as the Protocol on Investment to the New Zealand-Australia Closer Economic Relations Trade Agreement.⁷⁵ (But that agreement did not include ISDS and also included some tweaks that are reminiscent of provisions found in the EU-Canada FTA, the CETA.)⁷⁶

The annex to this essay, containing recent iterations of the fair and equitable treatment (FET) clause, illustrates how much the TPP's investment chapter owes to post-NAFTA US treaty practice. As investment lawyers recognize, the FET clause is the heart of most investment protection treaties and perhaps the investment regime as a whole. Nearly all investment protection agreements have an express reference to FET and indeed, to the extent FET is considered part of customary international law, all treaties that include a reference to protecting investors "under international law" might be deemed to include this right. The FET guarantee has become more important in practice as states have turned away from the outright nationalizations and expropriations which once upon a time constituted the core risks faced by foreign investors. FET is, in addition, the treaty guarantee that is the most invoked by investors and, most importantly, is the most likely to be successful on their behalf.⁷⁷ While references to "fair and equitable treatment" date back centuries, that guarantee did not receive sustained attention from adjudicators until investor-state claims began being heard in significant numbers starting in the late

⁷⁴ Id. at 9–12, and Annex A (table comparing the 1984 and 2004 US BITs). For the text of the 2004 US Model BIT, see <http://www.state.gov/documents/organization/117601.pdf>; for the text of the 2012 US Model BIT, see <http://www.state.gov/documents/organization/188371.pdf>.

⁷⁵ Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement, signed 16 Feb. 2011, [2013] ATS 10, *available at* <http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/E6F1AE822746BA39CA25784200205358>.

⁷⁶ *Canada-European Union: Comprehensive Economic and Trade Agreement (CETA)*, CAN. FOREIGN AFF., TRADE & DEV., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng>.

As noted below, this CETA text, released in February 2016, now replaces resort to ISDS with an international investment court comparable to that proposed by the EU in the on-going negotiations for the Trans-Atlantic Partnership. See id., Arts.8.23-8.31.

⁷⁷ See RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 119–49 (2008).

1990s.⁷⁸ Today, with some 600 investor-state arbitral claims either being heard or already decided, this provision has drawn prominent attention at the highest levels of government.

Of course, FET may be of use to an investor even if a treaty does not include it but another investment treaty concluded by the host state does and the investor has the right to claim FET protection through the magic of a most favored nation treatment clause.⁷⁹ In addition, in some treaties, like the US-Argentina BIT quoted in the annex, there is a reference to FET in a treaty's preamble as well as its substantive text.⁸⁰ A preamble's FET reference may facilitate a finding by an arbitrator that this guarantee is part of a treaty's essential object and purpose. It may encourage a finding that the good faith interpretation of the treaty's object is to provide investors with fair treatment; it may enable interpretations that in case of ambiguity the question should be resolved in favor of protecting investments and investors.⁸¹ For these and other reasons, the meaning of FET has often featured prominently in debates about the merits of the international investment regime.

To proponents of these treaties and to investor claimants the FET clause is useful because of its flexibility. Indeed, some have suggested that the FET provision provides invaluable "gap-filling" protection to an investor who fails to convince a tribunal that he or she has been the victim of discriminatory treatment or an expropriation. But to critics of the investment regime, this is precisely the problem: a reference to FET provides an imprecise right to foreign investors that simultaneously provides little guidance to state regulators, delegates considerable "law-making" power to creative investor claimants and arbitrators, and enables foreigners to claim protections not available to national investors under national law.⁸²

As the annex illustrates, the FET provision has "evolved" over time, even with respect to the limited treaty parties reflected in that annex. Indeed, it is probably the investment guarantee that, at least

⁷⁸ See MARTINS PAPARINSKIS, *THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT* (2013).

⁷⁹ For the role of the MFN clause in "multilateralizing" the international investment regime, see STEPHAN SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* at 121–96 (2009).

⁸⁰ US-Argentina BIT, Preamble, para. 4.

⁸¹ See generally, DOLZER & SCHREUER, *supra* note 78, at 122.

⁸² See, e.g., VAN HARTEN, *supra* note 22, at 86–90.

in US investment treaty practice, has changed the most over the past 20 years, with the US's much altered expropriation provision being a close second.⁸³ The FET guarantee is an "absolute" right in the sense that it does not require comparison to how a domestic investor is treated. Proving an FET violation does not require a showing of discriminatory treatment. But much else about FET has generated debate among scholars and arbitrators. Tomes have been written on alternative interpretations of this seemingly simple phrase.⁸⁴ This essay limits itself to the following five illustrative possibilities.⁸⁵

1. FET means only those guarantees that customary international law extends under the minimum standard of treatment of aliens. On this view, FET tends to be equated with the right to procedural due process; that is, a violation of FET requires a denial of justice. This is the minimalist view of FET accepted even by tribunals that reject variations 2–5 below. However, substantial debates have ensued about what constitutes a contemporary "denial of justice" or violation of the "international minimum standard."
2. FET may include, in addition to (1) above, a host state's violations of its other international legal obligations. This would mean that if a host state can be shown to be violating the WTO in its treatment of a foreign investor that violation can be the subject of an ISDS claim (as well as possibly a WTO to the extent the investor's home state wishes to pursue it).
3. Whether or not one accepts (2) above, a violation of FET may emerge from a host state's violations of its own law. Tribunals that take this view may do so on the premise that violations of a state's own law violates the "legitimate expectations" of investors or on the premise that a host state that violates its own law is presumptively not acting in good faith. On this view, FET becomes a substantive guarantee and not only a procedural one.
4. FET requires consideration of whether a host state has treated an investor "fairly" along with a distinct inquiry about whether it has treated the investor "equitably." Violations of either are not restricted to departures from a host state's national or international obligations. On this view, the FET clause is a de facto delegation of authority to arbitrators to determine the relative "equities"

⁸³ See generally, Alvarez, *supra* note 48.

⁸⁴ See, e.g., Paparinskis, *supra* note 79.

⁸⁵ For a fuller discussion, see Alvarez, *supra* note 66, at 177–246.

on both sides, including consideration of whether a host state or an investor is otherwise acting in “good faith.”

5. Reference to FET as such does not have a single core meaning. The meaning and scope of this guarantee varies depending on the treaty text, including the context of the provision, the negotiating history of the particular treaty and all the other factors authorized under the traditional rules for treaty interpretation.

While (1) above has been the most common formulation of FET among arbitrators and scholars, it has not displaced (5); that is, an FET clause that includes, apart from a bare reference to “fair and equitable treatment,” other language is likely to be interpreted in light of that context. This is certainly the operating assumption of those who drafted the FET clauses contained in the annex, including the TPP’s.

The US-Argentina BIT text, based on the US Model BITs of 1984 and 1987, quoted in the annex provides the most investor-protective formulation of FET in US treaty practice. Under this clause, FET is a distinct additional right accorded to investors, above and beyond “full protection and security” and any entitlements under “international law.” This formulation of the right to FET does not equate it with customary international law or even with a state’s other international obligations but situates the right in a complex web of additional investor rights, including rights to be free of “arbitrary and discriminatory measures” as applied to a wide range of activities (management, operation, and so on) associated with an investment (and not just the direct decision to invest). In this treaty, the right to FET is also embedded in a clause that also compels states to “observe any obligation it may have entered into with regard to investments,” an ostensible umbrella clause whose wide scope would appear to embrace a state’s contracts “entered into” with investors but which may also embrace other representations made by a state to investors whether contained in licenses, oral statements, or perhaps the state’s general laws or international commitments.⁸⁶ Not surprisingly, this formulation of FET, in context and interpreted in

⁸⁶ Notably, this formulation does not clarify whether the clause protects investors only with respect to specific representations made by states to specific investors or whether general representations should be included in the duty to observe any “obligation.” It also seems to protect all types of assurances “entered into” by a host state and a foreign investor and not only the investment authorizations and investment agreements contemplated by the TPP’s Art. 9.1. For a review of the interpretation of such umbrella clauses, see ANDREW NEWCOMBE & LUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES STANDARDS OF TREATMENT*, at 437–79 (2009).

light of the *ejusdem generis* canon of construction, can easily be treated as designed to protect investors' "legitimate expectations." Such expectations are, after all, the apparent rationale connecting the various rights enumerated alongside the right to FET.⁸⁷

By contrast, the FET clause in the Argentina-Australia BIT of 1995⁸⁸ in the Annex is the simplest insofar as it says nothing about the possible connections between FET and other parts of international law, customary or otherwise, and provides no other helpful context at least within the FET clause itself. Without more, this clause is not necessarily more solicitous in terms of protecting the host state's regulatory space. Indeed, its simplicity provides arbitrators, particularly those not apt to adhere to prior arbitral rulings on point, with the most discretion. When FET stands alone, as in this text, arbitrators charged with interpreting and enforcing it have at least in theory all five interpretative possibilities surveyed above to choose from.

But the 1994 NAFTA version of the FET clause in the annex cabins that discretion in one respect: it affirms that investors must be treated "in accordance with international law" and indicates that international law *includes* the FET guarantee. This phrasing appears to suggest that FET is not some self-standing right apart from general international law (including the international minimum standard of treatment) but is part and parcel of international law. Since at least one NAFTA arbitral tribunal was not convinced that the NAFTA drafters intended to cut back so dramatically on the FET right that at least one of the NAFTA parties had previously concluded, on July 31, 2001 the NAFTA parties released their joint interpretation of the NAFTA's FET clause quoted in the annex.⁸⁹

⁸⁷ See generally, DOLZER & SCHREUER, *supra* note 78, at 133–40.

⁸⁸ Agreement Between The Government Of Australia And The Government Of The Argentine Republic On The Promotion And Protection Of Investments signed 23 Aug. 1995, [1997] ATS 4, available at <http://investmentpolicyhub.unctad.org/IIA/country/11/treaty/109>.

⁸⁹ See NAFTA Free Trade Comm'n, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), http://www.naftaclaims.com/commissionfiles/NAFTA_Comm_1105_Transparency.pdf. For a concise account description of the evolution of this interpretation and its effect on a pending NAFTA case, see David Gantz, *Pope & Talbot, Inc. v. Canada*, 97 AM. J. INT'L L. 937 (2003).

This controversial Commission Interpretation, binding on NAFTA investor-state arbitrators, has been criticized as an unauthorized amendment of the NAFTA and not a mere clarification.⁹⁰ Whether or not it was a faithful interpretation of the NAFTA's FET clause, it undoubtedly narrowed the interpretation of the FET guarantee as provided under prior US BITs, including the US-Argentina BIT. The Commission Interpretation, which as the annex indicates, influenced subsequent versions of the FET clause in US treaties (and indeed the treaty texts of some other BIT parties, including China's)⁹¹ states that FET prescribes the international minimum standard of treatment under customary law. It also indicates that violations of other treaties (including other parts of the NAFTA itself) do not "establish" a breach of FET.⁹²

By the time the US drafted its 2004 Model BIT three years later, the minimum standard of treatment became the title for the old FET clause. As the annex indicates, the 2004 Model incorporates the NAFTA's formulation of FET in its first paragraph but goes on to clarify, "for greater certainty," that neither FET nor full protection and security extend any greater rights than that accorded under the customary international law minimum standard of treatment of aliens and that FET "includes" denial of justice "in accordance with the principle of due process." Finally, the 2004 Model incorporates into its text the final part of the NAFTA Commission Interpretation from 2001, indicating that breaches of other treaties does not "establish" a breach of this provision. In response to suggestions in several NAFTA arbitral rulings suggesting that the customary international law minimum standard has evolved (while relying on prior arbitral rulings in support), the 2004 Model goes a step further and includes an annex purporting to confine the meaning of "customary international law" and specially of "the international

⁹⁰ See, e.g., Gabrielle Kaufmann-Kohler, *Interpretive Powers of the Free Trade Commission and the Rule of Law*, in FIFTEEN YEARS OF NAFTA CHAPTER 11 ARBITRATION (Emmanuel Gaillard & Frédéric Bachand, eds. 2011), available at http://www.arbitration-icca.org/media/1/13571335953400/interpretive_powers_of_the_free_trade_commission_and_the_rule_of_law_kaufmann-kohler.pdf.

⁹¹ See Alvarez, *supra* note 48, at 12.

⁹² Some arbitral tribunals have nonetheless permitted investors to argue that a host state's violations of its other treaties, including WTO commitments, is a relevant consideration in determining that a violation of FET occurred even though such violations do not alone "establish" that the FET obligation has been breached. This may be the case where a tribunal believes that it protects the investors' legitimate expectations to be treated in accordance with the host state's national and international legal obligations. See, e.g., Newcombe & Paradell, *supra* note 87, at 285.

minimum standard of treatment of aliens.” The former is stated to result from state practice followed by a sense of legal obligation. The latter protect the “economic rights and interests of aliens.”

Prior US FET clauses explain nearly every aspect of the TPP’s FET provision. Like the 2004 US Model BIT, the TPP’s equivalent provision, at Art. 9.6, is now entitled “minimum standard of treatment.” Its first paragraph duplicates the NAFTA provision on point, as well as the first paragraph of the 2004 Model. Its second and third paragraphs replicate the second and third paragraphs of the 2004 Model. In addition, the TPP’s annex on customary international law replicates, with one minor deviation, the comparable definitional annex from the 2004 Model. The only departure from the prior US text in that annex is that the international minimum standard of treatment of aliens now includes “all customary international law principles that protect investments of aliens,” a circular definition that seems to be broader than the original US text insofar as it is not limited to the “economic interests of aliens” (but may be narrower depending on what is meant by rights that protect “investments of aliens”).⁹³

The one clear departure in the TPP is Art. 9.6, paragraph 4 which uses the familiar US phrase “for greater certainty” to introduce a limitation that was certainly not clear in either prior FET clauses or the majority of arbitral rulings on point. Paragraph 4 seems to be saying that the violation of an investor’s expectations cannot be the only reason (“the mere fact”) for finding a breach of FET, even if violating those expectations causes tangible loss or damage. This poorly worded clause has not appeared in prior US Model texts and appears to be responsive to provisions like that in the CETA text provided in the annex, at Art. 8.10, para. 4. The CETA text seeks to limit the scope of “legitimate expectations” as deployed by some arbitral tribunals. It clarifies that only specific representations by a host state (as in a contract) that actually induces an investor to invest and on which the investor relies can be taken into account. The TPP’s comparable clause takes the opposite tack: it purports not to define the scope of legitimate expectations but to modify the relevant evidentiary burdens but only with respect to “expectations” (which are not defined or clarified). Subject to this exception, the TPP’s FET clause appears to be the latest iteration of that clause in its latest treaties.

⁹³ It is not clear whether this broader language is intended to extend protection to, for example, the human rights of aliens.

In following this path, the negotiators of the TPP rejected some alternatives suggested by the CETA text set out in the annex. The CETA equivalent provision does not equate FET to customary international law or the international minimum standard and does not purport to define these terms. It provides, on the other hand, a closed list of what constitute FET breaches in Art. 8.10, para. 2 (a-f) that might be seen as designed to narrow the interpretative discretion accorded to arbitrators. By contract, the TPP includes, consistent with prior US practice, only the first item 2 (a) from the CETA text, namely denials of justice, but suggests that other kinds of FET breaches may exist that it does not enumerate. Those looking for a narrower version of the FET guarantee might prefer the CETA's alternative to the open-endedness of the TPP's Article 9.6, para. 2(a). On the other hand, the CETA enumeration at (a-f), notwithstanding some efforts to cabin breaches that might have been included under the expansive US-Argentina BIT (e.g., restricting investors to bringing claims only for "manifest" arbitrariness), includes some very expansive possibilities, such as "abusive treatment of investors." The actual "closeness" of its list and the ostensible value to host states seeking clarity or certainty with respect to what treatment they owe investors may be less than meets the eye.

At the same time, as the CETA text indicates, the TPP is not alone in following a path initially blazed by the US, including in its NAFTA practice. The CETA's "closed list," at para. 2 (a-f) appears to be an effort to codify the most cited paragraph from a NAFTA ruling, *Waste Management v. Mexico*.⁹⁴ The CETA text also adopts the NAFTA's innovation of re-introducing a role for its state parties in defining, from time to time, the meaning of the FET guarantee in its para. 3, while its para. 6 essentially replicates Art. 5, para. 3 from the 2004 US Model.

There are many other examples in the TPP of provisions that either reflect or even go beyond more recent US treaty practices in order to re-calibrate the balance of investor rights versus state's right to regulate. The TPP's definition of investment narrows the property rights that it protects by making clear that only tangible "assets" involving a commitment of capital entailing an assumption of risk can be

⁹⁴ *Waste Mgmt., Inc. v. Mexico*, Case No. ARB (AF)/00/3, Award, ¶ 98 (ICSID Apr. 30, 2004).

included.⁹⁵ The TPP also narrows nearly all of the substantive protections accorded to foreign investors from the high point of those protections (as under the US-Argentina BIT), apart from FET. While the right to national and MFN treatment extends to the right of entry, the TPP permits individual TPP Parties to opt out of ISDS with respect to such claims and thus far, Australia, Canada, New Zealand, and Mexico have all decided to do so.⁹⁶ As with US treaties after the NAFTA, the umbrella clause extending protections for “obligations” entered into by host states, originally part of the FET obligation in the US-Argentina BIT, has been replaced by a more limited obligation that permits investors to bring claims for breaches of “investment authorizations” and some “investment contracts” with TPP party states.⁹⁷ The TPP’s national treatment protection clarifies that consideration of whether a foreign investor is denied such treatment turns on an examination of “the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives” and not a more mechanical approach to interpreting whether a foreign and national investor are in “like circumstances.”⁹⁸ Its most-favored-nation treatment provision does not encompass dispute settlement procedures or mechanisms, thereby preventing investors from claiming more beneficial provisions on ISDS extended in TPP parties’ prior treaties.⁹⁹ Beyond the limitations on FET discussed earlier, that guarantee does not extend to some forms of restructured public debts which can be subject to an investor claim only if discriminatory treatment is shown.¹⁰⁰

⁹⁵ TPP, Sec. 9.1 (definition of investment). This nods to the “Salini factors” developed in investor-state caselaw which attempted to restrict the meaning of protected investment for purposes of the ICSID Convention. *See, e.g.*, DOLZER & SCHREUER, *supra* note 78, at 60–71. This definition can be compared to the comparable provision in the US-Argentina BIT which provided only a general circular definition of investment (“investment means every kind of investment . . .”), without reference to “asset,” “commitment of assets” or “assumption of risk.” *See* US-Argentina BIT, art. 1(a). The TPP also suggests that mere contracts for the sale of goods are “less likely” to have the characteristics of investment. TPP, fn. 2.

⁹⁶ TPP, Annex 9-H.

⁹⁷ TPP, Art. 9.1 (defining both “investment authorizations” and “investment agreements” with the latter limited to contracts with a TPP host state in relation to the exploitation of natural resources, the operation of public utilities, and government procurement); Art. 9.18 (1)(permitting investors to bring claims for breaches of investment authorizations and agreements).

⁹⁸ TPP, Art. 9.4, fn. 14. This goes beyond the US Model BIT of 2012, *supra* note 75, which has no such clarification or limitation.

⁹⁹ TPP, Art. 9.5, para. 3. This takes a more a more narrow approach to the MFN than had been taken by some arbitral tribunals. *See* DOLZER & SCHREUER, *supra* note 78, at 253–57.

¹⁰⁰ TPP, Annex 9-G, para. 2.

The TPP's guarantee of prompt, adequate, and effective compensation upon expropriation is essentially derived from the US's most recent iterations of this provision. It includes, in Annex 9-B, a considerable narrowing of the potential for claims based on regulatory or indirect takings of property, including a requirement of case-by-case balancing of three factors drawn from a famous US Supreme Court case and a clarification, indicating, "for greater certainty," that non-discriminatory regulatory actions taken for legitimate public welfare objectives do not "except in rare circumstances" constitute indirect takings.¹⁰¹ But it also adds to those assurances of greater policy space, clarifications not previously reflected in US treaty practice.¹⁰²

As do recent US treaties, the TPP discourages some forms of "nationality" or "treaty-shopping" by specifying that its benefits do not extend to those enterprises which have only a paper presence in the other TPP treaty party, that is, have "no substantial business activities" in another TPP Party state other than the Party against which a claim is brought.¹⁰³ In accordance with post-NAFTA US treaty practice, the TPP includes a clause permitting states to take environmental, health or other regulatory measures "otherwise consistent" with its investment chapter, but goes beyond US prior practice by including another clause that reaffirms the importance of each Party's "encouraging" the adoption of corporate codes of social responsibility.¹⁰⁴

¹⁰¹ TPP, Annex 9-B. This is a response to considerable ambiguity arising with respect to the handling of prior "regulatory takings" by prior ISDS tribunals, including widespread dissatisfaction with the dicta expressed in the NAFTA's Metalclad ruling and a desire, by US treaty drafters, to return to the security provided under the leading US Supreme Court authority on takings. *See, e.g.*, DOLZER & SCHREUER, *supra* note 78, at 92–106, 109–14. The three factor test contained in the TPP's Annex 9-B, para. 3(a)(i-iii) is taken from the famous ruling interpreting the "takings clause" of the US Constitution rendered by the US Supreme Court: *Penn Central v. City of New York*, 438 US 104 (1978).

¹⁰² It ties the concept of "public purpose" to customary international law. TPP, Art. 9.7, fn. 17. It also indicates that the second factor in the three factor test applicable to indirect takings, which requires examining whether an investor's investment-backed expectations are "reasonable," depends on "whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector." TPP, Annex 9-B, fn. 36. The TPP also adds provides considerable detail to what may constitute permissible regulatory actions to protect public health. TPP, Annex 9-B, fn. 37.

¹⁰³ TPP, Art. 9.14(1)(b). For discussion of the treaty-shopping risks that this clause seeks to address, see, e.g., DOLZER & SCHREUER, *supra* note 78, at 49–52.

¹⁰⁴ TPP, Arts. 9.16 and 9.17. Interestingly, both of these articles are included in section A of the investment chapter which means that they are subject to investor-state dispute settlement under Art. 9.18.

The TPP also borrows heavily from the US treaty toolkit with respect to fixing the alleged “rule of law” flaws of ISDS. It anticipates that respondent states may file certain counterclaims,¹⁰⁵ requires claimants to state the basis of their claims from the outset,¹⁰⁶ requires claims to be brought within 3 years and six months of the alleged breach,¹⁰⁷ anticipates the acceptance of amicus briefs by investor-state arbitrators,¹⁰⁸ provides an expedited process for the handling and prompt dismissal of frivolous claims as well as those challenging jurisdiction,¹⁰⁹ clarifies that the burden of proof rests on the investor with respect to proving all elements of its claim,¹¹⁰ adopts a WTO-inspired procedure enabling the litigants to get a “first look” at the draft arbitral award prior to its issuance,¹¹¹ anticipates that the TPP parties may establish an appellate mechanism,¹¹² requires transparency with respect to all documents filed in the course of investor-state arbitration,¹¹³ requires ISDS arbitrators to respect any binding interpretations of the treaty issued by the TPP parties,¹¹⁴ permits the disputing parties to consolidate claims that share a common question of law or fact,¹¹⁵ and imposes limits on damages with respect to claims alleging denial of entry.¹¹⁶ In a departure from prior US treaty practice and presumably responding to criticisms of ISDS with respect to the current handling of challenges to arbitrators, the TPP anticipates that its state Parties will “provide guidance on the application” of a “Code of Conduct for Dispute Settlement Proceedings.”¹¹⁷ The TPP also narrows the scope of ISDS in other respects, including by permitting state Parties to opt out of it altogether with respect to claims arising from their tobacco control measures.¹¹⁸ The TPP also includes the latest versions of US general exceptions from the provisions of the investment chapter, including an

¹⁰⁵ TPP, Art. 9.19(2).

¹⁰⁶ TPP, Art. 9.19(3).

¹⁰⁷ TPP, Art. 9.21(1)

¹⁰⁸ TPP, Art. 9.23(3).

¹⁰⁹ TPP, Art. 9.23(4) and (5). It also provides the arbitrators with the option of awarding the prevailing party costs in such proceedings. TPP, Art. 9.32(6).

¹¹⁰ TPP, Art. 9.23(7). This provision had not previously appeared in US treaty practice.

¹¹¹ TPP, Art. 9.23(10).

¹¹² TPP, Art. 9.23(11).

¹¹³ TPP, Art. 9.24. In a further departure from prior US treaty practice, the transparency requirements now extend to any available minutes or transcripts of the hearings of the tribunal. *Id.*, (1)(d).

¹¹⁴ TPP, Art. 9.25(3).

¹¹⁵ TPP, Art. 9.28.

¹¹⁶ TPP, Art. 9.29(4)(requiring that any the only damages that may be awarded in such cases be limited to those that the claimant proves were sustained in the attempt to make the investment and proximate to the breach).

¹¹⁷ TPP, Art. 9.22(6).

¹¹⁸ TPP, Art. 29.5 (tobacco control); Art. 29.4 (requiring pre-screening by the respective Party’s tax authorities for claims claiming expropriation based on tax measures). As noted, a side letter to the TPP also ensures no ISDS as between the investors of Australia and New Zealand.

exception for measures that Parties “consider necessary for fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”¹¹⁹

As the above summary suggests, the TPP’s investment chapter largely replicates recent US treaty practice. A recent comparison of treaty texts by two scholars, finding that that 82 percent of the text of the TPP’s investment chapter is taken from the US-Colombia FTA’s investment chapter (and that the TPP’s investment chapter text has a 60 % similarity with the NAFTA’s), strongly supports this conclusion.¹²⁰ Of course, assuming this linguistic analysis is correct, 18 percent of the TPP’s investment chapter does not replicate recent US practice and those differences could prove determinative with respect to winning and losing prominent investor claims.¹²¹

It is impossible to predict whether the TPP’s investment chapter, should it go into effect unchanged, lead to eventual caselaw comparable to that produced to date under the NAFTA or other treaties with similar or even identical provisions. Much will depend on the claims brought, the arbitrators selected, as well as matters that are not yet clarified in the existing text (such as the contents of the anticipated Code of Conduct for arbitrators).¹²² The parts of the investment chapter that do not draw from US practice—such as its language under FET concerning the meaning of “legitimate expectations,” its statement that MFN does not apply to dispute settlement, or its provision on corporate social responsibility—may prove to have considerable impact.

¹¹⁹ TPP, Art. 29.2. Other exceptions permitted include “temporary safeguard measures” on transfers of capital (Art. 29.3) and measures deemed necessary by New Zealand to fulfill the Treaty of Waitangi (Art. 29.6). In addition, the TPP’s Financial Services Chapter includes exceptions taken for “prudential” reasons to, among other reasons, “ensure the integrity and stability of the financial system” as well as non-discriminatory measures in pursuit of monetary or exchange rate policies. TPP, Financial Services Chapter, Art. 11.11(1) and (2).

¹²⁰ Wolfgang Alschner & Dmitriy Shouharevskiy, *The New Gold Standard? Empirically Situating the TPP in the Investment Treaty Universe* (Graduate Institute of International and Development Studies Working Paper Series, Nov. 23, 2015), available at

http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI%202015-8%20Alschner_Skouharevskiy_TPP.pdf.

¹²¹ Indeed, one critic of the significance of the 82 percent finding has pointed out that chimpanzees and humans share 98 percent of the same DNA but that 2 percent in that instance makes all the difference.

¹²² See TPP, Art. 9.21(6).

The TPP also appears to leave more room than prior US BITs or FTAs for each of its state Parties to make exceptions to its terms and this too may have a considerable impact on whether it will generate the sovereign backlash against ISDS that has been evident elsewhere. The TPP's Parties have considerable options, for example, with respect to how to deal with their own prior investment protection treaties and whether, for example, investors under the TPP will be able to enhance their rights by drawing from any better treatment accorded to others in these older treaties through MFN.¹²³ This scope for discrete party exceptions even applies, as noted, with respect to whether tobacco control measures will be subject to investor challenge through ISDS. To the extent the TPP does not avoid overlap with the 35 investment agreements, including the NAFTA, concluded among a subset of TPP parties, it is likely to encourage, not eliminate, the prospect of forum shopping, resorts to MFN or normative conflicts among these treaties.¹²⁴

For this reason, it is not clear that the TPP is likely to harmonize global investment standards and thereby facilitate conclusion of a multilateral investment treaty.¹²⁵ At the same time, thanks to the TPP, three pre-existing investment treaties, between Australia and Japan, Malaysia and the US respectively, which did not originally have ISDS, would, if the TPP comes into effect, provide investors from those countries access to ISDS. Although as noted, Australia and New Zealand's FTA from 2011 will not be affected given those two countries decision to opt out of the TPP's ISDS as between themselves, the TPP is still a significant departure from Australia's recent practice with respect to investor-state dispute settlement (at least with respect to Australia's relations with the other TPP partners apart from New Zealand).

It is also possible that given the exceptions from the investment chapter taken by the 12 TPP Parties individually, the TPP will not produce the extent of investment liberalization among its Parties that some proponents of the treaty anticipated. And yet, the text of the investment guarantees accorded in the TPP that remain subject to ISDS cannot be described as 'lowest-common denominator' investor rights.

¹²³ See, e.g., Alschner & Shouharevskiy, *supra* note 121, at 21–24.

¹²⁴ *Id.*

¹²⁵ *Id.* at 26–28.

Although the TPP narrows most investor guarantees as compared to the high point of early US BITs, that narrowing lies within the parameters of the generally high standards of investment protection that have historically characterized US treaty practice. This is a treaty that accords foreign investors absolute rights (e.g., FET, full protection and security, compensation for direct expropriations, bans on multiple performance requirements, and free transfers of capital) and relative rights (e.g., national and MFN treatment), while also responding at the margins to arbitral decisions that have alarmed host states.

The TPP's investment chapter is a relatively balanced instrument for a reason. It is, after all, a treaty concluded among states that experience, for the most part, bidirectional investment flows even if in some instances (as with respect to New Zealand) those flows are disproportionately inward directed. It should not surprise anyone that the TPP seeks to balance the needs of capital exporters desiring to protect the rights of their investors abroad with the needs of capital importers which, as host states, still need to be able to regulate to protect the public interest.¹²⁶ The TPP's investment chapter converges around high US standards for investment protection, host state flexibility, and investor-state arbitration.¹²⁷ That trifecta is not achieved in the broader universe of investment treaties elsewhere, including in the Asian region.

Of course, if the TPP's text largely converges around the practice of one of its twelve parties, that may be, to its critics, itself a problem insofar as it supports Benvenisti's "divide and conquer" hegemonic account.¹²⁸ And, if what one expects from a "gold standard" is not just a treaty that reflects current trends but one that ends, for good, the second-guessing of host states' regulatory practices and does not provide foreign investors with any *greater* rights than those given to national investors, this is not such a treaty.

Consider for example, the controversial arbitral award made in favor of the US investor Bilcon in *Bilcon v. Canada*, a NAFTA award of Mar. 17, 2015.¹²⁹ In that case, the majority—Judge Bruno Simma (formerly of the ICJ) and Prof. Bryan Schwartz, over the dissent of Prof. Donald McRae, ruled in favor of

¹²⁶ *Id.* at 13–16.

¹²⁷ *Id.* at 19.

¹²⁸ See Benvenisti, *supra* note 15.

¹²⁹ *Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015.

the mining company who had been denied the right to engage in a quarry project in Nova Scotia after an environmental review by the federal and provincial authorities. The decision turned substantially on the interpretation of the FET provision in the NAFTA identified in my handout. The tribunal agreed that this provision is identical to rights to the international minimum standard under CIL but noted that, in accord with a number of prior NAFTA decisions, that standard has evolved over time so that it no longer requires proof of bad faith, willful neglect of duty, or grossly unfair or a manifest or outrageous failure of justice but could be triggered by violations of due process.¹³⁰ In accord with the warnings against relying exclusively on the investors' legitimate expectations (that now appears in the TPP's FET clause as we discussed) and that to the extent those expectations exist these must be based on specific representations by Canada on which the investor relied (see the language in CETA), the tribunal concluded that it could still take into account the reasonable expectations of the investor that they would indeed be permitted to operate their quarry based on brochures and other statements by Canadian officials.¹³¹ The tribunal found a violation of the FET provision based on the fact that the Canadian environmental review board relied on an unclear concept of "community core values" not specifically mentioned in Canadian law and departed from its usual procedure of suggesting mitigation procedures prior to issuing a final denial to a project.¹³²

Dissenting arbitrator McRae, a prominent Canadian academic and himself a trade and investment arbitrator, argued that the actions of Nova Scotia officials in encouraging investment in mining were irrelevant to the alleged treaty violation, that consistency with community core values was indeed part of Canadian law and anticipated that the investor engage effectively in consultations with Aboriginal peoples, fishers and other others in the affected community, and that the tribunal's ruling otherwise appeared to be based simply on their view—right or not—that Canadian laws had not been properly applied despite the discretion normally accorded to the environmental review process.¹³³ To McRae, the reviewers of the

¹³⁰ *Id.* paras. 433–54.

¹³¹ *Id.* paras. 455–74.

¹³² *Id.* paras. 502–14, 530–43, 546–47.

¹³³ *Id.* Dissenting Opinion of Professor Donald McRae. In this connection, note that the recently "scrubbed" text of CETA, as released in February 2016, after the Bilcom ruling, now includes a purported clarification ("for greater

project took a principled position that was in accord with due process, with the socio-economic considerations that they were charged with considering, and which could not be seen as arbitrary or unfair or inequitable.¹³⁴ McRae pointed out that by treating this as a treaty breach, the majority had introduced the potential for getting damages for action that under Canadian law does not provide a damages claim—thereby adding a further control over environmental review panels that does not exist under Canadian law.¹³⁵ He suggested that the decision would change the character of environmental reviews in Canada since these are generally made up of scientists and environmental experts and not lawyers attentive to the nuances in language that his arbitral colleagues apparently now expected.¹³⁶ McRae concluded that “this is a significant intrusion into domestic jurisdiction and will create a chill on the operation of environmental review panels . . . [it] is not only an intrusion into the way an environmental review process is conducted, but also an intrusion into the environmental public policy of the state.”¹³⁷

As Lise Johnson and Lisa Sachs point out, there is nothing in the TPP’s FET clause that would prevent another arbitral award like *Bilcon*.¹³⁸ To such critics, the TPP’s efforts to narrow the guarantees offered to investors, including FET, in response to 15 years of ISDS caselaw, does nothing to reduce the risks of arbitral second-guessing at odds with a state’s ability to protect public values.¹³⁹ It does not eliminate the possibility of arbitral reliance on state representations that were never intended to be legally binding and that would probably not be deemed relevant to resolve contractual disputes under national law. It does not eliminate resort to investor “expectations” and does not render more precise how “egregious” a violation of due process needs to be to violate FET or how much as customary international

certainty”) indicating that “the fact that a measure breaches domestic law does not, in and of itself, establish a breach of [FET].” See Annex, CETA, Art. 8.10, para. 7.

¹³⁴ *Id.* para. 38.

¹³⁵ *Id.* para. 48.

¹³⁶ *Id.* paras. 48–51.

¹³⁷ *Id.* paras. 48–49.

¹³⁸ Johnson & Sachs, *supra* note 71, at 8–11 (arguing that the TPP’s efforts to clarify the concept of non-discrimination would not prevent *Bilcon*-type rulings and the bringing of “speculative” claims). Although Johnson and Sachs address the national treatment guarantee of the NAFTA, their conclusion applies equally with respect to the TPP’s FET revised guarantee.

¹³⁹ Nor does the TPP ensure that investor claims will not challenge state measures of extraordinarily significant dimensions, such as a decision to eliminate its reliance on nuclear energy. See, e.g., Nathalie Bernasconi-Osterwalder & Rhea Tamar Hoffmann, *The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the New Dispute Vattenfall v. Germany (II)*, IISD, June 2012, <https://www.iisd.org/library/german-nuclear-phase-out-put-test-international-investment-arbitration-background-new>.

law has “evolved” and what is relevant to making that judgment other than the decisions of prior arbitrators under BITs and FTAs.¹⁴⁰

Johnson and Sachs have a similar reaction to the other TPP efforts to re-calibrate the balance of investor and states’ rights: Art. 9.16 does not, in their view, protect the states’ right to regulate since all it does is clarify that states can take regulatory measures that are “otherwise consistent with the [investment] chapter.”¹⁴¹ The TPP’s provision that the claimant investor bears the burden of proof just recognizes what is already the law; the rules on frivolous claims already appear in old treaties and do not fully protect states from such claims if arbitrators fail to use their powers, and its rule of law fixes on ISDS, nearly all familiar, do nothing to enable interested non-parties to intervene in these public interest cases, to provide the public with access to all relevant information—such as the settlements that states may enter into with investors in order to get rid of claims prior to an award—or to enable a real second look at erroneous arbitral awards through any provision for appellate review.¹⁴² The TPP, in short, does little in their view to protect against potential regulatory chilling effects. Johnson and Sachs conclude that the TPP

“represent[s] just small tweaks around the margins. . . . At their core, ISDS and investor protections in treaties establish a privileged and powerful mechanism for foreign investors to bring claims against governments that fundamentally affect how domestic laws are developed, interpreted and applied, and sideline the roles of domestic individuals and institutions in shaping and applying public norms. For this reason, the TPP should drop ISDS altogether, or replace it with a new and truly reformed mechanism that addresses the myriad concerns that are still lurking in the TPP.”¹⁴³

As this suggests, those who were opposed to the TPP’s investment chapter before it was made public are not likely to change their minds now that they have a final text.¹⁴⁴ But what is that “reformed”

¹⁴⁰ Johnson and Sachs suggest that a better result would have been to eliminate the FET guarantee altogether or to make it subject only to state to state but not investor-state adjudication. Johnson & Sachs, *supra* note 71, at 6.

¹⁴¹ *Id.* at 2.

¹⁴² *Id.* at 4.

¹⁴³ *Id.* at 19.

¹⁴⁴ For a survey of evidence indicating that ten years after it was concluded, those who were for and against the NAFTA’s Investment Chapter appear not to have changed their minds about the wisdom of that treaty, see José E. Alvarez, *The NAFTA’s Investment Chapter and Mexico*, in FOREIGN INVESTMENT ITS SIGNIFICANCE IN RELATION TO

mechanism that Johnson alludes to? The EU's recently tabled proposal for an international investment court in the on-going TTIP negotiations (along with comparable provisions in the EU-Vietnam FTA and CETA), constitutes the latest possible reform for those still searching for the "gold standard."¹⁴⁵

The EU's proposed dispute settlement system for the investment chapter of the TTIP would adopt many of the reformist measures already contained in the TPP (such as full transparency, a process for early dismissal of unfounded claims, and binding party interpretations) but crucially, would also establish a new international court system consisting of a Tribunal of First Instance (composed of 15 appointed judges) capped by an Appellate Tribunal (of six judges).¹⁴⁶ The fifteen judges of the Tribunal of First Instance would be appointed jointly by the EU and US governments and be composed of five EU nationals, five US nationals, and five nationals of third countries. The Appellate Tribunal would be composed of two judges from the EU and the US respectively, along with an additional two from third countries. All 21 judges would be appointed for renewable six year terms, be barred from taking on any work as legal counsel on any investment disputes, and would be subject to strict ethical rules to prevent conflicts of interest.¹⁴⁷ They would be expected to be persons comparable to those suited to judicial offices with demonstrated expertise in public international law.¹⁴⁸ Under the envisioned system, the disputing parties would not choose their judges; their claims would be adjudicated by groups of three judges (one each from the EU, the US, and from third countries) appointed, on a rotational basis, by the Presidents of the Tribunal of First Instance and the Appeal Tribunal respectively.¹⁴⁹

THE FIGHT AGAINST POVERTY, ECONOMIC GROWTH, AND LEGAL CULTURE 241 (Rudolf Dolzer, Matthias Herdegen & Bernhard Vogel, eds., 2006).

¹⁴⁵ European Commission, EU-Vietnam Free Trade Agreement: Agreed text as of January 2016, *available at* <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>; CETA, *supra note* .

¹⁴⁶ European Commission, Draft Text, Transatlantic Trade and Investment Partnership Trade in Services, Investment and E-Commerce, Chapter 2 Investment, on Art. 18 (transparency), Art. 16-17 (preliminary objections), Art. 13(5)(binding Committee interpretations), and Art. 9 and 10 (establishing a Tribunal of First Instance and an Appeal Tribunal), DRAFT TTIP text, *supra note* 42.

¹⁴⁷ *Id.* art. 9, 10, and 11.

¹⁴⁸ *Id.* art. 9(4) and 10(7).

¹⁴⁹ *Id.*, art. 9(6) and (7) and 10(8) and (9).

The EU proposal has been embraced by a number of scholars, including Robert Howse and Joost Pauwelyn.¹⁵⁰ To proponents, replacing ISDS with an international investment court presents a commendable compromise between those who want no supranational review of host states that are charged with violating investors' rights and those who continue to embrace ISDS despite the sovereign backlash it has generated. ISDS, they claim, emerged largely by accident. It was the product of path dependency by those who were only familiar with arbitration as a method for settling inter-state disputes. If a system for adjudicating investment disputes had been designed today, it would have likely been inspired by today's "models of functioning transnational or international tribunals" instead.¹⁵¹

The EU proposal is clearly intended to correct the perceived rule of law flaws of ISDS. It responds to the fundamental lack of trust with respect to the relatively small pool of party appointed investor-state arbitrators, many of whom litigate, on the side of the state or investor, investment claims themselves when they are not asked to preside over them.¹⁵² Proponents of the investment court see it as resolving adverse perceptions of arbitrator conflict of interest while ensuring that investment adjudicators do not think of themselves as partisan representatives for the party that appointed them to the dispute. Establishing a formal court will, it is said, enable and encourage the genuine reason-giving and coherent caselaw that the rule of law demands and that investors and states both expect, given the need for clarity and certainty with respect to the applicable rules.¹⁵³ The Appellate Tribunal in particular is seen as ensuring greater coherency in investment law, while also providing, unlike the limited ICSID annulment process, the possibility for correcting erroneous interpretations of law or egregious errors in fact-finding. The EU proposal is also praised for ensuring that those who adjudicate these "public" disputes have the needed expertise in public international law. Proponents also contend that since the EU proposal

¹⁵⁰ Robert Howse, *Courting the Critics of Investor-State Dispute Settlement: the EU proposal for a judicial system for investment disputes* (2015) (unpublished manuscript) (on file with author); Joost Pauwelyn, *Why the US Should Support the EU Proposal for an "Investment Court System,"* LINKEDIN (Nov 16, 2015), <https://www.linkedin.com/pulse/why-us-should-support-eu-proposal-investment-court-system-pauwelyn>

¹⁵¹ Howse, *supra* note 150, at 7; *see also* Pauwelyn, *supra* note 150, suggesting that the EU proposal resembles the WTO's dispute settlement system, including its Appellate Body.

¹⁵² For a critique of party-appointed investor-state arbitrators, *see, e.g.,* Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, in VALE COLUMBIA CENTER ON SUSTAINABLE DEVELOPMENT, *FDI PERSPECTIVES*, 71 (2d ed. 2012), available at <http://ccsi.columbia.edu/files/2012/11/FDI-Perspectives-eBook-v2-Nov-2012.pdf>.

¹⁵³ *Compare, e.g.,* Kingsbury & Schill, *supra* note 53 (urging greater attention to reason-giving within ISDS).

imposes strict time limits on the processing of claims as well on limits on the ensuing costs, there would be substantial efficiency benefits—at least as compared to ISDS where the average award now takes 3.5 years and \$8 million to resolve.¹⁵⁴ Finally, proponents of the EU international investment court argue that it would replicate, for investment disputes, the WTO’s successful dispute settlement scheme—which has brought “rule of law” without comparable sovereign backlash.¹⁵⁵

Whether the EU proposal for an international investment court and comparable provisions now appearing elsewhere presents the future of the investment regime—whether it is the new “gold standard” for those looking for a form of supranational investment regulation that does not generate sovereign backlash—remains to be seen. While the proposal for an international investment court may indeed correct many (if not all)¹⁵⁶ of the perceived rule of law flaws that now trouble critics of ISDS, it does not eliminate the fundamental risk that now drives critics of the investment regime: namely the risk that sovereign decisions in the public interest will be second-guessed and chilled by the bringing of investor claims. Even if the envisioned investment court should come into being,¹⁵⁷ there is nothing in the establishment of a permanent court, with or without an appellate body, that ensures that it will produce the types of sovereign-sensitive decisions that ISDS critics like Lise Johnson desire. The fact that under the EU proposal two groups of judges will be in charge of interpreting the law does not mean that they

¹⁵⁴ Howse, *supra* note 150, at 12–14.

¹⁵⁵ Pauwelyn, *supra* note 150. *See generally*, Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Panelists are from Venus*, AM. J. INT’L L. (Oct. 2015).

¹⁵⁶ Notably, the EU proposal does not cure one ISDS flaw: the complaint that the fellow adjudicators are expected to decide on challenges to arbitrators. *See* Draft TTIP Text, *supra* note 42, Art. 11 (3) (anticipating that the President of the Tribunal or of the Appeal Tribunal respectively will decide on challenges to judges). (Interestingly, CETA’s comparable provision anticipates that such challenges will be decided by the President of the International Court of Justice. CETA, *supra* note , at 8.30, paras. 2-3.) The EU proposal also adds a rule of law problem of its own. It anticipates that the proposed investment court’s awards will be enforced only as between the parties to the TTIP. *Id.*, Art. 30. ICSID awards are, of course, enforceable as among all ICSID parties.

¹⁵⁷ Whether this occurs is not simply a matter of whether the EU’s proposal is accepted by the US and the TTIP is successfully concluded. It is not entirely clear whether the European Court of Justice will accept the existence of a “rival” body capable of interpreting EU and international law. *See* Stephan Schill, *The Proposed TTIP Tribunal and the Court of Justice: What Limits to Investor-State Dispute Settlement under EU Constitutional Law?*, VERFASSUNGSBLOG (Sept. 29, 2015), <http://verfassungsblog.de/the-proposed-ttip-tribunal-and-the-court-of-justice-what-limits-to-investor-state-dispute-settlement-under-eu-constitutional-law>.

will produce better—or more sovereign sensitive—treaty interpretations. As a noted US Supreme Court justice one noted, appellate review does not ensure correctness; it only ensures finality.¹⁵⁸

Even if the EU proposal will generate the appointment of judges with the kind of public international law expertise now associated with judges on the ICJ and the ECtHR, will those judges, faced with interpreting an investment protection treaty, be more likely to defer to sovereigns than today's ad hoc arbitrators? There is room for doubt on that score. The semi-permanent judges on an investment court, and especially those on the proposed Appeals Court, may be more, not less, empowered than an arbitrator appointed to a single case. Neither their status as semi-permanent judges of a formal court¹⁵⁹ nor their envisioned expertise in public international law is necessarily likely to make them more deferential to states. Former ICJ judge Bruno Simma, a renowned expert on both public international law and human rights, was, after all, one of the two arbitrators writing the controversial (and singularly not deferential) majority opinion in the *Bilcon* case discussed above. Those who expect the envisioned international investment court to be more sympathetic to respondent states sued by investors may well be disappointed.

We should be mindful that investment and human rights treaties share some commonalities. Both are designed to protect the right to property, non-discrimination and fair process from state abuse. Neither the ECtHR nor the Inter-American Court of Human Rights have been reticent about intruding into states' regulatory discretion. Both have seen their role as enforcers against the abuse of state power. Both of those permanent courts of public international law specialists have been criticized for not being sufficiently sensitive to the regulatory or security needs of states; both have generated their own measure of sovereign backlash.

On the other hand, to the extent advocates for the new investment court predict that its judges will come to resemble those now serving on WTO panels and its Appellate Body, there is room to doubt

¹⁵⁸ “We are not final because we are infallible, but we are infallible because we are final.” Concurring Opinion, Justice Robert H. Jackson, in *Brown v. Allen*, 344 US 443, at 540 (1953).

¹⁵⁹ The “semi-permanent” status of the proposed international investment court of the TTIP is suggested by the fact that its envisioned judges are not engaged as such permanently but only receive a monthly retainer fee to ensure their availability as disputes and appeals arise; in addition, certain administrative and legal secretariat services are outsourced to ICSID. See Draft TTIP Text, *supra* note 42, Art. 9-10.

whether that possibility will generate the level of legitimacy desired and emulate the relative success of the WTO dispute settlement system as Pauwelyn suggests. As Pauwelyn has demonstrated those who now serve as WTO adjudicators tend to come disproportionately from WTO governments, including trade ministries.¹⁶⁰ It seems appropriate to turn to government functionaries—often former trade officials—to resolve trade disputes that trade ministers bring against one another. But investor-state claims are not between governments. The networks of international investor protection treaties have generated expectations that they are intended to protect private third party beneficiaries and not only states' regulatory prerogatives.¹⁶¹ Whether government functionaries will satisfy these rule of law expectations and credibly preside over disputes between private investors and governments remains an open question.

The turn to ad hoc arbitration to revolve investor-state disputes may not have been entirely a historical accident or the unintended product of path dependency in favor of arbitration as has been suggested. ISDS itself is a compromise. Enabling both investors and respondent states to appoint their own respective arbitrators strikes a balance between likely biases on either side. It also enables private parties to feel a certain degree of party ownership and control over an adjudicative process that would otherwise be totally within the control of the states that they are suing.¹⁶² Of course, even if only an irrational default penchant for arbitration explains the rise and continued reliance on investor-state arbitration, it remains unclear whether those who have long been accustomed to exercising discretion on all the matters governing their dispute—from the appointment of arbitrators to the selection of arbitral rules and institutions—are ready to give all of that up for the untested merits of a single international investment court whose judges, rules, and procedures have all been fashioned by the prospective respondent states—and over which governments will continue to assert interpretative control through the issuance of binding interpretations. As the checkered history (and still underutilized jurisdiction) of the ICJ suggests, even permanent courts with considerable legitimacy need to attract (and retain) their

¹⁶⁰ Pauwelyn, *supra* note 155.

¹⁶¹ Compare Jeremy Waldron, *Are Sovereigns Entitled to the Benefits of the International Rule of Law?* 22 EUR. J. INT'L L. (2011) (questioning whether the international rule of law requires protecting the rights of sovereigns as sovereigns).

¹⁶² See generally, Sophie Nappert, EFILA Annual Lecture: Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism (Nov. 26, 2015), available at https://efilablog.files.wordpress.com/2015/11/efila-annual-lecture-sophie-nappert-two-column_text-defa-27-11-2015.pdf.

litigants. The EU's international investment court may be an impressive rule of law achievement on paper—but one that, should it fail to secure the confidence of investors or states or both, may be left high and dry as its prospective litigants contract around it.

Some might question whether, for other reasons, the EU's proposed investment court is a realistic gold standard. While that court may be popular with some scholars, the jury is out on whether it will be popular with governments outside Europe. Realists might point out that the US government (and most of Asia's governments) do not *do* international courts. While the recent free trade agreement between the EU and Vietnam¹⁶³ suggests that some Asian states may yet change their minds on that score, the US (and its Congress) is not likely to acquiesce in the EU's proposal for an international investment court in the TTIP and some suspect that the EU knows this all too well and is making the proposal for domestic consumption—to show those clamoring for a formal court that it tried and failed. Despite the displacement of ISDS in the EU-Vietnam and CETA agreements, the prospect that the TPP will be re-opened to replace ISDS with an international investment court seems unlikely unless the United States changes its posture in favor of ISDS.¹⁶⁴ Such a change would also require quite a change in the attitudes of many of the other TPP parties. There is no Asian court of human rights, after all, and it seems odd that the first such international court in the region would be one designed to protect only those persons with capital, namely investors.¹⁶⁵

Conclusion

Those looking for the motivations of New Zealand's government when it entered into the TPP negotiations need look no further than the words of Alfred Lord Tennyson emblazoned on a wall in the international terminal of Auckland's airport: "For I dipt into the future, far as human eye could see, Saw

¹⁶³See *supra* note .

¹⁶⁴Under the TPP's current provisions, it is more likely that its provisions for dispute settlement could be modified only by adding an appellate mechanism. See TPP, Art. 9.23.11 (providing that "[i]n the event that 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 9.29 (Awards) should be subject to that appellate mechanism . . .").

¹⁶⁵Nor is the rather cynical Pauwelyn idea—the EU should just call for the establishment of WTO-like "panels" and an "appellate body" filled with "panelists" and not "judges"—likely to fool anyone who is adverse to permanent bodies of empowered individuals over the state even if appointed by the state. See Pauwelyn, *supra* note 150.

the vision of the world, and all the wonder that would be; Saw the heavens fill with commerce, argosies of magic sails, Pilots of the purple twilight dropping down with costly bales”¹⁶⁶ At the risk of oversimplification, New Zealand’s current officials saw the investment chapter as the necessary price to be paid for the treaty’s proffered gateway for new markets for New Zealand exports. Their vision of “heavens filled with commerce” led to the government’s (perhaps reluctant) embrace of the TPP’s investment chapter and ISDS.

The TPP’s investment chapter pursues a reform path within the existing international investment regime that many other states, including the US, support. Benvenisti and Kelsey emphasize that it is a path forged by the exercise of asymmetrical power among nations in which, as Kelsey states, “the world’s declining but still powerful superpowers are trying to consolidate new global rules that entrench and advance their economic interests.”¹⁶⁷ But the fact that mega-regionals like the TPP may advance the economic and security interests of hegemons does not mean that, on balance, they may not also advance the interests of even small states like New Zealand. Most treaties—and indeed perhaps most of customary international law—have been the product of exercises of asymmetric power games. Unless we presume that the underlying games being played are zero-sum, this alone may not tell us that agreeing to the rules such negotiations produce are unwise for weaker negotiating parties. The TPP is made up of package deals of no less consequence than in the Law of the Sea Convention or on-going efforts to control climate change. It incorporates tradeoffs between regulatory discretion and the benefits anticipated for trade in goods and global value chains. These tradeoffs merit sober reflection.

Whether the tradeoffs embedded in the current text of the TPP’s investment chapter are, on balance, of net benefit to New Zealand need to take into account likely alternatives. One alternative is suggested by those that seek to exit the investment regime (like Ecuador). That path is marked by a purported search for renewed forms of regional autonomy, self-determination, and more egalitarian forms of economic exchange. That path is less predictable in terms of long term political, economic and security benefits, has uncertain support even from presumptive allies like Cuba, and may generate, in the worst

¹⁶⁶ ALFRED LORD TENNEYSON, LOSKSLEY HALL.

¹⁶⁷ Kelsey, *supra* note 71.

case scenario, renewed turns to unilateral forms of self-help common to the pre-BIT world—or other, less lawyerly, ways to resolve investment disputes. A third, more radical reformist path is suggested by the EU’s proposed international investment court. This vision is built on a very European craving for international courts and a particular progress narrative for how best to generate and sustain the global rule of law.

We should not mistake these three possible routes to achieving the “gold standard” for the “end of history.”¹⁶⁸ Further pragmatic compromises among the three alternatives above are not only possible but likely. These may include, for example, continued reliance on ISDS but the incorporation of an appellate mechanism.¹⁶⁹ Even in the face of the competing EU and US visions for the future of the investment regime, countries like Brazil (that have remained outside ISDS) are attempting to carve out other alternatives, including a return to state-to-state arbitration.¹⁷⁰ Only those whose imaginations are limited to trans-Atlantic developments are likely to suggest that the only choices are either the US’s—marked by the TPP—or the EU’s—and that any other possibilities are but futile efforts to find the Holy Grail.

¹⁶⁸ See generally, FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

¹⁶⁹ See, e.g., Stephan Schill, *Editorial: US Versus EU Leadership in Global Investment Governance*, 17 J. WORLD INV. & TRADE 1, at 2 (2016). For other possibilities, see, e.g., UNCTAD, *World Investment Report 2015*, Chapter IV: Reforming the International Investment Regime: An Action Menu, available at http://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf.

¹⁷⁰ Joaquim de Paiva Muniz & Luis Peretti, *Brazil Signs New Bilateral Investment Treaties with Mozambique and Angola: New Approach to BITs or “Toothless Lions”?*, GLOBAL ARB. NEWS (Apr. 17, 2015), <http://globalarbitrationnews.com/20150407-brazil-signs-new-bilateral-investment-treaties>.

ANNEX**United States-Argentina BIT (based on the US Model BIT of 1987):**

Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments . . . Each party shall observe any obligation it may have entered into with regard to investments.

Argentina-Australia BIT (1995):

Each Contracting Party shall at all times ensure fair and equitable treatment to investments.

NAFTA (1994), Article 1105 (1):

Each Party shall accord to investments of investors of another Party in accordance with international law, including fair and equitable treatment and full protection and security.

NAFTA, 31 July 2001 Free Trade Commission Interpretation:

- (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 investment 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).

US 2004 Model BIT:

Article 5: Minimum Standard of Treatment⁸

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require

treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

- a. “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;
- b. “full protection and security” requires each party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

⁸ Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A.

Annex A

Customary International Law

The parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Canada-European Union: Comprehensive economic and Trade Agreement (CETA) (2016)

Chapter Eight: Investment

Section D: Investment Protection

Article 8.10: Treatment of Investors and of Covered Investments

1. Each Party shall accord in its territory to covered investments of the other Party and to Investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 6.
2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:
 - a. denial of justice in criminal, civil or administrative proceedings;
 - b. fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
 - c. manifest arbitrariness;
 - d. targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
 - e. abusive treatment of investors, such as coercion, duress and harassment; or
 - f. a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.

4. When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

5. For greater certainty, ‘full protection and security’ refers to the party’s obligations relating to physical security of investors and covered investments.

6. For greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article.

7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, a Tribunal must consider whether a party has acted inconsistently with the obligations in paragraph 1.

Trans-Pacific Partnership (2015)

Article 9.6: Minimum Standard of Treatment¹⁵

1. Each party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:

a. “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

b. “full protection and security” requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

¹⁵ Article 9.6 (Minimum Standard of Treatment) shall be interpreted in accordance with Annex 9-A (Customary International Law)

Annex 9-A Customary International Law

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 9.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.