Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership

by Meredith Wilensky

Meredith Wilensky is an associate attorney at Lozeau Drury LLP in Oakland, CA. She is a 2012 graduate of the University of California-Berkeley School of Law. This Article was written while she was the 2013-2014 Associate Director and Fellow at Columbia Law School's Sabin Center for Climate Change Law.

Summary

The pending Trans-Pacific Partnership (TPP) trade agreement has raised controversy, fueled by leaks of the draft text and congressional debate over fast-track negotiation authority. Like similar agreements, the TPP creates the risk of government liability for enacting regulations, especially new or comprehensive measures to address climate change. This Article analyzes how the TPP's investor protection provisions and dispute settlement mechanism might be invoked to challenge climate change policy. The author concludes that the negotiators' efforts to date are insufficient to protect climate measures from the risk of liability, and suggests reforms to the draft text.

I. Introduction

The Trans-Pacific Partnership Trade and Globalization Agreement (TPP) is currently being negotiated by the United States and 11 other Pacific Rim countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. With 29 chapters in the document, the TPP addresses much more than trade: It will also set binding policy related to investment, intellectual property, technological barriers to trade and, most importantly for readers of the *Environmental Law Reporter*, the environment. If negotiations are successful, this mega-treaty will be the largest free-trade agreement to date, initially governing 40% of the world's gross domestic product (GDP) and 26% of the world's trade. The agreement will be open for other Pacific Rim countries to join over time.[1]

Many scholars have expressed concern that fair trade agreements (FTAs) and other international investment agreements (IIAs) create a threat of government liability for measures undertaken to address climate change.[2] This Article examines whether the TPP investment chapter adequately shields governments from the risk of liability for climate change policies. TPP negotiations are confidential, and negotiating parties have not released any official working drafts of the agreement; however, private organizations have leaked two drafts of the investment chapter, first in June 2012 and then in March 2015.[3] These drafts are assumed to be genuine for purposes of the Article.

IIAs are intended to encourage foreign investment through the development of a legal scheme that protects foreign investors from certain government actions that negatively affect their investments. To achieve this goal, modern IIAs impose standards of conduct on host countries in their dealings with foreign investors, and usually establish an investor-state dispute settlement (ISDS) mechanism. The ISDS mechanism permits aggrieved investors to initiate arbitration in ad hoc international tribunals for compensation for losses that arose from the host country's violation of the investor protection provisions. Any damages awarded are paid out of the liable government's national treasury.

While it is generally agreed that host countries should be held to certain standards of treatment regarding foreign

1. *See generally* Office of the U.S. Trade Representative (USTR), *Trans-Pacific Partnership Frequently Asked Questions*, http://www.ustr.gov/tpp (last visited Feb. 11, 2014).
2. *See generally* Lise Johnson, *Investor-State Contracts, Host State "Commitments,"* 24 Am. Rev. Int'l Arb. 361, 367 (2013).
3. Trans-Pacific Partnership Trade and Globalization Agreement (TPP) Investment Chapter (Jan. 20, 2015 draft; leaked Mar. 2015), *available at* www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf. The website also leaked the 2012 draft, *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf.

investors, the ISDS mechanism has been heavily criticized for allowing investors to challenge government policies intended to protect public health and the environment.[4] To date, governments have paid out substantial damage awards under the United States' IIAs alone; over one-half of the awards pertain to natural resource, environmental, and energy policies.[5] According to an open letter by a group of over 100 academics, judges, practicing attorneys, and legislators advocating the exclusion of ISDS from the TPP, that figure is as high as 70%.[6]

A few particularly salient examples of arbitration spurred by public interest regulations are currently pending. Vattenfall AB, a Swedish energy company, has initiated arbitration under the Energy Charter Treaty in response to Germany's decision to phase out nuclear energy in the wake of the Fukushima disaster.[7] While the arbitration documents have been confidential, the German Federal Ministry of Economic Affairs and Energy revealed that the claim is for $6 billion dollars.[8] This suit comes on the heels of Vattenfall's 2009 suit against Germany alleging that the restrictive water quality standards in an environmental permit issued for the company's coal-fired power plant would make the project "uneconomical."[9] Vattenfall initially sought 1.4 billion Euros in damages plus arbitration costs, but settled the suit when the government agreed to watered-down standards.[10]

Another example arose in Canada when Quebec imposed a moratorium on shale gas exploration and production due to concerns over drinking water contamination. The oil and gas exploration company Lone Pine Resources, Inc. brought suit seeking over $250 million in compensation under the North American Free Trade Agreement (NAFTA)[11] for the revocation of its gas exploration and production permit.[12] While *Vattenfall* and *Lone Pine* are still pending, the sheer size of the damage awards being sought demonstrates the substantial financial risk that ISDS can create for countries taking action to protect public health and the environment.

Critics of ISDS argue that the risk of liability constrains governments' fundamental responsibility to protect public health and welfare.[13] In May 2012, a group of lawyers and scholars, led by retired Australian judge Elizabeth Evatt, sent an open letter to TPP negotiators urging the rejection of ISDS, arguing that ISDS "threatens to undermine the justice systems in [member] countries and fundamentally shift the balance of power between investors, states and other affected parties."[14] Compensation for the economic impacts of environmental regulation is a particularly troublesome issue. Rooted in the "polluter-pays" principle, environmental regulation aims to shift the costs of environmental harm to the responsible entity. To compensate an investor for lost profits shifts the costs of regulation back onto the public, essentially turning the polluter-pays principle on its head.[15] In most cases, investors claim damages of tens or hundreds of millions of dollars.[16] In practice, these payments may make regulatory measures cost-prohibitive, especially in an era marked by austerity.

Because of the high price associated with ISDS, many critics worry that investors may use the ISDS mechanism as a strategic tool to attack regulations that negatively affect their investments.[17] For example, efforts to discourage tobacco smoking, one of the leading causes of preventable deaths, led Australia and Uruguay to pass legislation requiring plain packaging of cigarettes.[18] Tobacco giant

4. In 2012 alone, over 500 treaty-based arbitrations were initiated. *See* United Nations Conference on Trade and Development [UNCTAD], Reform of Investor-State Dispute Settlement: In Search of a Roadmap No. 2 (2013) [hereinafter UNCTAD, Roadmap].
5. *See* Public Citizen, *Table of Foreign Investor-State Cases and Claims Under NAFTA and Other U.S. "Trade" Deals* (Feb. 2014) [hereinafter Public Citizen Trade Chart], *available at* http://www.citizen.org/documents/investor-state-chart.pdf (referencing the following disputes addressing environmental, natural resource, and energy policies: Ethyl Corp. v Canada, NAFTA UNCITRAL (1998) ($13 million settlement due to methylcyclopentadienyl manganese tricarbonyl (MMT) export ban); S.D. Myers v. Canada, NAFTA UNCITRAL (2002) ($5.6 million award for temporary polychlorinated biphenyl (PCB) ban); Pope & Talbot v. Canada, NAFTA UNCITRAL (2002) ($500,000 for lumber agreement with United States); Abitibi-Bowater v. Canada, NAFTA (2010) ($122 million settlement for removal of timber and water rights after closing of paper mill); Metalclad v. Mexico, NAFTA ICSID Case No. ARB(AF)/97/1 (2000) ($15.6 million award for closure of landfill of hazardous wastes); St. Mary VCNA v. Canada, NAFTA (2013) ($15 million settlement for delayed permitting process for rock quarrying); Tampa Elec. Co. (TECO) Holdings v. Guatemala, CAFTA ISCID Case No. ARB/10/23 (2013) ($25 million award for lowering electricity rates that a private utility could charge); TCW Grp. v. Dominican Republic, CAFTA UNCITRAL (2009) ($26.5 settlement for failure to raise electricity rates)). All but one of the remaining successful cases listed in Public Citizen's chart were brought in response to public health policies. *Id.*
6. Letter from Retired Justice Elizabeth A. Evatt et al., to Negotiators of the Trans-Pacific Partnership Urging Rejection of Investor-State Dispute Settlement at 3 (May 8, 2012), *available at* https://tpplegal.wordpress.com/open-letter/.
7. *See* Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/12/12, http://www.italaw.com/cases/documents/1655; IISD News in Brief, Investment Treaty News, July 19, 2012; Nathalie Bernasconi-Osterwalder & Rhea Tamara Hoffmann, Int'l Inst. for Sustainable Dev., *The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the New Dispute* Vattenfall v. Germany (II) 2 (June 2012).
8. *See* Alexander Hellemans, *Vattenfall Seeks $6 Billion in Compensation for German Nuclear Phase-Out*, IEEE Spectrum, Nov. 12, 2014, http://spectrum.ieee.org/energywise/energy/nuclear/swedish-energy-giant-vattenfall-nets-billions-for-nuclear-phaseout.
9. *See* Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/09/6, Request for Arbitration (Mar. 30, 2009).
10. *See* Bernasconi-Osterwalder & Hoffman, *supra* note 7, at 4.
11. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) (NAFTA).
12. *See* Lone Pine Resources, Inc. v. Canada, Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of NAFTA (Nov. 8, 2012), *available at* http://www.italaw.com/cases/documents/1607.
13. *See* Vicki Been & Joel Beauvais, *The Global Fifth Amendment: NAFTA's Investment Protections and the Misguided Quest for an International Regulatory Takings Doctrine*, 78 N.Y.U. L. Rev. 30, 132 (2003); Samrat Ganguly, *The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health*, 38 Colum. J. Transnat'l L. 113, 119 (1999) ("The prospect of crushing liability claims or the chilling effect of the number and size of claims that may result under ISDMs can deter governments from legislating in the interest of the public.").
14. Letter from Retired Justice Elizabeth A. Evatt et al., *supra* note 6, at 1.
15. J. Martin Wagner, *International Investment, Expropriation, and Environmental Protection*, 29 Golden Gate U. L. Rev. 465, 471 (1999).
16. *See* Public Citizen Trade Chart, *supra* note 5.
17. *See* Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 Envtl. L. 851, 852-53 (2003).
18. *Tobacco Plain Packaging Act 2011* (Austl.); *Ministry of Public Health Ordinance No. 514* (Uruguay).

Phillip Morris responded by initiating arbitration in both countries, seeking an injunction and lost profits potentially in the billions of dollars.[19] The threat of investment arbitration is widely believed to have played an important part in deterring the Canadian government from adopting tobacco plain packaging laws in the 1990s.[20] Philip Morris' attack on the Australian legislation led New Zealand's government to announce in early 2013 that it will delay implementation of its plain packaging laws until the dispute is resolved.[21]

Due to concerns over the chilling effect of ISDS on public interest regulation, the Australian government announced in 2011 that it would not submit to ISDS under the TPP. A government-issued trade statement noted that Australia could not "support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses."[22] Australia is not alone in its concern over ISDS. South Africa announced in 2012 that it would not renew its existing bilateral investment treaty (BIT) with the Belgo-Luxembourg Economic Union and that it intended to revoke a number of other BITs with European partners.[23] Indonesia has also announced that it intends to terminate more than 60 BITs.[24] In addition, the European Commission temporarily suspended trade negotiations with the United States to conduct public consultations on ISDS.[25] Nonetheless, a draft of the TPP investment chapter leaked in March 2015 revealed that all countries party to the TPP negotiations, except for Australia, have thus far agreed to submit to ISDS.[26]

Climate change regulation is particularly vulnerable to ISDS attacks because, compared to many other areas of environmental law, climate policy is very much in its infancy. As climate policy evolves, it can be expected to impact a broad range of investments. For example, emissions standards may require power plants and other carbon-intensive industries to install new technologies and may lead to early closure of some facilities. Additionally, adaptation measures such as setbacks from coastlines will likely result in new limits on property use. Measures adopted after the ratification of the TPP would be subject to challenge under investor protection provisions. The financial repercussions of ISDS may further deter timely action to combat climate change. The most recent reports by the Intergovernmental Panel on Climate Change (IPCC) make clear that the repercussions of delay could be grave.[27]

This Article analyzes the leaked investment chapter to assess the risk of governmental liability for climate change measures under the TPP. Part II discusses the investor protection provisions included in the TPP draft and how they might be invoked to challenge climate policy. Part III examines whether the TPP draft provides language to prevent liability for climate change measures by including an exception for measures taken to protect the environment or in compliance with international obligations. Part IV discusses how the structure of ISDS contributes to the risk of liability, and assesses whether the TPP draft includes proposed reforms to reduce this risk. The Article concludes that, while the draft text demonstrates an effort on the part of TPP negotiators to reduce the risk of liability for legitimate regulations promulgated in the public interest, the efforts are insufficient to protect climate change measures from the risk of liability under the TPP.

II. Investor Protection Provisions

The leaked draft of the TPP investment chapter includes four main investor protection provisions that could be invoked to challenge measures taken by a member country to address climate change. The chapter provides an expropriation provision to ensure compensation for all takings and three additional provisions imposing a standard of conduct on host countries in their dealings with foreign investors: The fair and equitable treatment (FET) obligation sets a minimum standard of treatment of all foreign investors; and the national treatment and most-favored nation (MFN) obligations prevent discrimination against foreign investors. (The national treatment principle prohibits favoring domestic investors, while the MFN principle prohibits favoring investors from one nation over another.) This part discusses each of these TPP obligations in turn.

A. Expropriation

Expropriation provisions require host countries to compensate investors for the taking of private property. Consistent with previous IIAs, the TPP prohibits a Party from expropriating a foreign investor's property unless the action

19. *See* Notice of Arbitration Australia: Hong Kong Agreement for the Promotion and Protection of Investment (Nov. 21, 2011), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0665.pdf; Philip Morris Brands Sàrl, v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Request for Arbitration (Feb. 19, 2010).

20. Mathew Porterfield & Christopher Byrnes, *Philip Morris v. Uruguay: Will Investor-State Arbitration Send Restrictions on Tobacco Marketing Up in Smoke?*, IISD Investment Treaty News, July 12, 2011.

21. Joe Schneider, *New Zealand Follows Australia on Tobacco Plain Packs*, Bloomberg News, Feb. 19, 2013.

22. Gillard Gov't, Trade Policy Statement: Trading Our Way to More Jobs and Prosperity 14 (2011). However, Australia's position may shift since the new Liberal-National coalition has loosened its stance on ISDS. *See* IISD, *Australia Changes Position on Investor-State Arbitration in Free Trade Agreement With Korea*, News in Brief, Jan. 19, 2014.

23. Open letter from Sidwell Medupe, Spokesman, South Africa Department of Trade and Industry, *Letter: Critical Issues Ignored* (Oct. 1, 2012), http:www.bdlive.co.za/opinion/letters/2012/10/01/letter-critical-issues-ignored.

24. Netherlands Embassy in Jakarta, Indonesia, Termination Bilateral Investment Treaty, http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html (last visited May 19, 2014).

25. International Ctr. for Trade and Sustainable Dev., *EU Temporarily Suspends Investment Part of U.S. Trade Talks Bridges*, 18 Bridges, Jan. 23, 2014, http://www.ictsd.org/bridges-news/bridges/news/eu-temporarily-suspends-investment-part-of-us-trade-talks.

26. TTP Investment Chapter, *supra* note 3, at §B.

27. *See generally* Intergovernmental Panel on Climate Change (IPCC) WGIII AR5, Climate Change 2014: Mitigation of Climate Change, Summary for Policymakers (2014); IPCC WGII AR5, Climate Change 2014: Impacts, Adaptation, and Vulnerability Summary for Policymakers (2014).

is: (1) for a public purpose; (2) nondiscriminatory; (3) in accordance with due process of the law; and (4) compensated to the investor.[28] Expropriation may be direct or indirect.[29] A direct expropriation occurs when a government nationalizes or transfers the title of an investor's property. An indirect expropriation, also known as a regulatory taking, refers to measures tantamount to an expropriation that do not involve formal transfer of ownership. Where a government action constitutes an expropriation, a foreign investor is entitled to compensation equivalent to "the fair market value of the expropriated investment immediately before the expropriation took place."[30]

Climate-related measures are at risk of constituting an indirect expropriation if they interfere with foreign investments. Regulations such as an emissions standard, adaptation requirement, or greenhouse gas (GHG) emissions tax, could arguably constitute an indirect expropriation if they result in tax increases, the denial of a necessary operational permit, or even failed contract negotiations.[31] For example, an expropriation could occur in the context of managed retreat. As sea level rises and coastal property becomes more vulnerable to flooding and storm damage, governments may bar most uses of the area to allow for coastal buffer zones and obviate the need for repetitive government disaster relief.[32] If a foreign investor purchases coastal property for the purpose of erecting a resort hotel, and subsequently the government decides to ban construction there because of sea-level rise, the investors could initiate arbitration seeking damages, including lost profits.

Under some previous IIAs, tribunals have found that the impacts of environmental and health regulations constitute an expropriation in a number of disputes.[33] The likelihood of such a finding in the context of climate change is heavily dependent on the test employed to determine what constitutes an indirect expropriation. Because tribunals have adopted divergent approaches, governments have faced substantial uncertainty in their risk of liability.[34]

1. 2012 Leaked Text

In the earlier version of the investment chapter leaked in 2012, TPP negotiators had responded to this issue by proposing two alternate interpretative annexes clarifying how to determine what actions constitute an expropriation. While the language of each proposal was slightly different, both annexes stated that a legitimate exercise of state police powers to protect public welfare, including public health and the environment, will not constitute an indirect expropriation *except in rare circumstances*.[35]

The key issue for climate change regulation is how the proposed annexes address what constitutes "rare circumstances." Annex 12-C does not provide any guidance on the term; thus, if Annex 12-C were adopted, tribunals would likely choose to interpret the term based on arbitral practice. Many tribunals follow the rule adopted by the tribunal in the 2005 *Methanex v. United States* award, and require the claimant to show that the host state made "specific commitments" to induce the investor to enter the market or make the subject investment.[36] The *Methanex* tribunal reasoned that investors should be aware of the risk of regulation, especially in highly regulated industries.[37] Thus, a state should only be responsible for the impacts of regulation on an investment where the investor had reasonably relied on specific commitments by the host state that it would refrain from such regulation.[38] Requiring a specific commitment by the host state greatly limits the pool of potential claimants for an expropriation claim; however, the protection offered by this approach has been somewhat eroded by subsequent tribunals that have found that a commitment can be implied, for example, by a statement made by a government official.[39]

In addition, tribunals may look to the remaining language of the annex as a guide when determining what constitutes rare circumstances. Annex 12-C instructs tribunals to conduct a case-by-case inquiry, taking into account economic impact, the extent to which the government action interferes with "distinct, reasonable, investment-backed expectations," and the character of the government action.[40] The outcome of this balancing approach will be highly dependent on the specific tribunal. A tribunal may find that a reasonable investor would foresee climate change regulation. Alternatively, a tribunal might find that the significant economic impact of climate change regulations are not justified given the minimal impact of a specific investor's emissions on global climate change.

Annex 12-D provided guidance as to what may constitute rare circumstances, stating that an expropriation is particularly likely where it is either: (a) discriminatory in its effect, either as against the particular investor or against a class of which the investor forms a part; or (b) in breach of the state's binding written commitment to the investor, whether by contract, license or other legal document.[41]

28. TPP Investment Chapter, *supra* note 3, art. 11.7.1.
29. *Id.*
30. *Id.* art. 11.7.2.
31. Johnson, *supra* note 2, at 11151.
32. New York Governor Mario Cuomo initiated a voluntary buyout program in 2013 for homes in certain areas devastated by Hurricane Sandy and particularly vulnerable to future floods. While this program was voluntary, it is possible that as sea-level rise continues, governments will begin to initiate mandatory programs. *See* Anne Siders, Managed Coastal Retreat: A Legal Handbook on Shifting Development Away From Vulnerable Areas (2013).
33. *See, e.g.*, Tecnicas Medioambientales v. United Mexican States, ICSID Case No. ARB(AF)/00/2 [hereinafter Tecmed] (May 29, 2003); Metalclad v. Mexico, NAFTA ICSID Case No. ARB(AF)/97/1 (2000).
34. Daniel M. Firger & Michael B. Gerrard, *Harmonizing Climate Change Policy and International Investment Law: Threats, Challenges, and Opportunities*, *in* Y.B. Int'l Investment L. & Pol'y 2010-2011 542 (2012).
35. TPP Investment Chapter, *supra* note 3, Annexes 12-C(4)(b) & 12-D(5).
36. Methanex v. United States, NAFTA/UNCITRAL, pt. IV, ch. D, ¶ 7 (Aug. 9, 2005), *available at* http://ita.law.uvic.ca/.
37. *Id.* ¶ 9.
38. *Id.* ¶ 7.
39. *See* Tecmed, *supra* note 33, ¶¶ 158-74; Metalclad v. Mexico, NAFTA ICSID Case No. ARB(AF)/97/1 (2000), ¶¶ 28-29.
40. TPP Investment Chapter, *supra* note 3, Annex 12-C(4)(a)(i)-(iii) (2012 draft).
41. *Id.*, Annex 12-D(4)(a)-(b).

Subsection (b) of Annex 12-D is an improvement over Annex 12-C because it clarifies that a commitment must be binding and written. This language essentially codifies the *Methanex* approach and reinforces the meaning of "specific commitment" as a narrow exception by eliminating the potential for a mere permit or government statement to be interpreted as implying a commitment. The requirement that the commitment be binding and written requires a contractual relationship between the host state and the investor, and thus reduces the potential for finding an expropriation.

However, subsection (a) of Annex 12-D presented a new issue of uncertainty. While expropriation provisions generally prohibit regulations from discriminating amongst investors, a measure of general applicability is usually accepted as nondiscriminatory for expropriation purposes.[42] Subsection (a) specifically points to whether a measure is discriminatory *in its effect*. This new language may impact the expropriation analysis. Climate change regulations are intended to be discriminatory in their effect, favoring low-emissions technologies over carbon-intensive technologies. Subsection (a) does not expressly require that the prohibited provision be discriminatory against foreign investors, only against a class of investors. Whether climate regulation is discriminatory in its effect will depend on how a tribunal defines a class of investors. If a tribunal considers all energy generators as belonging to one class of investors, then regulations that disfavor carbon-intensive fuels could arguably be discriminatory in their effect because they favor renewable units over fossil fuel units. A more reasonable interpretation would be to only consider a measure discriminatory in its effect if it discriminates on the basis of nationality or between investors on arbitrary grounds. This interpretation would be consistent with the aim of IIAs to protect foreign investors without compromising states' capacity to make their own policy choices. However, the current language of Annex 12-D leaves this determination to the discretion of the tribunal, thereby creating a risk of liability for the host state.

Annex 12-D also included an alternate proposal that removes the "except in rare circumstances" language. The provision states: "Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, shall not constitute indirect expropriation."[43] This blanket rule would mean that no climate regulation could constitute an expropriation, regardless of the extent of its impact.

2. 2015 Leaked Text

In the 2015 leaked text, the negotiators have adopted an annex that addresses some of the issues seen in Annexes 12-C and 12-D.[44] The 2015 annex generally reflects the language of Annex 12-C, but with a few key additions. First, the annex includes a footnote stating that: "For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as 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."[45]

This language does not go as far as Annex 12-D, because a binding written assurance is not required but only a factor to be considered in determining whether investment-backed expectations are reasonable. However, it nonetheless provides further guidance for tribunals and suggests that a tribunal should not find an expropriation occurred unless there were specific assurances to warrant a finding that the investor's investment-backed expectations were reasonable. Moreover, the 2015 annex as a whole decreases the risk of successful expropriation claims by preventing tribunals from adopting an approach that ignores the regulatory measure's purpose.[46]

Further, proposed footnote 34 in the definitions section clarifies that "a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a subsidy or grant, or a decree, order, or judgment, standing alone . . . shall not be considered a written agreement."[47] The inclusion of this footnote language constrains how a tribunal may interpret what constitutes a specific commitment, and prevents a tribunal from watering down this requirement by adopting an overly broad interpretation of "specific commitment."

In addition, the negotiators have added a provision to the expropriation section to clarify what constitutes a taking. The provision provides that a Party's decision not to "issue, renew, or maintain a subsidy or grant" does not alone constitute an expropriation so long as there was no specific commitment under law or contract or the decision is in accordance with such a law or contract.[48] This provision also seems to speak to what constitutes "reasonable investment-backed expectations." Without a contract or other commitment, an investor cannot reasonably expect that it is guaranteed to continue receiving a subsidy. In the context of climate change, this language prevents potential liability should a government decide, for example, to end subsidies for fossil fuels. However, the language does not necessarily protect a government from arbitration similar to *Vattenfall*, because the language only extends to subsidies or grants. The draft text does not provide the same security to host states deciding not to renew a license or permit.[49]

42. Johnson, *supra* note 2, at 367.
43. TPP Investment Chapter, *supra* note 3, Annex 12-D(5) (2012 draft).
44. TPP Investment Chapter, *supra* note 3, Annex II B (Jan. 20, 2015, draft).
45. *Id.* at n.34.
46. *See* Metalclad v. Mexico, NAFTA ICSID Case No. ARB(AF)/97/1 (2000), ¶ 111 (stating that the motivation or intent of the government action is irrelevant in determining whether an expropriation occurred).
47. *See* TPP Investment Chapter, *supra* note 3, at 12-4 n.5 (Jan. 20, 2015 draft).
48. *Id.* art. 11.7.6.
49. In other places in the text, the negotiators have explicitly referred to subsidies and grants separately from the granting of licenses and permits. *See* TPP Investment Chapter, *supra* note 3, at 12-4 n.5 (Jan. 20, 2015 draft) ("For

The inclusion of the 2015 annex and clarifying language suggests that foreign investors should not be able to utilize the TPP as a sword to prevent the implementation of good-faith climate change laws and regulations. In particular, the "reasonable investment-backed expectations" language would support a host state's defending a climate change action from an expropriation claim, on the ground that a reasonable investor would anticipate climate-related measures given the current state of climate science. However, in view of the inconsistency in arbitral practice and the fact that tribunals are not bound by a principle of *stare decisis*, the risk of liability still exists.[50] Negotiators could further reduce risk by removing the "except in rare circumstances" language altogether, as was done in Annex 12-D of the 2012 leaked text.

If a host state were to face an expropriation claim under the TPP for a climate-related measure, domestic property law may bolster its defense. For example, under U.S. law, property rights do not include the right to create a nuisance.[51] Applying that rule in the United States, any climate change measure that prevented certain land uses to protect against the impacts of climate change would not be a taking if the impacted land use would have constituted a nuisance.[52] Since the investor never had the right to create a nuisance, the United States could argue that the measure did not constitute an expropriation because it did not take away a previously existing property right. Such an argument would be supported under a general rule of international law known as *lex situs*, which states that municipal or domestic law defines the scope of property rights.[53] According to Prof. Zachary Douglas of the Graduate Institute of International and Development Studies in Geneva, tribunals may even be required to adhere to this rule.[54]

Moreover, failure to define the scope of property rights based on domestic law would create an unfair advantage for foreign investors over their domestic counterparts. If a tribunal were to recognize property rights of foreign investors not recognized by the host state, that recognition might create an incentive for investors to place property in the hands of foreign affiliates to allow for the possibility of remedy under IIAs if climate-related property restrictions were to be implemented.

The practical risk of a successful expropriation claim may be further reduced in light of recent trends in arbitral practice. Recent tribunals have required a high level of interference to support a finding that a government action constituted an indirect expropriation.[55] However, the effectiveness of this stricter standard in preventing state liability is dependent on whether investors can successfully invoke other investor protection provisions. Unlike the high standard for expropriation, the threshold for violating the FET requirement, as discussed below, seems to be relatively low.[56] Thus, success under FET may offset the high standard for expropriation.

B. FET

The second investor protection provision adopted in the draft investment chapter requires Parties to accord all covered investments a minimum standard of treatment "in accordance with customary international law, including fair and equitable treatment . . . ."[57] Although the FET obligation can be found in virtually all IIAs, defining the content of the standard has proven difficult.[58] The difficulty is due in part to the fact that the terms "fair" and "equitable" are intrinsically imprecise and contextual.[59] One scholar, addressing the complexities of interpreting the FET obligation, described the terms as "maddeningly vague, frustratingly general, and treacherously elastic."[60]

Also contributing to variations in application of the FET standard are the differences in the language of the FET provisions themselves. Some IIAs tie the FET obligation to the minimum standard of treatment under customary international law (CIL), while others do not. In the IIAs that do not explicitly link FET to the minimum standard of treatment, tribunals have disagreed as to whether there is an autonomous FET obligation separate from CIL.[61] The TPP avoids this issue by explicitly tying the FET obligation to the minimum standard of treatment.[62] However, the extent to which the CIL standard has evolved over time remains an issue for tribunals to address.

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greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a subsidy or grant, or a decree, order, or judgment, standing alone . . . shall not be a written agreement."). This language suggests that the negotiators did not intend for the term "grant" to include the granting of a license or a permit.

50. *See* Firger & Gerrard, *supra* note 34, at 543.
51. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1020, 22 ELR 21104 (1992).
52. *See Lucas*, 505 U.S. at 1029.
53. *See* Cheshire, North & Fawcett, Private International Law 1199-1200 (2008).
54. Zachary Douglas, The International Law of Investment Claims 44-45 (2009) (stating that there is "considerable authority for the proposition that the application of the *lex situs* rule is even *required* by general international law").
55. *See, e.g.*, El Paso v. Argentina, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011) ("A mere loss in value of the investment, even if important, is not an indirect expropriation."); *cf.* Kate Miles, *Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes*, 1 Climate L. 63, 75 (2010).
56. Johnson, *supra* note 2, at 11152.
57. TPP Investment Chapter, *supra* note 3, art. 11.6 (Jan. 20, 2015 draft).
58. Kyla Tienhaara, Investor-State Dispute Settlement in the Trans-Pacific Partnership Agreement, Submission to the Department of Foreign Affairs and Trade 9 (May 19, 2010), http://dfat.gov.au/trade/agreements/tpp/submissions/Documents/tpp_sub_tienhaara_100519.pdf; Jeswald Salacuse, The Law of Investment Treaties 218 (2010).
59. Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liabilities Under Investment Treaties*, 29 Berkeley J. Int'l L. 1, 38 (2011).
60. Salacuse, *supra* note 58, at 221.
61. UNCTAD, Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II 21 (2012).
62. TPP Investment Chapter, *supra* note 3, art. 11.6.2 (Jan. 20, 2015 draft):

    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.

Tribunals initiated under NAFTA and the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA), which also equate FET with the CIL minimum standard, have disagreed about the current status of CIL.[63] In the 2009 case *Glamis Gold v. United States*, the tribunal found no evidence that the CIL standard had evolved.[64] Glamis Gold Ltd. initiated arbitration under NAFTA alleging that state and federal regulatory measures in response to concerns over the environmental and social impacts of a proposed gold mining project violated the FET obligation. Citing the 1926 *Neer* arbitration award,[65] the tribunal found that "an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons" to constitute a breach of CIL.[66]

Most NAFTA tribunals, however, have disagreed with *Glamis Gold*, finding that the modern CIL standard is much broader than the standard defined in *Neer*.[67] For example, a number of tribunals have found that the CIL has evolved to include requirements of transparency and not to undermine the legitimate expectations of investors.[68] In the 2004 decision *Waste Management v. Mexico* (*Waste Management II*), the tribunal articulated a broad standard based on a number of previous NAFTA tribunal awards:

> [T]he minimum standard of treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the Claimant."[69]

The divergence between *Glamis Gold* and *Waste Management II* can be attributed to the divergent approaches taken by the tribunals to determine the status of CIL. While it is well-accepted that CIL evolves from consistent state practice, most tribunals have relied on the opinions of scholars and previous tribunal awards to demonstrate the evolved status of CIL.[70]

To prevent overly broad interpretations of the minimum standard of treatment under CIL, the TPP negotiators have included an annex stating that CIL "results from a general and consistent practice of States that they follow from a sense of legal obligation."[71] Limiting CIL to consistent state practice should place the burden on investors to demonstrate that consistent state practice reflects that the CIL standard has evolved. As noted in 2009 by the tribunal in *Cargill v. Mexico*, "surveys of State practice are difficult to undertake and particularly difficult in the case of norms such as 'fair and equitable treatment' where developed examples of State practice may not be many or readily accessible."[72] The difficulty in ascertaining state practice was also discussed in *Glamis Gold* and accounted for the tribunal's finding that the standard had not evolved.[73] Consequently, constraining CIL to consistent state practice would likely prevent investors from successfully arguing that the FET obligation has evolved.

Unfortunately, experience under CAFTA suggests that the TPP 2015 Annex will be ineffective in constraining CIL to consistent state practice. CAFTA Annex 10-B also clarifies that CIL evolves from consistent state practice.[74] Notwithstanding that treaty provision, in 2012 in *Railroad Development Corp. (RDC) v. Guatemala*, the tribunal determined that CIL has evolved based on the case law of previous arbitral awards.[75] RDC initiated arbitration under CAFTA after Guatemala terminated a 50-year contract granting RDC the right to use railway equipment on its determination that the contract was not in the interest of the state.[76] The tribunal acknowledged CAFTA Annex 10-B, but went on to criticize the strict standard applied in *Glamis Gold*, noting that the *Neer* award was not based on an analysis of consistent state practice.[77] The tribunal found arbitral awards to be "an efficient manner for a party . . . to show what it believes to be the law."[78] On this basis, the tribunal adopted the broad standard applied in *Waste Management II*, and found that Guatemala had violated its FET obligation.[79] Consequently, without textual guidance, it is likely that the broad definition of the FET obligation will continue to be applied under the TPP.

63. While the original provision does not specifically mention customary international law, in 2001, the NAFTA Free Trade Commission issued a Note of Interpretation limiting the FET obligation to that required under CIL. *See* NAFTA Free Trade Commissions, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001). Dominican Republic-Central America-United States Free Trade Agreement, 19 U.S.C.S. §4011, art. 10.5 (2005) [hereinafter CAFTA].
64. Glamis Gold, Ltd. v. United States, NAFTA/UNCITRAL, Award, ¶ 22 (June 8, 2009).
65. Neer v. Mexico, 4 R.I.A.A. 60 (1926).
66. *Glamis Gold*, ¶ 616.
67. *See, e.g.*, Merrill & Ring Forestry L.P. v. Canada, NAFTA, UNCITRAL, ICSID Administered Case 2, ¶ 213 (Mar. 31, 2010).
68. *See id.* ¶ 208.
69. Waste Mgmt. v. Mexico (*Waste Mgmt. II*), NAFTA ICSID Case No. ARB(AF)/00/03, ¶ 98 (2004).
70. *See* Matthew C. Porterfield, *A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals*, IISD Investment Treaty News, Mar. 22, 2013. *See, e.g.*, CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, ¶¶ 267-68,
71. TPP Investment Chapter, *supra* note 3, Annex II-A Customary International Law (Jan. 20, 2015 draft).
72. Cargill v. Mexico, NAFTA ICSID No. ARB(AF)/05/02, Award (Sept. 18, 2009).
73. Glamis Gold, Ltd. v. United States, NAFTA/UNCITRAL, Award, ¶¶ 202-604 (June 8, 2009).
74. CAFTA, *supra* note 63, Annex 10-B.
75. *See* Railroad Dev. Corp. (RDC) v. Guatemala, CAFTA ICSID Case No. ARB/07/23, Award, ¶¶ 213-18 (2012).
76. *Id.* ¶¶ 30-37.
77. *Id.* ¶ 216.
78. *Id.* ¶ 217.
79. *Id.* ¶¶ 218-19.

Particularly important in the context of climate change is whether the minimum standard under CIL has evolved to include an obligation not to undermine investors' legitimate expectations. Legitimate expectations claims are based on the principle that where government actions create expectations in the minds of investors, it is unfair for a state to change laws in such a way that frustrates the expectations it helped to create.[80] In the context of climate change, these claims are particularly concerning because where climate regulations increase costs or frustrate investments, foreign investors may argue that the regulations violate their legitimate expectations of profit.[81] For example, such suits may arise where emissions standards result in early retirement of coal-fired power plants because they are unable to achieve newly imposed GHG emissions standards. If such a claim is successful, a host state would be required to compensate the investor for the expected profits had the plant continued to operate.

The principle of legitimate expectations has been one of the most contentious issues in interpreting and applying the FET obligation.[82] In its most expansive form, the principle of legitimate expectations has been interpreted to require a stable legal and business framework. In *Tecnicas Medioambientales v. United Mexican States* ("*Tecmed")*, the tribunal found that FET requires host countries to act such that investors "know beforehand any and all rules and regulations that will govern its investment, as well as the goals and the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."[83] The tribunal found that Mexico had undermined Tecmed's legitimate expectations when it refused to renew a one-year permit to operate a hazardous waste facility due to public health concerns.[84] Although this aspect of the award has been criticized for "holding states to an unrealistically high standard," it has been cited by a number of subsequent tribunals.[85] This interpretation of FET as seen in *Tecmed* would create a high level of risk of liability for climate-related regulations.

Confining the FET obligation to the minimum standard of treatment under CIL has not prevented a number of NAFTA and CAFTA tribunals from including legitimate expectations as part of the FET standard.[86] Even *Glamis Gold* states that legitimate expectations are relevant to the FET analysis.[87] When the tribunal reiterates the *Neer* standard toward the end of the opinion, it states that a breach of the FET standard under NAFTA "may be exhibited by a 'gross denial of justice or manifest arbitrariness falling below acceptable international standards;' *or the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations*."[88] This is particularly surprising since there is no support for this determination in the *Neer* award.[89]

Limiting FET to CIL has, however, generally prevented tribunals from taking the far-reaching approach seen in *Tecmed*. *Glamis Gold* and other NAFTA tribunals addressing legitimate expectations have found that in order for expectations to be legitimate, a claimant must have reasonably relied on representations made by the host state.[90] Requiring specific assurances has thus far prevented a tribunal from finding that investors may reasonably expect that laws and policies will remain stable throughout the duration of their investment.[91] However, just as with expropriation, the protection afforded by the FET obligation depends on the tribunal's decision as to what types of representations an investor may reasonably rely on.[92]

Moreover, the continued evolution of CIL may result in a broader interpretation of legitimate expectations in future awards.[93] Where awards such as *RDC* and *Waste Management II* have already weakened the distinction between the FET standard confined to CIL and the autonomous treaty standard, an adoption of the *Tecmed* approach would simply be another step in this direction. Investors are certainly advocating for this expansion, as they have continued to cite *Tecmed* as support for the inclusion of legitimate expectations in the FET obligation under NAFTA and CAFTA.[94] If tribunals are willing to determine the status of CIL on the basis of arbitration awards, the number of tribunals that have accepted the *Tecmed* approach may serve as evidence of the standard's evolution. Tribunals could further rationalize the adoption of the *Tecmed* approach because the *Tecmed* tribunal equated the FET standard with international law and rested its interpretation of the standard on the *Neer* award and a NAFTA tribunal award.[95]

In sum, limiting the FET obligation to CIL may be insufficient to effectively shield host states from the risk of liability for climate change measures. Despite the inclusion of similar language in NAFTA and CAFTA, tribunals have relied on previous awards for determining the status

80. Salacuse, *supra* note 58, at 232.
81. Firger & Gerrard, *supra* note 34, at 544.
82. Patrick Dumberry, *The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard Under NAFTA Article 1105*, J. Int'l Arb. 47, 48 (2014).
83. Tecmed, *supra* note 33, Award ¶¶ 153-54.
84. *Id.*
85. Moloo & Jacinto, *supra* note 59, at 47 (*citing, e.g.*, MTD Equity Sdn. Bhd & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, at 114 (May 25, 2004), *available at* http://ita.law.uvic.ca).
86. While NAFTA case law does not make clear whether legitimate expectations is an element under the FET obligation, it suggests that an investor's legitimate expectation is at least a factor to be considered. *See, e.g.*, Waste Mgmt. v. Mexico (*Waste Mgmt. II*), NAFTA ICSID Case No. ARB(AF)/00/03, ¶ 98 (2004); Dumberry, *supra* note 82, at 61-62.
87. Glamis Gold, Ltd. v. United States, NAFTA/UNCITRAL, Award, ¶ 621 (June 8, 2009).
88. *Id.* ¶ 627 (emphasis added) (citations omitted).
89. Dumberry, *supra* note 82, at 60.
90. *Glamis Gold*, ¶ 621. *See also* Dumberry, *supra* note 82, at 65-66. Some tribunals have even required that the representations have been made for the purpose of inducing the investment. *See, e.g.*, Mobil Investments Canada Inc. v. Canada, ICSID Case No. ARB(AF)/07/4, ¶ 152 (May 22, 2012); *Glamis Gold*, ¶ 621.
91. The *Glamis* tribunal explicitly rejected the *Tecmed* approach. *See Glamis Gold*, ¶ 813 ("A claimant cannot have a legitimate expectation that the host country will not pass legislation that will affect it.").
92. *See, e.g.*, Parkerings v. Lithuania, ICSID Case No. ARB/05/8, Award, ¶ 331 (Sept. 11, 2007) (stating that assurances from a host-state may be implicit).
93. Railroad Dev. Corp. (RDC) v. Guatemala, CAFTA ICSID Case No. ARB/07/23, Award, ¶ 218 (2012).
94. *RDC*, ¶ 156; Glamis Gold, Ltd. v. United States, NAFTA/UNCITRAL, Award, ¶ 568 (June 8, 2009).
95. Tecmed, *supra* note 33, at 152-55.

of CIL instead of requiring a showing of consistent state practice. This practice has allowed tribunals to determine that the FET obligation has evolved to a much more stringent standard. If tribunals initiated under the TPP follow a similar practice, host states may be at risk of liability for the development of climate change regulations. TPP negotiators could reduce this risk by including more specific language as to what standard of conduct the FET obligation imposes.

For example, the text could explicitly state that the FET standard does not include a commitment to respect investors' legitimate expectations. Further, the text could improve predictability and consistency by explicitly providing what responsibilities are included under the FET standard. Alternatively, the text could require a written commitment to find a violation of legitimate expectations, as seen in the proposed annex for expropriation. This is unlikely, however, because tying the obligation to CIL is intended to allow the standard to evolve over time with state practice. Alternatively, the FET provisions could explicitly state that it is the burden of the investor to demonstrate that a state has violated CIL based on evidence of actual state practice and *opinio juris*, and that arbitral awards and secondary sources are insufficient to meet that burden.[96] However, without the right of appeal, there would be no means for governments to challenge an award if a tribunal were to determine the status of CIL on the basis of arbitral awards.

It is worth noting that there are a few characteristics of climate change that can aid host countries defending against a FET claim for climate-related measures. First, host countries may argue that investors do not have legitimate expectations that climate change regulations would not be implemented. Host countries may point to existing international agreements under the United Nations Framework Convention on Climate Change (UNFCCC)[97] and numerous domestic laws and policies as indicators that such measures were imminent. The intensive publicity surrounding climate regulation over the past several years also means that the adoption of such regulation should hardly come as a surprise.

In addition, host countries may be able to point to the TPP itself. The leaked version of the environment chapter provides a section entitled "Trade and Climate Change" in which the Parties "acknowledge climate change as a global concern that requires collective action and recognize the importance of implementation of their respective commitments under the UNFCCC and its legal instruments."[98] The section recognizes "the role that market and non-market approaches can play in achieving climate change objectives" and notes international efforts currently underway to increase energy efficiency, promote sustainable transport and infrastructure, and develop adaptation actions.[99] This provision suggests that a reasonable investor would expect the development of climate regulations.[100] Where measures to address climate change have long been on the horizon, tribunals should not protect as "legitimate" any expectation to continue business-as-usual practices.

Likewise, the strong scientific consensus surrounding climate change will aid host countries in defending challenged climate regulations. In applying the FET standard, tribunals assess whether the host country relied on legitimate scientific evidence as the basis for the measure.[101] In addition, tribunals have linked legitimate expectations with the issue of whether the measure was enacted for a proper purpose.[102] The reports of the IPCC—the officially constituted international body with the responsibility to gather and assess scientific evidence on this issue—certainly provide an ample basis. The most recent IPCC report states that evidence of the warming climate is "unequivocal" and that limiting climate change will require "substantial and sustained reductions of greenhouse gas emissions."[103] Host countries can point to the dangers of climate change as evidence of a measure's proper purpose.

While the strong scientific underpinning of climate science will aid host countries in defending climate-related measures, tribunals will still look for underlying protectionist purposes.[104] For example, in *S.D. Myers v. Canada*, the tribunal concluded that Canada's ban on the export of polychlorinated biphenyls (PCBs) violated the FET standard where there was evidence of protectionist motives in addition to the environmental rationale.[105] Consequently, host countries should be sure to design regulations to minimize discrimination against foreign investors where it is not necessary to serve climate change goals.

C. National Treatment

National treatment provisions are intended to prevent host countries from favoring domestic investors. Under the TPP, states must accord treatment to foreign investors "no less favorable" than that provided to domestic investors "in like circumstances."[106] The national treatment provisions apply to actions a state takes "with respect to the establishment, acquisition, expansion, management, conduct,

96. Porterfield, *supra* note 70, at 5.
97. U.N. Framework Convention on Climate Change (UNFCCC), 1771 U.N.T.S. 107; S. Treaty Doc. No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 I.L.M. 849 (1992).
98. Trans-Pacific Partnership Trade and Globalization Agreement, Environment Chapter draft text [hereinafter TPP Environment Chapter SS.15 (Nov. 24, 2013 draft; leaked Jan. 2014), https://wikileaks.org/tpp-enviro/.
99. *Id.* at SS.15.2-3 (Nov. 24, 2013 draft).
100. The United States has submitted a counterproposal that replaces the climate change language with the need to move to a "low-emissions economy." Despite the removal of the term "climate change," this language could accomplish the same end, since the agreement to work toward a "low-emissions economy" should also signal to investors that emissions reductions regulations are likely.
101. Moloo & Jacinto, *supra* note 59, at 54.
102. *See* Tecmed, *supra* note 33, ¶ 157.
103. IPCC, Climate Change 2013: The Physical Science Basis Report, Summary for Policy Makers (2013).
104. Moloo & Jacinto, *supra* note 59, at 54.
105. *See* S.D. Myers v. Canada, NAFTA UNCITRAL (2002).
106. *See* TPP Investment Chapter, *supra* note 3, art. II.4 (Jan 20, 2015 draft).

operation, and sale or other disposition of investments in its territory."[107]

National treatment provisions may be invoked to challenge climate-related measures that limit the import or export of carbon-intensive fuels or favor domestic energy sources because of lower associated GHG emissions. The success of these claims is primarily dependent on what constitutes "like circumstances." The leaked draft of the TPP provides no guidance for construing the term. Under existing IIAs, tribunals have generally adopted the "regulatory context" approach, which takes into account environmental and health policy objectives in determining whether investors are in "like circumstances."[108] Most tribunals follow the *S.D. Myers* tribunal and place the burden on the regulating entity to show that the discrimination was "reasonable" based on public policy objectives.[109] But some tribunals, such as in *Methanex*, have taken a more discerning approach, only comparing the foreign investors to an identical domestic competitor.[110]

Under both approaches, if climate regulations differentiate among sources or products for the purpose of reducing emissions, then the investors should not be considered to be "in like circumstances."[111] However, there is an additional risk under the majority approach, because even where policy objectives are reasonable, the tribunal may still find that the regulations are not a reasonable way to achieve those objectives. For example, in *S.D. Myers*, the tribunal found that although Canada's goal of maintaining the ability to process PCBs within the country was legitimate, the ban was not a permissible way to achieve it.[112] While *S.D. Myers* suggests that a very restrictive measure, such as an import or export ban, is more likely to be deemed unreasonable than a less-restrictive measure, arbitral practice does not clarify how middle-of-the-road policies will fare.

Consider, for example, California's Low Carbon Fuel Standard (LCFS), a market mechanism that requires providers of petroleum-based transportation fuels to reduce the carbon intensity of their products.[113] As part of the carbon intensity determination, the California Air Resources Board (CARB) assigned default intensity figures for different fuels based on their place of origin. Taking into account the place of origin was part of CARB's effort to accurately reflect the fuels' life-cycle GHG emissions, since GHGs are generated in transporting the fuel from where it is produced to the filling stations where it is sold. If a host country were to adopt a similar program (or any program that disfavored sellers of foreign fuels because of associated emissions) after the ratification of the TPP, foreign fuel producers could argue that taking the origin of a fuel into account violated national treatment provisions.

Under the primary interpretation of national treatment, a tribunal would likely find that achieving emissions reductions is a legitimate goal.[114] However, because the LCFS specifically assigned carbon-intensity figures based in part on the fuels' place of origin, a tribunal could conceivably find that the structure of the program was not a legitimate way to achieve that goal, as it did with respect to Canada's PCB ban in *S.D. Myers*. The odds of such an outcome would be reduced if the LCFS were based on mileage rather than on national boundaries. For example, if an LCFS were adopted by the United States that treated fuel that is transported 2,000 miles the same regardless of whether it was produced in the United States, Canada, or Mexico, an argument based on the national treatment obligation would have little force.

It is important to note that while the regulatory context approach is the dominant approach used in determining what constitutes "like circumstances," without any textual requirements, tribunals initiated under the TPP may choose to adopt a different approach that does not take into account public interest objectives. In rare cases, past tribunals have disfavored the regulatory context approach and instead adopted the approach utilized in World Trade Organization (WTO) jurisprudence, which focuses on whether or not goods are in a competitive relationship, largely ignoring public policy concerns.[115] For example, the tribunal in the 2007 award *Occidental Exploration & Prod. Co. v. Republic of Ecuador* compared all exporters regardless of the sector.[116] The TPP could avoid Party liability for climate change regulation by clarifying that investments are not in like circumstances where there is a legitimate public policy purpose for treating them differently and the differential treatment serves that goal. Alternatively, the TPP could include text similar to the police powers exception for indirect expropriation.

D. MFN

The MFN treatment obligation prohibits preferential treatment of investors from one Party to the agreement over

107. *Id.* art. II.4.1-2.
108. *See* Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, Am. J. Int'l L. 48, 76 (2008).
109. *Id.*
110. Methanex v. United States, NAFTA/UNCITRAL, ¶ 19 (Aug. 9, 2005), *available at* http://ita.law.uvic.ca/.
111. Moloo & Jacinto, *supra* note 59, at 57.
112. S.D. Myers v. Canada, NAFTA UNCITRAL (2002), ¶ 255.
113. *See* California Air Res. Bd. (CARB), Low Carbon Fuel Standard (LCFS), http://www.energy.ca.gov/low_carbon_fuel_standard/.
114. *Cf.* Rocky Mtn. Farmers Union v. Corey, No. 12-15131 (9th Cir. Sept. 18, 2013), (determining that CARB's consideration of geography was permissible because it was for the purpose of accounting for GHG emissions involved in transporting the fuel).
115. DiMascio & Pauwelyn, *supra* note 108, at 71. The General Agreement on Tariffs and Trade (GATT) has a General Exceptions provision allowing states to adopt and implement measures that serve certain specified legitimate goals, including measures "necessary to protect human, animal or plant life or health," or "relating to the conservation of exhaustible natural resources," provided the measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." *See* GATT 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).
116. Occidental Exploration & Prod. Co. v. Republic of Ecuador, LCIA Case No. UN3467, Award, ¶ 176 (July 1, 2004) ("[N]o exporter ought to be put in a disadvantageous position compared to other exporters"), *available at* http://www.italaw.com/cases/761.

another.[117] In requiring equitable treatment of investors from all Member States, the TPP utilizes the same "like circumstances" language as the national treatment provision.[118] Thus, the risk of liability mirrors that of the national treatment obligation, with one added concern. Tribunals have almost unanimously interpreted MFN provisions to allow foreign investors to import more favorable provisions from the host country's other IIAs under the rationale that IIAs themselves can be discriminatory if they give certain foreign investors access to more favorable ISDS rules.[119] The TPP anticipates this issue by clarifying that the MFN provision does not encompass ISDS procedures,[120] but the treaty fails to prevent the import of other provisions, such as favorably worded FET provisions.[121] Where the TPP constrains the FET and indirect expropriation standards beyond previous IIAs, a foreign investor may try to invoke a more-expansive standard under an alternate IIA. Thus, it is important that the TPP clarify that the MFN provision may not be used to import any provision from another IIA.

In sum, while tribunals initiated under existing IIAs have taken a more consistent approach toward national treatment and MFN obligations than they have toward indirect expropriation and FET obligations, there is at least some risk of liability for climate change regulations under all investor protection provisions. The interpretative annexes included in the draft investment chapter are an improvement, but may be insufficient to fully shield climate change actions from resulting in liability, especially regulations that disfavor fuels or products based on their place of origin. Moreover, even if the interpretative annexes and other guidance language incorporated in the TPP help governments defend challenges to climate-related measures, they may not prevent investors from initiating arbitration. Investors might still feel encouraged to bring suits in hopes of a favorable outcome, or to use the threat of liability to inhibit implementation of climate-related measures or obtain settlements.

III. Preserving Flexibility for Climate Regulation

In addition to clarifying the investor protection standards themselves, the TPP negotiators could preserve flexibility for climate regulations by including general safeguard provisions. First, the TPP could include an environmental or climate-specific exception clause. Second, the treaty could include a provision that protects measures adopted in compliance with other international obligations. The draft text fails to include either of these safeguards, and there has been no public indication that negotiators intend to add such provisions.

A. Environmental Exception Clause

An environmental exception clause is a general provision that excuses governments from treaty obligations where the challenged measures were taken for environmental purposes. For example, GATT Article XX provides an exception clause for measures that, among other things, are "necessary to protect human, animal or plant life or health."[122] Short of a general environmental exception clause, the TPP could explicitly enumerate a set of climate-related measures that constitute legitimate public policies and would excuse violations of investor protection provisions.[123] The leaked draft of the investment chapter does neither. While the environmental chapter recognizes the role of "market and non-market approaches" in combating climate change, it does not relieve such approaches from risk of creating governmental liability.[124]

The draft text does include proposed language meant to preserve Parties' rights to implement environmental protection measures. The leaked investment chapter provides that: "Nothing in this chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental . . . concerns."[125]

While this provision seems to prioritize environmental concerns, it does not function as an environmental exception. NAFTA contains similar text,[126] and it has not prevented tribunals from finding that government measures intended to protect the environment violate investor protection provisions.[127] One possible reason is that the provision limits its reach to measures "otherwise consistent with this Chapter." This language makes clear that environmental regulations are subject to investor protection provisions. Consequently, while this provision rhetorically supports environmental concerns, it still prioritizes the interests of foreign investors.

As an alternative to a general exception provision, the TPP could provide a safe haven provision that would allow dismissal of a claim where parties determine that a challenged measure was a good-faith climate mitigation or adaptation measure. Such a provision could be modeled on the U.S. Model BIT, which includes a similar provision for financial services. The Model BIT provides a general provision stating that, "no party shall be prevented from adopting or maintaining measures relating to financial

117. TPP Investment Chapter, *supra* note 3, art. II.5 (Jan. 20, 2015 draft).
118. *Id.*
119. *See* Impregilo v. Argentina, Award, ICSID Case No. ARB/07/17, ¶ 108 (June 21, 2011); White Indus. v. India, UNICTRAL, Final Award, §11.2 (Nov. 30, 2011).
120. TPP Investment Chapter, *supra* note 3, art. II.5.3 (Jan. 20, 2015 draft).
121. *Cf.* MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, ¶ 104 (May 25, 2004) (stating that MFN may be used in construing a Party's FET obligation).
122. To invoke a general exception under GATT Article XX, the Member State must also comply with good-faith provisions under the Chapeau of Article XX. *See* GATT 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).
123. Firger & Gerrard, *supra* note 34, at 561-62.
124. TPP Environment Chapter, *supra* note 98, at §15.2-3.
125. TPP Investment Chapter, *supra* note 3, art. 12.15.
126. NAFTA, *supra* note 11, at 605, 642, ch. 11, art. 1114(1).
127. *See, e.g.*, Tecmed, *supra* note 33; Metalclad v. Mexico, NAFTA ICSID Case No. ARB(AF)/97/1 (2000).

services for prudential reasons . . . ."[128] However, instead of leaving it to the discretion of the tribunal to make this determination, the text goes on to establish a mechanism by which the competent financial authorities of both parties are given 120 days to address the issue.[129] If the issue is unresolved within the designated time period, the case proceeds to arbitration.[130]

The TPP could implement a similar safe haven measure for environmental, or more specifically, climate change regulation. In response to an ISDS claim, the provision could allow a state to raise a defense that the challenged measure was intended to mitigate or adapt to climate change, and give a certain period of time for the relevant environmental authorities of the host state and the investor's home state to determine whether the measure was in good faith. If the parties come to an agreement, then the claim cannot proceed. If there is no agreement, the tribunal cannot raise any negative inference regarding the failure to reach an agreement. This type of provision is more advantageous than a simple exception provision, because it allows parties to retain authority to prioritize climate regulation, instead of being subject to the whims of a tribunal.

The leaked draft of the TPP does not contain an environmental or climate exception. The closest the draft text came to an environmental exception was the proposed annex that prevents finding an indirect expropriation for legitimate environmental regulations; however, this clause does not extend to the FET, MFN, or national treatment obligations. Nor is it clear that this proposal will be adopted over the alternate proposals that include the "rare circumstances" language.

B. *Competing International Obligations*

International climate instruments adopted pursuant to the UNFCCC impose binding obligations on some states to reduce GHG emissions. Further international agreements will likely evolve either through UNFCCC negotiations or external bilateral and multilateral agreements such as the U.S.-China agreement to phase down HFCs.[131] Where compliance with obligations under climate change agreements requires governments to change legal frameworks or promulgate new regulations that frustrate foreign investments, compliance may put a Party at risk of liability under TPP investor protection provisions.

To prevent such circumstances, other IIAs have included provisions addressing inconsistent obligations. For example, the U.S.-Korea FTA (KORUS) provides:

> In the event of any inconsistency between a Party's obligations under this Agreement and a covered agreement, the Party shall seek to balance its obligations under both agreements, but this shall not preclude the Party from taking a particular measure to comply with its obligations under the covered agreement, provided that the primary purpose of the measure is not to impose a disguised restriction on trade.[132]

Although this balancing test does not completely remove the risk of liability, it clearly states that a Party shall not be precluded from complying with other international obligations.

The TPP environment chapter does not include any such provision addressing obligations inconsistent with international environmental agreements. The "Climate Change and Trade" article in the leaked environmental section only notes that international efforts are underway to address climate change.[133] A country could point to this provision to demonstrate that an international obligation is legitimate; however, tribunals have discretion to determine how international obligations impact the analysis of investor protection provisions.

While the relevant cases are limited, it appears that tribunals have been unwilling to find that obligations under non-investment treaties relieve a host country from liability under investor protection provisions.[134] In *S.D. Myers*, Canada argued that it had implemented its export ban on PCBs pursuant to its obligations under the Basel Convention.[135] The Convention prohibits the export of hazardous wastes, including PCBs, to nonparties (such as the United States) without a bilateral agreement, and requires Parties to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes. After discussing the obligations of the Basel Convention at length, the tribunal found there was no legitimate environmental reason for Canada's ban.[136] While this finding was based on concerns of protectionist intent, the inclusion of a provision like the one in KORUS would at least require the tribunal to explicitly grapple with the competing motivations behind the measure.

International obligations were also at issue in *Santa Elena v. Costa Rica*, which arose when Costa Rica expropriated foreign investor property to preserve a unique ecological site under international environmental agreements including the Convention Concerning the Protection of

128. United States Model Bilateral Investment Treaty (BIT), art. 20 (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.
129. *Id.* art. 20(3)(c).
130. *Id.* art. 20(3)(e).
131. Press Release, White House, United States and China Agree to Work Together on Phase Down of HFCs (June 18, 2013), http://www.whitehouse.gov/the-press-office/2013/06/08/united-states-and-china-agree-work-together-phase-down-hfcs.
132. Free Trade Agreement Between the Republic of Korea and the United States of America, ch. 20, art. 20.10.3 (June 30, 2007, modified, Dec. 5, 2010), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text.
133. TPP Environment Chapter, *supra* note 98, at SS.15.
134. *See* Miles, *supra* note 55, at 82.
135. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 U.N.T.S. 126, 28 I.L.M. 657 (1989).
136. S.D. Myers v. Canada, NAFTA UNCITRAL, ¶ 195 (2002) ("Insofar as there was an indirect environmental objective—to keep the Canadian industry strong in order to assure a continued disposal capability—it could have been achieved by other measures.").

the World Cultural and Natural Heritage.[137] The tribunal refused to take into account conservation obligations in determining the land value for compensation purposes.[138] *Santa Elena* and *S.D. Myers* highlight the importance of including a provision to address competing international obligations. Without such a provision, the TPP may put Parties in a position where they are unable to comply with emissions reduction obligations due to the risk of liability to investors.

IV. The ISDS Mechanism

In addition to investor protection provisions, the structure of arbitration may also contribute to host countries' vulnerability to liability for actions taken to combat climate change. ISDS has been heavily criticized for lack of consistency and transparency in arbitral awards and the considerable costs that states are forced to bear.[139] For example, South Africa cited "uncertainty and the unacceptable risk" in its decision not renew its BIT with the Belgo-Luxemberg Economic Union.[140] Such concerns have led a number of scholars and the United Nations Conference on Trade and Development (UNCTAD) to propose pathways to reforming ISDS.[141] The European Commission has issued a factsheet outlining how the Commission intends to address these concerns in future agreements and has initiated a public consultation on the issue.[142] This section will briefly discuss characteristics of ISDS that contribute to the vulnerability of public interest regulations and analyze whether the TPP sufficiently addresses them. It concludes that, aside from proposals to improve transparency, the leaked draft of the TPP essentially replicates the structure of the ISDS mechanism adopted in past agreements.

A. Transparency and Opportunity to Submit Amicus Briefs

Based on the firm-to-firm mode of arbitration, in which private arbitration was seen as critical to protecting commercial interests, ISDS has traditionally lacked transparency and opportunities for members of the public to submit amicus curiae briefs.[143] Under the most commonly employed procedures, ISDS proceedings are not open to the public unless both parties agree, and investors usually opt for closed hearings.[144] Of the 85 cases arbitrated under the UNCITRAL Arbitration Rules at the end of 2012 (the most recent statistics available), only 18 were public.[145] Occasionally, not only proceedings but also awards are kept confidential.[146]

The lack of transparency and opportunity for participation is of particular concern because investment arbitration has the capacity to affect public health and environmental policy. While an investment arbitration case is at its core a private dispute between the host state government and the foreign investor, the disputes often center on public law, such as the implementation of environmental regulation.[147] Given the large awards seen in investment arbitration, the threat of liability may deter host states from implementing regulations or lead to their repeal. For example, in 1997, Ethyl Corp., a manufacturer of the gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT), brought suit against Canada's MMT import ban, claiming over $200 million in damages.[148] Facing the potential of significant public liability, Canada agreed to repeal the ban in addition to making a payment of approximately US $13.5 million.[149]

In this sense, investment arbitration differs from private commercial arbitration, which is less likely to affect the implementation of public law.[150] Because an ISDS award may impact the public's rights and interests, the ISDS mechanism should be structured to ensure transparency and the opportunity for submissions of amicus briefs. Transparency subjects awards to public scrutiny and is an important check on the tribunals' discretion.[151] Acceptance of amicus briefs gives interested parties the opportunity to be heard.

The 2015 leaked investment chapter reveals a modest improvement with respect to transparency. The negotiators rejected proposed language to make transparency subject to the consent of the disputing parties.[152] In addition, the negotiators adopted a provision proposed in the 2012 draft that requires tribunal documents including briefs and awards to be available to the public, but again pro-

137. Compania del Desarallo de Santa Elena, S.A. v. Republic of Costa Rica, 39 I.L.M. 1317, 1325 (2000); Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 U.N.T.S. 151; 27 U.S.T. 37; 11 I.L.M. 1358 (1972).

138. *Santa Elena*, 39 I.L.M. at 1329 ("[T]he purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid.").

139. UNCTAD, Roadmap, *supra* note 4. *See, e.g.*, Kyla Tienhaara, Investor-State Dispute Settlement in the Trans-Pacific Partnership Agreement, Submission to the Department of Foreign Affairs and Trade 5 (May 19, 2010), http://dfat.gov.au/trade/agreements/tpp/submissions/Documents/tpp_sub_tienhaara_100519.pdf; Jeswald W. Salacause, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 51 Fordham Int'l L.J. (2007).

140. Open letter from Sidwell Medupe, *supra* note 23.

141. UNCTAD, Roadmap, *supra* note 4; *see* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2004).

142. European Commission, Factsheet: Incorrect claims About Investor-State Dispute Settlement (Oct. 3, 2013), *available at* http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151790.pdf.

143. Tienhaara, *supra* note 139, at 5.

144. *Id.* at 6 (referring to International Centre for Settlement of Investment Disputes (ICSID) Convention and the U.N. Commissions on International Trade Law (UNCITRAL)).

145. UNCTAD, Roadmap, *supra* note 4, at 3, n.8.

146. UNCTAD, Latest Developments in Investor-State Dispute Settlement: IIA Monitor No. 1, at 1 (2009) (noting that only 20 of the 26 decisions that are known to have been issued in 2011 are publicly available).

147. *See* William W. Burke-White & Andreas Von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 Yale J. Int'l L. 283, 288, 293-94 (2010).

148. Ethyl Corp. v. Canada, Notice of Arbitration (Apr. 14, 1997); Ethyl Corp. v Canada, NAFTA UNCITRAL (1998).

149. Moloo & Jacinto, *supra* note 59, at 29.

150. Poirier, *supra* note 17, at 880.

151. Franck, *supra* note 141, at 1616-17.

152. *Compare* TPP Investment Chapter, *supra* note 3, art. 12.23.2 (2012 draft), *with* TPP Investment Chapter, art. II.23.1 (Jan. 20, 2015 draft).

vides procedures for protected information.[153] Negotiators also adopted a proposed provision that gives tribunals the discretion to accept and consider amicus curiae submissions from a person who is not a disputing party, although the text does not provide intervention as of right or mandatory acceptance of amicus briefs.[154] The text also maintained the requirement, included in the previous leaked draft, that tribunals conduct hearings open to the public, with an exception allowing a tribunal to make "appropriate arrangements" in the case of protected information.[155]

B. Consistency

Without formal principles of *stare decisis* or a centralized appellate body, inconsistency has become a persistent problem in arbitral tribunals.[156] As discussed above, tribunals have been inconsistent both in interpreting treaty provisions and in assessing the merits of cases involving similar facts.[157] According to one scholar, "the lack of determinacy and coherence in treaty arbitration has raised the specter of a legitimacy crisis."[158] Inconsistency reduces the perceived legitimacy of ISDS because it prevents states and private parties from understanding and conforming to a desired code of conduct.[159] Moreover, unpredictability encourages settlement and may lead to unnecessary government payouts or the repeal of public interest regulations to avoid a burdensome award, as seen in *Ethyl Corp*.

The lack of transparency exacerbates inconsistency by limiting a tribunal's capacity to rely on a comprehensive assessment of the case law.[160] The ad hoc nature of tribunals and ambiguous investor protection provisions further contribute to this problem.[161] States facing inconsistent decisions or mistakes of law have little recourse. Most tribunal procedures do not allow review of an award on its legal merits.[162]

While TPP negotiators have attempted to reduce inconsistency in tribunal awards by clarifying investment protection provisions, the leaked text does not address the structural characteristics of ISDS that allow inconsistency to persist. To address inconsistency in arbitral awards, a number of scholars and politicians have advocated for the development of an appellate mechanism for ISDS awards.[163] In fact, recent U.S. FTAs have required that Parties consider the development of an appellate mechanism.[164] The leaked draft of the TPP does not make any such commitment. A proposed provision only requires parties to consider whether TPP awards would be subject to an appellate mechanism, should such a mechanism be developed in the future under other institutional arrangements.[165]

C. Compensation

At the heart of concerns over the chilling effect of ISDS on public interest regulation is the size of ISDS awards. To date, over $430 million has been paid to investors through ISDS under U.S. FTAs alone.[166] The dramatic increase in ISDS disputes has increased the risk of liability. New cases have jumped from a few per year in the late 1980s and early 1990s to 30-45 new cases per year since 2003.[167] At least 46 new disputes were initiated in 2011 alone, marking the highest number of known treaty-based disputes ever filed in one year.[168] In 2012, pending ISDS suits related to environmental, public health, and transportation policies demanded a total of $13 billion.[169]

With ISDS awards in the hundreds of millions (and even billions) of dollars, the sheer magnitude allows investors to "exert significant pressures on public finances and create potential disincentives for public-interest regulations."[170] Adjusting the definition of investments subject to compensation could serve to provide meaningful investor protections without compromising host countries' capacity to regulate in the public interest. IIAs generally define investments broadly to include expectation of gain or profit. The TPP mimics existing IIAs by defining investments to include "every asset that an investor owns or controls,

153. TPP Investment Chapter, art. II.23 (Jan. 20, 2015 draft).
154. *Id.* art. II.22.3.
155. *Id.* art. II.23.2.
156. Awards rendered in investment arbitration are only binding on the parties involved in the dispute. *See, e.g.*, Tienhaara, *supra* note 139, at 5; Poirier, *supra* note 17, at 518-19 (*citing, e.g.*, the Statute of the International Court of Justice. "The decision of the Court has no binding force except between the parties and in respect of that particular case." Statute of International Court of Justice, art. 59 (June 26, 1945)); Joseph de Pencier, *Investment, Environment and Dispute Settlement: Arbitration Under NAFTA Chapter Eleven*, 23 Hastings Int'l & Comp. L. Rev. 409, 924 (1999).
157. *See* UNCTAD, Roadmap, *supra* note 4, at 3; Franck, *supra* note 141, at 1558-82.
158. *See* Franck, *supra* note 141, at 1586.
159. *See id.* at 1602; Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 Vand. J. Transnat'l L. 37, 52 (2003).
160. Of the 37 known ISDS tribunal decisions rendered in 2013, only 23 are in the public domain. *See* UNCTAD, Recent Developments in Investor State Dispute Settlement (ISDS), No. 1, 1 (Apr. 2014).
161. Tienhaara, *supra* note 139, at 5.
162. For example, under ICSID procedures a tribunal's mistake of law or fact cannot justify the annulment of an award because neither type of mistake is an enumerated ground. *See* Franck, *supra* note 141, at 1547.
163. *E.g.*, Poirier, *supra* note 17, at 924; Franck, *supra* note 141, at 1617-25 (proposing the establishment of an independent, permanent appellate body with the authority to review awards rendered under a variety of investment treaties); UNCTAD, Roadmap, *supra* note 4, at 3. In granting the president trade promotion authority in 2000, Congress required that future trade agreements have "an appellate body or similar mechanism to provide coherence to the interpretation of investment provisions in trade agreements." 19 U.S.C. §3802(b)(3)(G)(iv) (2000).
164. *See, e.g.*, CAFTA, *supra* note 63, Annex 10-F (stating that "the FTC shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under the Investment Chapter of the Agreement"); United States-Chile Free Trade Agreement, June 6, 2003, U.S.-Chile, ch. 22, Annex 10-H.
165. TPP Investment Chapter, *supra* note 3, art. II.22.10 (Jan. 20, 2015 draft) ("In 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 II.28 should be subject to that appellate mechanism.").
166. *See* Public Citizen, *supra* note 5.
167. UNCTAD, Latest Developments in Investor-State Dispute Settlement, IIA Issues Note No. 1, 2 (2012).
168. *Id.*
169. Memo from Lori Wallach and Todd Tucker, Public Citizen's Global Trade Watch, Public Interest Analysis of Leaked Trans-Pacific Partnership (TPP) Investment Text 2 (June 13, 2012).
170. UNCTAD, Roadmap, *supra* note 4, at 3.

directly or indirectly, that has the characteristics of an investment including such characteristics as the commitment of capital or other resources, *the expectation of gain or profit*, or the assumption of risk."[171]

This broad definition of investments entitles foreign investors to compensation well beyond their domestic counterparts. Under the doctrine of sovereign immunity, governments generally shield themselves from liability for their actions, with only narrow exceptions.[172] For example, U.S. takings law essentially limits compensation for regulatory takings to the loss of value of the real property taken.[173] Consequently, the definition of investments under IIAs puts governments at risk of liability for actions that would otherwise be protected by the doctrine of sovereign immunity. Excluding expectations of gain or profit from recoverable damages would not only put foreign and domestic investors on more equal footing in most jurisdictions, but would also limit investors' ability to use the threat of liability to prevent a country from implementing climate change measures.[174]

D. Congressional Oversight

Interestingly, Congress may play a role in ensuring that the final draft of the TPP includes many of the important reforms discussed above, especially with respect to transparency and consistency. In April 2015, key congressional legislators unveiled a bipartisan bill to give the president fast-track authority in negotiating the TPP.[175] Fast-track authority streamlines the approval process for the TPP by only allowing Congress to approve or deny the agreement as a whole, without any amendments. A number of major trade agreements have been enacted under fast-track authority. The most recent grant of fast-track trade promotion authority was made in connection with a 2002 bill and expired in 2007.[176]

Fast-track authority is critical to the success of the TPP, because without it, the U.S. Senate could threaten the agreement by proposing amendments or filibustering, thereby preventing its ratification altogether. The fast-track bill has faced substantial opposition from congressional Democrats, who are concerned about ultimately limiting Congress' capacity to ensure that the agreement meets its trade objectives on a range of policy issues, including labor, the environment, and healthcare, especially without releasing the text to the public.[177] Despite this opposition, the Senate passed the fast-track bill on May 22.[178] The bill then moved to the U.S. House of Representatives, where it has faced even stronger opposition.

In the proposed fast-track bill, Congress has outlined a series of principal trade negotiating objectives. Among these objectives are a series of guidelines to improve ISDS, including: (1) enhancing opportunities for public input in the formulation of government positions; (2) ensuring transparency through public proceedings, submissions, and decisions, while balancing the need to protect confidential and classified information; (3) establishing an appellate body or similar mechanism to provide coherence; (4) allowing for the acceptance of amicus curiae submissions; and (5) providing mechanisms to eliminate frivolous claims and ensure efficient disposition of claims.[179] A number of these goals, such as public proceedings, submissions, and decisions, have already been adopted in the draft negotiating text; others, however, such as the establishment of an appellate body or a means to eliminate frivolous claims, are missing from the most recently leaked text. Because congressional approval is critical for the TPP's acceptance by the United States, the inclusion of these goals in the fast-track bill, if enacted, would likely bolster the chances of their inclusion in the final TPP text.

V. Conclusion

Avoiding catastrophic climate change will require governments to implement a broad range of policies to encourage the transition to a low-emissions economy. The TPP may obstruct advancement of climate-related policies by creating a risk of liability for measures that negatively affect foreign investments. In some previous IIAs, tribunals have adopted broad interpretations of investor protection provisions that have resulted in host state liability for a number of environmental policies. The leaked text of the TPP investment chapter indicates that negotiators may be attempting to rein in investor protection provisions and instead protect host states' rights to adopt laws and policies to promote public welfare. These reforms, along with the characteristics of climate change (including a strong scientific foundation demonstrating substantial risk and increased international attention), suggest that a reasonable arbitral tribunal would not find that nondiscriminatory, good-faith climate change regulations violate investor protection provisions.

However, the leaked text still leaves tribunals with substantial discretion to interpret its provisions. Given this discretion and tribunals' tendency to be sympathetic to investors' interests, states may still be at risk of liability for legitimate climate change measures. The potential for large awards, combined with inconsistent interpretation of treaty provisions and lack of transparency and oversight,

171. TPP Investment Chapter, *supra* note 3, at 12-3 (Jan. 20, 2015 draft) (emphasis added).
172. *See* Johnson, *supra* note 2, at 11149.
173. Been & Beauvais, *supra* note 13, at 63.
174. Citizen and environmental groups have criticized the TPP's broad definition of investment. *See, e.g.*, Sierra Club, *Raw Deal: How the Trans-Pacific Partnership Could Threaten Our Climate* 6; Public Citizen, *supra* note 5.
175. Jonathan Weisman, *Deal Reached on Fast-Track Authority for Obama on Trade Accord*, N.Y. Times, Apr. 16, 2015.
176. Trade Act of 2002, 19 U.S.C. §§3803-3805 (2002).
177. *See, e.g.*, Press Release: Senators Will Seek Approval of Measure Before Congress Completes Work on Fast Track Legislation (May 19, 2015). Press Release: DeLauro, Miller Lead 151 House Dems Telling President They Will Not Support Outdated Fast Track for Trans-Pacific Partnership, *available at* http://delauro.house.gov/index.php?option=com_content&view=article&id=1455:delauro-miller-lead-151-house-dems-telling-president-they-will-not-support-outdated-fast-track-for-trans-pacific-partnership&Itemid=21.
178. Trade Act of 2015, H.R. 1314, 114th Cong. (2015).
179. *Id.* §102(b)(4)(G).

aggravates the already troubling legal landscape for host countries wishing to implement climate policies. While the TPP includes proposals to address transparency concerns, it does little to improve consistency or constrain large awards.

To prevent liability for climate-related measures, TPP negotiators should structure the agreement to prevent investor protection provisions from being invoked to obstruct legitimate mitigation and adaptation efforts. The negotiators could address this issue by including an environmental or climate-specific exception that extends to the entire agreement. Short of a general exception provision, negotiators could improve interpretative guidance for investor protection provisions. For indirect expropriation and the FET obligation, the text could require proof of binding and written commitments from the host country before a tribunal can find that public interest regulations violated an investor's legitimate expectations. Alternatively, the text could include this limitation only with respect to expropriation and instead provide that respect for legitimate expectations is not an element under the FET obligation at all. For the MFN and national treatment obligations, interpretative guidance could clarify that investments with differing impacts on climate change are not in "like circumstances."

In addition, negotiators could reduce the risk of liability for climate change regulations by reforming the ISDS mechanism. The leaked text already includes proposals to improve transparency and provide opportunity to submit amicus briefs. Other reforms could include the establishment of an appeals mechanism or removing lost profits from compensable damages. TPP negotiators should assess all options to determine what combination best preserves foreign investor protections without compromising host countries' capacity to tackle climate change.[180]

Due to the confidentiality of the TPP negotiations, the treaty's full impact on climate-related policies is not yet apparent. Once the full text of the agreement is released, it will be very difficult, if not impossible, to amend the text to address all vulnerabilities. Preventing dangerous climate change is in the interest of all TPP nations, and it is the responsibility of the TPP negotiators to learn from the issues that have arisen under past agreements and to ensure that the treaty will not interfere with host countries' climate-related policies. The final agreement should not only expand trade and international investment, but also support all Member States in their efforts to combat climate change.

180. It is important to note that the investment chapter is not the only portion of the TPP that has implications for the future of climate policy. The treaty could foster an expansion of U.S. liquefied natural gas exports, and could limit the ability of governments to mandate "green purchasing" in government procurement contracts. However, these issues are beyond the scope of the Article.