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An Emerging Trend in International Trade: A Shift to Safeguard Against ISDS Abuses and Protect Host-State Sovereignty

Nikesh Patel

Note

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I. INTRODUCTION: WHAT IS "ISDS"?

Investor-state dispute settlement ("ISDS") is a legal mechanism contained in many international trade treaties that grants an investor the right to use dispute settlement proceedings to sue host governments in an international tribunal.[1] ISDS thus functions as an instrument of public international law providing investors protection under a given international trade treaty. With respect to ISDS, often the difficulty in structuring an international trade treaty is finding the right balance between providing investor protection and protecting state sovereignty from abuses. As investors have increasingly continued to initiate ISDS cases and sue host governments under respective investment trade treaties,[2]

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1. *See* Lise Johnson, Lisa Sachs & Jeffrey Sachs, Columbia Ctr. on Sustainable Inv., Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law 1 (2015), http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf.

2. *See* U.N. CONFERENCE ON TRADE AND DEV., INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2014 1 (2015), http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d2_en.pdf ("Investors continue to use the investor–State dispute settlement (ISDS) mechanism. In 2014, claimants initiated 42 known treaty-based ISDS cases. The total number of known ISDS cases reached 608.").

"investment dispute settlement is at the heart of this debate, with a number of countries reassessing their positions."[3]

Recently, Cecilia Malmström, the European Commissioner for Trade, addressed the issue in question and stated Europe's renewed vision of international trade policy for the 21st century:

> My assessment of the traditional ISDS system has been clear—it is not fit for purpose in the 21st century . . . I want to ensure fair treatment for EU investors abroad, but not at the expense of governments' right to regulate. Our new approach ensures that a state can never be forced to change legislation, only to pay fair compensation in cases where the investor is deemed to have been treated unfairly.[4]

Malmström's recent statement concerning ISDS reform reflects an emerging international consensus to improve the regime of international investment agreements ("IIA"s) and the ISDS mechanism as a better framework for sustainable development.[5] As countries increasingly continue to integrate more with the global economy through international investment agreements,[6] the ISDS mechanism has been brought into the public eye, offering an opportunity for countries to rethink policy in trade agreements. Consequently, countries are shifting trade policy in the 21st century towards safeguarding against ISDS abuses and providing a more host-state friendly framework.

This Note seeks to address an emerging trend in international investment policy towards safeguarding against ISDS abuses and protecting host-state sovereignty. Part II outlines the background of the ISDS mechanism in international trade treaties and presents major arguments arising from its application. Part III presents recent findings on ISDS disputes.

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3. *Id.* at 23.

4. Cecilia Malmström, *Investments in TTIP and Beyond - Towards an International Investment Court*, EUROPEAN COMM'N (May 5, 2015), http://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en.

5. *See generally UNCTAD Releases Review of Trends in Investment Agreements and Investor-State Dispute Settlement*, U.N. CONFERENCE ON TRADE & DEV. (Feb. 19, 2015), http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=929&Sitemap_x0020_Taxonomy=UNCTAD+Home (describing global trends in favor of the use of IIAs in the context of ISDS cases).

6. *See id.* ("In 2014, countries concluded one international investment agreement every other week.").

Part IV analyzes recent trends in international trade policy from various countries as a result of certain ISDS cases initiated by investors. Finally, this Note concludes increased international attention and ISDS disputes have resulted in an emerging shift in trade policy where host-state governments are shifting to safeguard against abuses and to protect government obligations.

II. BACKGROUND AND PURPOSE OF ISDS

A. BACKGROUND INFORMATION

International uniform law and ISDS share a common goal[7]—"to reduce the importance of national borders in cross-border relationships by creating a fair, even, and predictable playing field for private parties, regardless of their nationalities and the loci of their activities."[8] More specifically, the Office of the United States Trade Representative ("USTR") suggests for governments to implement ISDS for at least three reasons: (1) to resolve investment conflicts without creating state-to-state conflict; (2) to protect citizens abroad; and (3) to signal to potential investors that the rule of law will be respected.[9]

"Prior to the emergence of the ISDS system in the mid-20th century, investor-state disputes" were handled through diplomatic processes, "or, at times, by the threat or use of military force."[10] Numerous elements of the current investment protection system can be traced back to the Friendship, Navigation and Commerce Treaties of the 19th and 20th centuries.[11] Countries like the United States, United Kingdom, and Japan signed the treaties in the post-World War II era.[12]

7. Joshua Karton, *Lessons from International Uniform Law*, in RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 48, 52 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

8. *Id.*

9. *FACT SHEET: Investor-State Dispute Settlement (ISDS),* OFFICE OF THE U.S. TRADE REPRESENTATIVE (Mar. 11, 2015), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds.

10. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INVESTOR-STATE DISPUTE SETTLEMENT 7 (2012), http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf.

11. *See* ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 22–23 (2009) [hereinafter NEWCOMBE].

12. *See* John F. Coyle, *The Treaty of Friendship, Commerce, and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 310 (2013).

The treaties were primarily signed to promote trade and commercial relationships, however the investment protection function of these treaties came to dominate. The treaties were essentially designed to facilitate post-war reconstruction in Europe thereby resulting in significant investment protections.[13] Before ISDS, an investor whose property was treated inappropriately by a foreign government sought a discriminatory action in the domestic courts of the foreign government or support "of their claim by their investor's home government through a state-to-state dispute settlement."[14] With that in mind, ISDS intended to reflect a more cooperative and peaceful "mechanism for [effectively] addressing disputes between investors and host countries" without having to subject states to conflicts.[15]

In 1959, elements and provisions of modern investment protection law were introduced, where "ISDS first appeared in a bilateral trade agreement between Germany and Pakistan."[16] "The intention was to encourage foreign investment by protecting investors from discrimination or expropriation."[17] Nevertheless, "it was not until the late 1980s and early 1990s that a specific type of dispute settlement was introduced in investment treaties," including the North American Free Trade Agreement and the Energy Charter Treaty.[18] Instead of a state-to-state dispute, the dispute settlement proceedings now allow a foreign company as an investor to directly file suit "against the host state and seek arbitration between the investor and the state" government.[19] Accordingly, the newly established system of investor-state dispute settlement shifted investment

13. NEWCOMBE & PARADELL, *supra* note 11, at 23.

14. MARTIN A. WEISS, SHAYERAH ILIAS AKHTAR, BRANDON J. MURRILL & DANIEL T. SHEDD, CONG. RESEARCH SERV., R44015, INTERNATIONAL INVESTMENT AGREEMENTS (IIAS): FREQUENTLY ASKED QUESTIONS 13 (2015).

15. *Id.*

16. *See The Arbitration Game*, ECONOMIST (Oct. 11, 2014), http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration.

17. *Id.*

18. *See* NIKOLAOS I. THEODORAKIS, TRANSPARENCY IN INVESTOR-STATE DISPUTE SETTLEMENT: LAW, PRACTICE, AND EMERGING TOOLS AGAINST INSTITUTIONAL CORRUPTION 23 (2015).

19. *See* MARKUS KRAJEWSKI, MODALITIES FOR INVESTMENT PROTECTION AND INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) IN TTIP FROM A TRADE UNION PERSPECTIVE 6 (2014).

agreements from "mere tools of commercial diplomacy into legally enforceable instruments."[20]

An investor-state dispute settlement mechanism was an "institutional innovation inasmuch as it helped to reduce sources of international tension and recourse to military force."[21] The goal was to "promote compliance with international law, help to settle international disputes, and provide redress for victims of harm caused by violations of various aspects of international law."[22] ISDS thereby provides "both an enforcement mechanism that promotes compliance and a means of compensating victims of harm caused by breaches of investment treaty provisions."[23] As a result of its continued application, "states give their consent to participate in ISDS [proceedings] in some 3,000 international investment treaties."[24]

B. Arguments Arising from ISDS

Numerous arguments surround the issue of ISDS as a mechanism incorporated in international investment treaties. Both supporters and opponents frame their arguments based upon disciplines and rationale arising from political science, economics, and the law.

Proponents often argue that Foreign Direct Investment ("FDI") encourages more foreign investment and such investments benefit an economy with more jobs and development, thereby increasing economic growth.[25] An open international investment environment creates jobs and wealth worldwide and improves infrastructure in participating countries ranging from developed, developing and emerging economies.[26] ISDS is "a fair, efficient investment protection system" that protects investors from non-discriminatory treatment by host-state countries.[27] ISDS provides a "swift and

20. *Id.*
21. Organisation for Economic Co-operation and Development, *supra* note 10, at 7.
22. *Id.*
23. *Id.* at 8.
24. *Id.* at 63.
25. *See* Bus. and Indus. Advisory Comm. to the OECD, Investor-State Dispute Settlement: An Indispensable Element of Investment Protection 2 (2015), http://biac.org/wp-content/uploads/2015/02/BIAC-Investor-State-Dispute-Settlement.pdf.
26. *Id.* at 2.
27. *See id.* at 1.

high-quality mechanism of legal dispute resolution in cases of breaches of investment treaties by host states."[28] Therefore, the resolution system creates a non-discriminatory legal framework that is instrumental for enterprise, investment, and growth.

Furthermore, without ISDS, the enforceability of contractual obligations between investors and the government would be undermined.[29] As a result of regulatory risk, investors are less incentivized to make "beneficial investments . . . to the socially optimal amount."[30] A holdup problem is therefore created where domestic regulations and policies can be arbitrarily imposed on investors thereby increasing the costs for investors and making investors less likely to further invest.[31] In effect, some argue that ISDS mitigates the holdup problem by indemnifying investors if a host government's policies "are causing 'unjustified' harm through an ex post erosion of investment incentives."[32] The mechanism provides further assurance against discriminatory treatment because it follows procedures separate from the government's legal system.

Aside from the economic rationale, some also argue that ISDS protects against political risk. As suggested by Terra Lawson-Remer, an economist at the Brookings Institution, ISDS clauses protect investors against egregious governmental abuse by purchasing political-risk insurance.[33] Investors can seek remedies through a uniform, agreed-upon arbitration system that is non-discriminatory, timely, and outside the political control of the host-state government. ISDS arbitration can thus provide a framework for international law to mitigate potential political risk and protect against a host-state's changing political climate.[34] ISDS also upholds the rule of law pursuant to the investment treaty and shields investors from domestic courts,

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28. *Id.*

29. *See* Peter H. Chase, *TTIP, Investor–State Dispute Settlement and the Rule of Law*, 14 EUR. VIEW 217, 221 (2015).

30. WILHELM KOHLER & FRANK STÄHLER, THE ECONOMICS OF INVESTOR PROTECTION: ISDS VERSUS NATIONAL TREATMENT 1 (2016), http://www.cesifo-group.de/portal/page/portal/DocBase_Content/WP/WP-CESifo_Working_Papers/wp-cesifo-2016-02/cesifo1_wp5766.pdf.

31. *See id.*

32. *Id.* at 2.

33. *See The Arbitration Game*, *supra* note 16.

34. *See* Won-Mog Choi, *The Present and Future of the Investor-State Dispute Settlement Paradigm*, 10 J. INT'L ECON. L. 725, 725–47 (2007).

potential expropriation, and damaging public policies.[35] As a result, supporters contend that the ISDS framework encourages FDI for economic growth and development and ensures investor protection from political risk.

In contrast, opponents have arguments grounded upon public versus private rights and protection of national sovereignty against corporate interests. First, on the grounds of public versus private rights, it is argued that ISDS has "completely circumvent[ed] the very balance between private and public rights that has developed in the domestic context, and undermines the institutions that continue to shape it."[36] In other words, private arbitration courts are not the preferred institution to solve investor-state disputes. Rather, it is urged that domestic courts ought to be the appropriate institution because such courts prevent total insulation of host governments from regulating for the public interest and are more likely to consider the environmental, security, safety, and social interests than ISDS tribunals.[37] Accordingly, Economist Joseph Stiglitz, Professor Judith Resnik, Professor Cruz Reynoso, and former Federal Judge Lee Sarokin shared these concerns in their letter to Congress opposing ISDS.[38] The letter noted that ISDS risks undermining democratic norms because domestic laws and regulations enacted by elected officials are insulated from input in a private arbitration process.[39] The authors further noted that domestic law follows precedent and is a "uniform application of the law regardless of which judge or court hears a case" whereas ISDS arbitration panel decisions cannot be appealed and are not required to follow precedent.[40]

Furthermore, arguments against ISDS are also grounded upon the protection of national sovereignty over corporate

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35. *See id.*
36. JOHNSON, SACHS & SACHS, *supra* note 1, at 5.
37. *Id.*
38. *See generally* Letter from Judith Resnik, Professor, Yale Law Sch., Cruz Reynoso, Professor, Univ. of Cal., Honorable H. Lee Sarokin, Former U.S. Circuit Judge, U.S. Court Appeals, Joseph E. Stiglitz, Professor, Colum. Univ., & Laurence H. Tribe, Professor, Harvard Law Sch., to Mitch McConnell, Senate Majority Leader, Harry Reid, Senate Minority Leader, John Boehner, Speaker of the House, & Nancy Pelosi, House Minority Leader (Apr. 30, 2015) ("ISDS weakens the rule of law by removing the procedural protections of the legal system and using a system of adjudication with limited accountability and review. It is antithetical to the fair, public, and effective legal system that all Americans expect and deserve.").
39. *See id.*
40. *Id.*

interests.[41] In other words, allowing corporations to circumvent domestic courts and sue host-state governments to seek relief from taxpayers in ISDS tribunals compromise government sovereignty. An investor's suit against a host government's public welfare policy concerning the environment or public health thus interferes with a government's regulatory autonomy. With that in mind, critics have suggested that ISDS allows investors to challenge public interest regulation thereby creating substantial risk of undermining State sovereignty.[42]

In summary, arguments regarding ISDS have become increasingly politicized where competing interests of thought and different actors contribute to shape its institutional design and role. On a horizontal dimension, interest groups have debated the benefits and costs of arbitration, whereas on a vertical dimension governments encounter a challenge to balance national sovereignty against global or investor interests.[43]

III. RECENT DEVELOPMENTS

Investor-state disputes have increased dramatically over the past two decades. The growth in international investment agreements has brought a major expansion in the filing of claims.[44] In an Issue Note published on July 15, 2015, the United Nations Conference on Trade and Development ("UNCTAD") found that in 2014 claimants initiated 42 known treaty-based ISDS cases.[45] The total number of known ISDS cases reached 608."[46] The following graph illustrates the overall known ISDS claims from 1987 to 2014 and includes arbitration proceedings

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41. *See* Alex Weaver, *Between ICSID and a Hard Place*, 22 COLUM. J. EUR. L. (Apr. 10, 2015), http://cjel.law.columbia.edu/preliminary-reference/2015/between-icsid-and-a-hard-place/ ("The opposition to ISDS is grounded in a legitimate concern over sovereignty and regulatory latitude.").

42. *See* Claire Provost & Matt Kennard, *The Obscure Legal System That Lets Corporations Sue Countries*, GUARDIAN (June 10, 2015), http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid.

43. *See* Thomas Dietz & Marius Dotzauer, *Political Dimensions of Investment Arbitration: ISDS and the TTIP Negotiations* 19–20 (ZenTra Ctr. for Transnational Studies, Working Paper No. 48/2015).

44. Karton, *supra* note 7, at 1–2.

45. U.N. CONFERENCE ON TRADE AND DEV., *supra* note 2, at 1.

46. *Id.*

arising from International Centre for Settlement of Investment Disputes ("ICSID") and non-ICSID disputes.

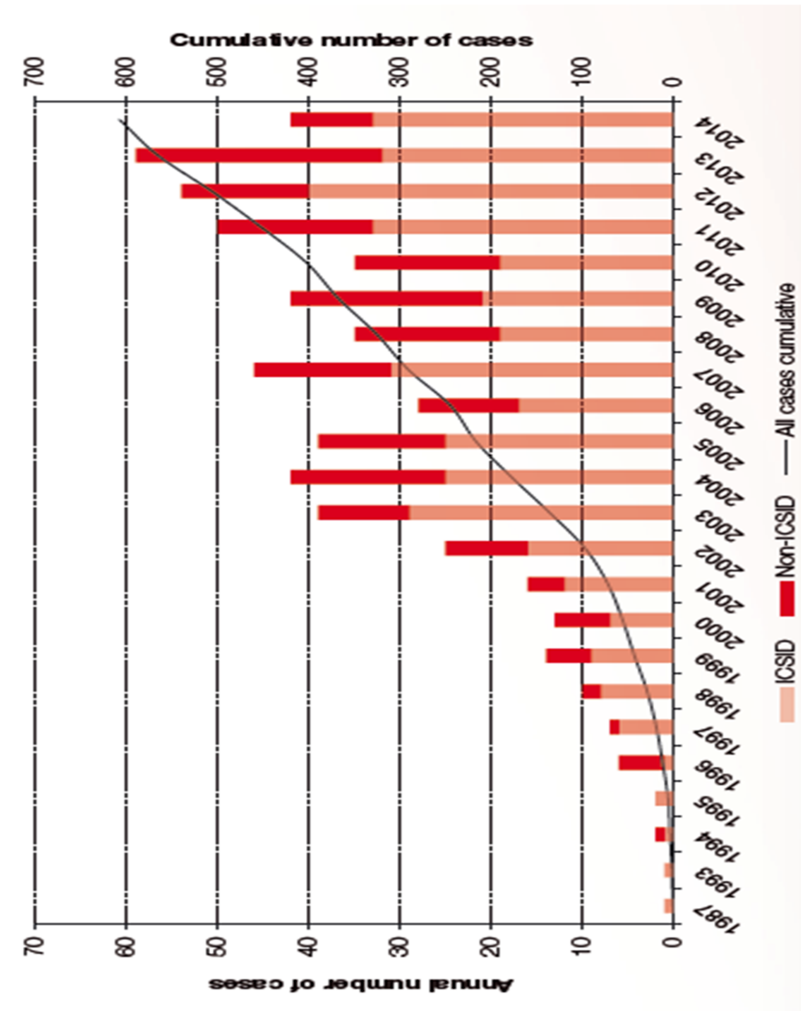

Figure 1. The overall number of known ISDS claims is 608. Ninety-nine governments around the world have been respondents to one or more known ISDS claims.[47]

47. *Id.* at 2.

In the recent Issue Note, the UNCTAD also presented the types of claims that were subject to dispute proceedings. Some include claims arising from legislative reforms in the renewable energy sector, alleged discrimination of foreign investors, alleged direct expropriations of investments, and cases concerning public policies, including environmental issues, anti-money laundering, and taxation.[48] Furthermore, for the reported cases, the amount claimed ranges from $8 million to about $2.5 billion.[49]

On June 25, 2015, the UNCTAD, published the 2015 World Investment Report.[50] For each year, the Report covers the latest trends in foreign direct investment and analyzes in-depth one selected topic related to foreign direct investment and development.[51] The 2015 Report "aims to inform global debates on the future of the international policy environment for cross-border investment."[52] In particular, it addresses the key challenges in international investment protection and promotion, including the right to regulate, investor-state dispute settlement, and investor responsibility.[53] In Chapter 4, the Report addresses an action for IIA reform. It notes that, as a result of the increase in ISDS cases during the last fifteen years, broad IIA provisions have allowed investors to challenge core domestic policy decisions in the areas of environmental, energy, and health policies.[54] Unlike the past, "there are more and more developed countries as defendants."[55] Consequently, it has triggered global debate about the pros and cons and whether or not to have ISDS. In response to these recent developments, "a number of countries have been reassessing their positions on ISDS and have already adopted certain reform measures."[56] According to the Report, two broad alternatives have come to

48. *See id.* at 4.

49. *Id.*

50. U.N. CONFERENCE ON TRADE AND DEV., *World Investment Report 2015: Reforming International Investment Governance*, U.N. Doc. UNCTAD /WIR/2015 (June 25, 2015).

51. *See generally World Investment Reports*, U.N. CONFERENCE ON TRADE AND DEV., http://unctad.org/en/pages/DIAE/World%20Investment%20Report /WIR-Series.aspx (last visited Oct. 5, 2016) (providing digital access to the World Investment Report, published annually since 1991).

52. U.N. CONFERENCE ON TRADE AND DEV., *supra* note 50, at iii.

53. *Id.*

54. *See id.* at 125.

55. *Id.*

56. *Id.* at 145.

exist: to keep and reform ISDS, as some countries have done, or to abandon and/or replace ISDS. As the Report suggests, given the recent criticism of the existing system, "maintaining the status quo is hardly an option."[57]

IV. ANALYSIS

With the recent growth in ISDS cases, countries have modified their approach in general trade policy and international investment treaties.[58] In response to adverse outcomes in ISDS cases initiated by investors, an emerging trend in international trade policy from various countries has resulted in a shift towards safeguarding against ISDS abuses and further protecting host-state sovereignty.[59] As a result of increased international attention on ISDS abuses, countries are thereby engaging in a more comprehensive approach toward protecting host state-sovereignty.[60] Recent IIAs, bilateral investment treaties ("BIT"s), and ongoing trade negotiations among specific countries will thus illustrate an increased role in international investment law to protect a host state's autonomy and mitigate potential ISDS abuses.

A. INDIA: WHITE INDUSTRIES AUSTRALIA LIMITED V. REPUBLIC OF INDIA AND ITS IMPLICATIONS ON INDIA'S NEW MODEL BIT

Recently, the Government of India approved a new Model BIT that will provide the terms and conditions for India's future trade negotiations, including the renegotiations of some of its 83 existing BITs and ongoing negotiations with the United States.[61] In general, the goal for structuring a BIT for a host state is to find an appropriate balance between two competing interests: providing investor protection and preserving a host state's regulatory autonomy. India's new Model BIT differs from the previous 2003 Model BIT, where the 2003 Model BIT functions

57. *Id.*

58. *See* Karton, *supra* note 7, at 1–2.

59. *See FACT SHEET: Investor-State Dispute Settlement (ISDS)*, *supra* note 9.

60. *See id.*

61. *See India Approves Model Bilateral Investment Treaty*, CMS LAW-NOW (Jan. 1, 2016), http://www.cms-lawnow.com/ealerts/2016/01/india-approves-model-bilateral-investment-treaty.

as being more "investor-friendly." Since 2010, notices and claims from various foreign investors under different BITs have increased, and as a result, it has influenced a shift towards more regulatory freedom.[62] Subsequently, the new Model BIT shifts to being more "host-state friendly" by providing greater regulatory freedom and government protections.

After 2010, India experienced a surge in its involvement with International Trade Administration ("ITA") claims.[63] In particular, a case in 2011 greatly influenced India's reassessment on how to approach future bilateral investment treaties. In *White Industries Australia Limited v. Republic of India*, a tribunal found that India violated its obligations to the investor under the India-Australia BIT.[64] The ruling was the first investment treaty decision adverse to India.[65] White Industries, an Australian company, had been in contract to supply and develop equipment for Coal India.[66] A dispute then arose between both parties and it was then submitted to the International Chamber of Commerce ("ICC").[67] Nine years after the ICC awarded in favor of White Industries, the company was still waiting for domestic Indian Courts to decide upon its jurisdictional claims.[68] White Industries then filed a claim against India under the Australia-India BIT and claimed that India violated its obligations because it had "treated White's investment on a less favorable basis than treatment afforded to investments of investors of a third country."[69] Similar to the 2003 Model BIT, the Australia-India BIT contains a broad definition of what constituted "investment" by a foreign investor.[70] The Australia-India BIT does not contain language

62. *See* LAW COMM'N OF INDIA, REPORT NO. 260: ANALYSIS OF THE 2015 DRAFT MODEL INDIAN BILATERAL INVESTMENT TREATY ¶ 1.6–7 (2015).

63. *See id.*

64. *Id.*

65. *India Approves Model Bilateral Investment Treaty*, CMS LAW-NOW (Jan. 1, 2016), http://www.cms-lawnow.com/ealerts/2016/01/india-approves-model-bilateral-investment-treaty.

66. White Indus. Austl. Ltd. v. Republic of India, Final Award, ¶ 3.2.2, (ITA Inv. Treaty Cases 2011), http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

67. *Id.* ¶ 3.2.24–29.

68. *Id.* ¶ 4.3.5.

69. *Id.* ¶ 4.4.1.

70. *See* Agreement on the Promotion and Protection of Investments art. 1, India-Austl., Feb. 26, 1999, http://finmin.nic.in/bipa/Australia.pdf; s*ee also India Model Text of BIPA*, ITALAW art. 1, http://www.italaw.com/sites/default/files/archive/ita1026.pdf.

requiring an investor to have actual presence, nor a requirement of having business activities in the host state.[71] The following text is what constitutes an "investment" under the Australia-India BIT.

> (c) "investment" means every kind of asset, including intellectual property rights, invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and investment policies of that Contracting Party . . . .
>
> (d) "investor" means:
>
>> (i) in respect of India, a company or a national. A national is a person deriving status as an Indian national from the laws in force in India;
>>
>> (ii) in respect of Australia, a company or a natural person who is a citizen or permanent resident of Australia. A permanent resident is a natural whose residence in Australia is not limited as to time under its laws:[72]

In addition, the Australia-India BIT contains a most favored nation ("MFN") clause.[73] A MFN clause allows an investor to import more beneficial standards of protection from other treaties. Subsequently, White Industries argued that the MFN clause allowed the company to import a more advantageous provision from the India-Kuwait BIT, which requires the host state to "provide effective means of asserting claims and enforcing rights."[74] The tribunal accepted the argument and awarded the company $4.08 million plus interest and fees.[75]

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71. *See* Agreement on the Promotion and Protection of Investments, *supra* note 70; *India Model Text of BIPA*, *supra* note 70.

72. Agreement on the Promotion and Protection of Investments art. 1, India-Austl., Feb. 26, 1999, http://finmin.nic.in/bipa/Australia.pdf.

73. *Id.* art. 16 ("[W]hether general or specific, entitling investments by investors of the other Contracting Party to treatment more favorable than is provided for by the present agreement, such rules shall to the extent that they are more favorable prevail over the present Agreement.").

74. Agreement for the Encouragement and Reciprocal Protection of Investment, India-Kuwait, art. 4, Nov. 27, 2001, http://finmin.nic.in/bipa/Kuwait.pdf.

75. White Indus, Austl. Ltd. v. Republic of India, *supra* note 66, ¶ 3.2.33.

Thus, the tribunal found that delays by India Courts amounted to a breach of the "effective means" standard under the India-Kuwait BIT.[76]

As a result of the decision in *White Industries Australia Limited*, India undertook a review of its 2003 Model BIT and made a new draft of a Model BIT.[77] The new Model BIT shifts toward a more host-state friendly framework. The Law Commission of India's Report on the first Model BIT draft states that "[t]he Report is presented with a view to assist the Government in achieving a balanced negotiating text, that takes into consideration the protection of Indian investors investing abroad, as well as safeguarding the regulatory powers of the State."[78]

Consequently, the new Model BIT eliminates the previous broad definition of what constitutes an "investment" and does not mention the application of an MFN clause.[79] The new Model BIT adopts an "enterprise-based" approach to the definition of investment.[80] The following text reflects what constitutes an "investment" under the new Model BIT released in January 2016.

> "[I]nvestment" means an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the

76. *India Liable under BIT for Extensive Judicial Delays*, THOMSON REUTERS, Feb. 29, 2012, at 2–3 ("[T]he court delays did not reach the high standard required to constitute a denial of justice, but they did breach the less demanding 'effective means' standard in the India-Kuwait BIT.").

77. *See* LAW COMM'N OF INDIA, *supra* note 62, ¶ 1.7 ("As a result of the adverse *White Industries* award and the ITA notices under different BITs, there is renewed focus on India's BIT programme.").

78. *Id.* ¶ 1.12.

79. *See Model Text for the Indian Bilateral Investment Treaty*, MINISTRY FIN., http://finmin.nic.in/the_ministry/dept_eco_affairs/investment_division/ModelBIT_Annex.pdf.

80. *See id.* art. 1.

> investment is made. An enterprise may possess the following assets . . . .
>
> "enterprise" means:
>
> > (i) any legal entity constituted, organised and operated in compliance with the law of a Party, including any company, corporation, limited liability partnership or a joint venture; and
> >
> > (ii) a branch of any such entity established in the territory of a Party in accordance with its law and *carrying out business activities* there.
>
> "[I]nvestor" means a natural or juridical person of a Party, other than a branch or representative office, that has made an investment in the territory of the other Party;
>
> For the purposes of this definition, a "juridical person" means:
>
> > (a) a legal entity that is constituted, organised and operated under the law of that Party and that has *substantial business activities* in the territory of that Party; or
> >
> > (b) a legal entity that is constituted, organised and operated under the laws of that Party and that is directly or indirectly owned or controlled by a natural person of that Party or by a legal entity mentioned under subclause (a) herein.[81]

As a result, the new Model BIT defines an investment as "an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made . . . ."[82] Enterprise includes "a branch of any such entity established in the territory of a Party in accordance with its law and carrying out business activities there."[83] In contrast, the Australia-India BIT described an

81. *Id.*
82. *Id.*
83. *Id.* art. 1.

investment to include "every kind of asset."[84] Therefore, the definition of "investment" is more narrowly tailored than the Australia-India BIT, which is similar in language to India's 2003 Model BIT. Furthermore, the new Model BIT requires investors to exhaust local remedies at least 5 years before commencing a "notice of dispute" under an international tribunal.[85] Also, the new Model BIT does not contain a MFN provision.[86] In effect, unlike *White Industries Australia Limited*, the new Model BIT would prohibit treaty shopping and disallow investors to import beneficial provisions in other India BITs.

The adverse outcome in *White Industries Australia Limited* and the recent increase in pending claims from investors have shifted India's new Model BIT from a prior "investor-friendly" to a "host-state friendly" framework. Although India's new Model BIT ensures investor protection, it tips the scale more toward protecting its sovereignty. As India emerges in the global marketplace towards a more open economy, the country's new model BIT illustrates greater protections for governance. While India continues to integrate with the global economy and negotiate prospective investment trade treaties, the new Model BIT provides India with more autonomy and safeguards against prospective ISDS claims like in *White Industries Australia Ltd*.

B. CANADA: LONE PINE RESOURCES INC. V. THE GOVERNMENT OF CANADA AND ITS IMPLICATIONS ON CETA

In August 2014, Canada and the European Union concluded negotiations on the EU-Canada Comprehensive Economic and Trade Agreement ("CETA").[87] In Canada and the European Union, ISDS measures and recent cases have raised public scrutiny and doubts concerning FTAs.[88] Questions in Germany

84. *See* Agreement on the Promotion and Protection of Investments, India-Austl., Feb. 26, 1999, http://finmin.nic.in/bipa/Australia.pdf.

85. *Model Text for the Indian Bilateral Investment Treaty*, *supra* note 79, art. 15.

86. *See supra* note 79 and accompanying text.

87. *See Comprehensive Economic and Trade Agreement (CETA)*, EUROPEAN COMM'N, http://ec.europa.eu/trade/policy/in-focus/ceta/ (last updated Aug. 3, 2016).

88. *See* Les Whittington, *Investor Protection Fears Could Unravel Canada-EU Trade Deal*, TORONTO STAR (Jul. 26, 2014), http://www.thestar.com /news/canada/2014/07/26/investor_protection_fears_could_unravel_canadaeu_t rade_deal.html.

about the value of ISDS measures were heightened by a case involving a Swedish power company, Vattenfall, filing suit against Germany for $5.8 billion plus interest after Germany began to phase out nuclear energy.[89] The final decision was not available to the public.[90] Similarly, a case also raised doubt in Canada where an energy company, Lone Pine Resources Inc., initially filed a $250 million suit against Canada under provisions of NAFTA after Quebec implemented a ban on fracking.[91] The case remains active. Subsequently, Canada and the European Union began to increase their attention to reassess ISDS as prospective trade negotiations between both countries continued. The consolidated text of the agreement reflects this commitment.[92] In the preamble, the agreement states that "the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity."[93] As a result of increased public criticism and the Lone Pine Resources' case, the final CETA negotiations signal an indication that Canada and the EU, have begun to consider reforming ISDS and to further protect state sovereignty.

In *Lone Pine Resources Inc. v. The Government of Canada*, Lone Pine Resources alleges that the company has contractual interests relating to five exploration licenses for petroleum,

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89. *See generally* NATHALIE BERNASCONI-OSTERWALDER & MARTIN DIETRICH BRAUCH, INT'L INST. FOR SUSTAINABLE DEV., THE STATE OF PLAY IN VATTENFALL V. GERMANY II: LEAVING THE GERMAN PUBLIC IN THE DARK 2 (Dec. 2014), http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf ("According to most recent media reports, Vattenfall is claiming compensation of €4,675,903,975.32 (US$5.8 billion) plus 4 per cent interest. . . . [T]he German government spent over €3.2 million on attorneys' fees, experts' fees and services such as translations; that amount also includes €200,000 spent on arbitration costs. Machnig also stated that the German government estimates that the total costs of the proceedings could reach €9 million.").

90. *See* Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Decision, (ITA Inv. Treaty Cases 2013), http://www.italaw.com/cases/1654#sthash.gUAhqAcV.dpuf.

91. Lone Pine Resources Inc. v. Government of Canada, Notice of Arbitration, ¶¶ 53–58 (Sept. 6, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf.

92. *See Consolidated CETA Text*, EUROPEAN COMM'N, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (last visited Oct. 1, 2016).

93. *Id.* at 3.

natural gas, and underground reservoirs.[94] The licenses were signed with the holder, Junex Inc., a Canadian company.[95] In 2011, a Quebec law, *An Act to limit oil and gas activities* (the "Act"), was enacted to revoke exploration licenses located in the St. Lawrence River, and consequently, the Act revoked one of Lone Pine Resources' exploration licenses.[96] Lone Pine claimed that the revocation of the license violated Canada's obligations under Article 1105 of the North American Free Trade Agreement ("NAFTA").[97] Article 1105 of NAFTA provides that "each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[98] In addition, Lone Pine claimed the revocation of the license violated Canada's obligations under Article 1110 of NAFTA.[99] Article 1110 states: "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except: for a public purpose; on a non-discriminatory basis; in accordance with due process of law, and on payment of compensation."[100] Lone Pine therefore asserts that the Act breaches NAFTA in two ways: (1) that the revocation constituted an uncompensated "expropriation" that lacks a public purpose in violation of Article 110; and (2) the Act violates Canada's obligation to afford the "minimum standard" guaranteed by Article 1105 to Lone Pine's investments.

In response, the Government of Canada alleged that the Act does not affect the claimant because it is not the holder of the exploration license owned by Junex.[101] The Government notes

94. *See Cases Filed Against the Government of Canada: Lone Pine Resources Inc. v. Government of Canada*, GLOBAL AFF. CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/lone.aspx?lang=eng (last modified Mar. 22, 2016) [hereinafter GLOBAL AFF. CAN.].

95. *Id.*

96. *See* Lone Pine Resources Inc. v. The Government of Canada, Claimant's Memorial, ¶ 6 (ITA Inv. Treaty Cases 2015), http://www.italaw.com/sites /default/files/case-documents/italaw4259.pdf [hereinafter Lone Pine Resources].

97. *See id.* ¶ 280.

98. *See id.*; *see also* North American Free Trade AgreementCan-Mex.-U.S., art. 1105, Dec. 17, 1992, 32 I.L.M. 289.

99. Lone Pine Resources, *supra* note 96, ¶ 7.

100. *Id.*

101. *See* GLOBAL AFF. CAN., *supra* note 94.

that the Act is a legitimate measure of public interest that applies indiscriminately to all holders of exploration licenses, and achieves an important public policy objective—the protection of the St. Lawrence River.[102] The Act therefore cannot be considered an "arbitrary, unfair or inequitable measure."[103] Lastly, the Government of Canada disputes the investment was capable of being expropriated, and even if so, the Act was not "tantamount" to expropriation or substantially depriving the investor because only one of the five licenses was revoked.[104] Ultimately, the Government suggests that the Act is a "legitimate exercise of the Government of Quebec's police power and, thus, the measure cannot constitute an expropriation."[105] The status of the case remains active. As Canadian taxpayers remain subject to liability for millions of dollars, the case has long raised public scrutiny in Canada.[106] Consequently, an adverse decision holding Canada in violation of the agreement could further ignite public tensions on the country's trade policies moving forward.

Furthermore, Canada is the most sued country under NAFTA and a majority of the disputes involve investors challenging the country's environmental laws.[107] As a result of numerous ISDS claims against Canada, including Lone Pine Resources Inc., a growing backlash has resulted in Canada and globally against ISDS claims challenging public policy and regulatory measures.[108] With that in mind, the prospective trade agreement between Canada and the European Commission ("CETA") can provide an indication on whether Canada has

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *See generally* Julian Beltrame, *Quebec Fracking Ban Lawsuit Shows Perils Of Free Trade Deals: Critics,* HUFFINGTON POST (Oct. 10, 2013), http://www.huffingtonpost.ca/2013/10/03/quebec-fracking-ban-lawsuit_n_4038173.html (warning that Canada needs to be careful in negotiating trade pacts around the world).

107. Sunny Freeman, *NAFTA's Chapter 11 Makes Canada Most-Sued Country Under Free Trade Tribunals*, HUFFINGTON POST (Jan. 14, 2015), http://www.huffingtonpost.ca/2015/01/14/canada-sued-investor-state-dispute-ccpa_n_6471460.html.

108. *See* Scott Sinclair, *Investor vs. State: Canada is Being Pummeled by NAFTA Corporate Lawsuits. Why Do We Put Up with It?*, CANADIAN CTR. FOR POL'Y ALTERNATIVES (July 1, 2015), https://www.policyalternatives.ca/publications/monitor/investor-vs-state.

altered its terms on ISDS and shifted more towards protecting a host state's regulatory freedom.

On September 26, 2014, the Canada-EU summit marked the end of the negotiations of CETA.[109] The trade-negotiating mandate became available to the public in December 2015.[110] The Preamble of CETA recognizes that the provisions preserve the right to regulate and preserve a host state's flexibility to achieve legitimate policy objectives.[111] In addition, the preamble also ensures recognition of the "importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation."[112] Therefore, while CETA ensures investor protection, the general purpose of CETA also highlights the significance of protecting state sovereignty. Under NAFTA, as noted in *Lone Pine Resources Inc.*, the agreement contains a broad public interest exception under what constitutes an expropriation. However, under CETA, the language goes further to address a host state's right to regulate:

> For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.[113]

The language differs from NAFTA's expropriation clause and further expands protection for a host state's regulatory autonomy. As illustrated in the text, CETA thus provides "a presumption that there is no indirect expropriation where a new regulation in the field of health, safety and environment makes it substantially more costly for companies to deploy their activities in the host State concerned."[114]

109. *See Canada*, EUROPEAN COMM'N, http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/ (last modified Sept. 13, 2016).

110. *See id.*

111. *Consolidated CETA Text*, *supra* note 92.

112. *Id.*

113. *Id.* at 183.

114. *EU Law Alert: Increased Protection of Foreign Investments Under the Comprehensive Economic and Trade Agreement Recently Signed Between the European Union and Canada*, KRAMER LEVIN NAFTALIS & FRANKEL LLP (Oct.

In addition, the ISDS provisions in CETA stipulate new rules on the conduct of procedures in ISDS proceedings. Specifically, these include "complete transparency—all documents submitted will be publicly available, all hearings will be open to the public and all interested parties will be able to make submissions."[115] The improved transparency is intended to replace previous BIT agreements between Canada and the European Commission, which had given rise to serious concerns as to "both transparency and abusive or excessive restrictions on public authorities in their relations with foreign investors."[116] As a result of much criticism of the confidential arbitral proceedings, Article 8.36 of the consolidated text ensures transparency of proceedings by adopting the UNCITRAL Rules on Transparency to all ISDS proceedings.[117]

With initiatives also pushed by the European Commission, the recent conclusions of negotiations under CETA illustrate Canada's commitment to reform ISDS and further protect host-state regulatory autonomy.[118] The rise of public dissatisfaction may not completely reflect the changes made in ISDS under CETA. Nevertheless, it does provide a greater emphasis than previous IIAs on ensuring host state sovereignty.

C. AUSTRALIA: PHILIP MORRIS ASIA LIMITED V. THE COMMONWEALTH OF AUSTRALIA AND RESULTING CHANGES UNDER CHAFTA

On June 17, 2015, China and Australia signed the China-Australia Free Trade Agreement ("ChAFTA"), which was implemented on December 20, 2015.[119] Prior to the enactment,

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27, 2014), http://www.kramerlevin.com/EU-Law-Alert-Increased-Protection-of-Foreign-Investments-Under-the-Comprehensive-Economic-and-Trade-Agreement-Recently-Signed-Between-the-European-Union-and-Canada-10-27-2014/.

115. *See* EUROPEAN COMM'N, CETA – SUMMARY OF THE FINAL NEGOTIATING RESULTS 11 (2016), http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf; *see generally* UNCITRAL, RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (Jan. 2014), https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf (explaining rule on transparency).

116. EUROPEAN COMM'N, *supra* note 115, at 12.

117. *See Consolidated CETA Text*, *supra* note 92, at 66.

118. *See Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, EUROPEAN COMM'N (Feb. 2016), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf.

119. *See China-Australia Free Trade Agreement (ChAFTA)*, AUSTRALIAN

in 2011, tobacco company Phillip Morris filed suit against Australia alleging the Tobacco Plain Packaging Act 2011 (the "Tobacco Act") prohibited the company from using its intellectual property on tobacco products and packaging.[120] The Tobacco Act regulates the retail packaging and appearance of tobacco products.[121] Its stated objectives include, "the improvement of public health by discouraging people from taking up smoking, encouraging people to give up smoking, discouraging people from relapsing if they have given it up, and reducing people's exposure to smoke from tobacco products to improve public health by discouraging people from smoking."[122] The company claimed that the Tobacco Act violated a trade agreement between Australia and Hong Kong.

The suit resulted in international public criticism and dissent from the ISDS mechanism in FTAs.[123] Robert French, Chief Justice of Australia's Highest Court, subsequently gave a speech reflecting the public dissatisfaction of ISDS proceedings by highlighting the significance of the Philip Morris dispute and the risks posed by ISDS.[124] The recent approval of ChAFTA on June 17, 2015, even though ISDS proceedings are included in agreement, can provide an indication of ISDS changes and whether more protection for a host state's regulatory autonomy exists.

In *Philip Morris Asia Ltd. v. Australia*, Philip Morris, a United States company that holds a Hong Kong-based subsidiary, claimed that the Tobacco Act violated provisions in the Australia-Hong Kong BIT.[125] Philip Morris alleged that the Tobacco Act violated the commitment to "fair and equitable

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TRADE AND INV. COMM'N, https://www.austrade.gov.au/Australian/Export/Free-Trade-Agreements/chafta (last visited Oct. 1, 2016).

120. *See* Philip Morris Asia Ltd. v. Australia, Notice of Claim, ¶ 10, (ITA Inv. Treaty Cases 2011), http://www.italaw.com/sites/default/files/case-documents/ita0664.pdf [hereinafter Philip Morris Claim].

121. *See* JT Int'l SA v Commonwealth [2012] HCA 43 (Austl.).

122. *Id.*

123. *See e.g.*, Danielle Mackey, *The US-EU Trade Treaty That Could Let Corporations Sue Governments*, ALJAZEERA AM. (May 27, 2015), http://america.aljazeera.com/articles/2015/5/27/a-eu-us-trade-agreement-could-allow.html ("[T]he Philip Morris case exemplifies some of the driving factors for the public outcry over the system . . . .").

124. Chief Justice Robert French, Investor-State Dispute Settlement—A Cut Above the Courts?, Speech at the Supreme and Federal Courts Judges' Conference 4–6 (July 9, 2014), http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf.

125. *See* Philip Morris Claim, *supra* note 120, ¶ 10 (b).

treatment" of the company's investments under Article 2(2).[126] In addition, the company argued that the Tobacco Act constituted a direct and indirect expropriation of investments without adequate compensation, thereby violating Article 6 of the Hong Kong-Australia BIT.[127] The following text illustrates the language governing expropriation in Article 6:

> Investors of either Contracting Party shall not be deprived of their investments nor subjected to measures having effect equivalent to such deprivation in the area of the other Contracting Party except under due process of law, for a public purpose related to the internal needs of that Party, on a non-discriminatory basis, and against compensation.[128]

The Government of Australia responded by arguing that the plain packaging measures are non-discriminatory regulatory measures to achieve a public welfare objective: the protection of public health.[129] The government asserted that such measures do not amount to expropriation and a duty of compensation.[130] Furthermore, the government argued that the measure did not constitute unfair or inequitable treatment because the measure was not arbitrary.[131] Rather, the Tobacco Act was based on a "broad range of studies and reports on which the Australian Government has relied in good faith, and is supported by leading Australian and international public health experts" and was "adopted following a transparent process."[132] Essentially, the government alleges to have responded in good faith with a "reasonable regulatory response" to address public health concerns.[133] After a lengthy process, the tribunal eventually dismissed the suit, ruling in favor of the Government of Australia. However, Australians incurred more than fifty

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126. *Id.*
127. *Id.* ¶ 10 (a).
128. Agreement for the Promotion and Protection of Investments, Austl.-H.K., Sept. 15, 1993, http://investmentpolicyhub.unctad.org/Download/TreatyFile/152.
129. *See* Philip Morris Asia Ltd. v. Australia, Case No. 2012-12, Australia's Response to the Notice of Arbitration, ¶ 38 (Perm. Ct. Arb. 2011), http://www.italaw.com/sites/default/files/case-documents/ita0666.pdf.
130. *Id.* ¶ 46.
131. *Id.* ¶ 47.
132. *Id.* ¶ 49.
133. *See id.*

million dollars of taxpayers' money arising from legal costs to defend against the complaint.[134]

While increased public criticism against ISDS clauses resulted from the Philip Morris suit, Australia signed a bilateral trade agreement with China.[135] The agreement makes several changes in ISDS proceedings and attempts to further protect a host state country's right to regulate for legitimate public welfare objectives. First, the preamble of the agreement notes the recognition of safeguarding public welfare. "Upholding the rights of their governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare."[136]

Secondly, under Article 9.11, the text includes a public welfare objective provision: "Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section."[137]

Furthermore, under Article 9.17, the agreement makes certain changes to ISDS settlement proceedings by increasing transparency throughout the arbitration process and proceedings.[138] Lastly, Article 9.8 further addresses regulatory autonomy for a host state. The Article ensures that both states are entitled to enact measures if it is:

> (a) necessary to protect human, animal or plant life or health; (b) necessary to ensure compliance with laws and regulations that are not inconsistent with this Agreement; (c) imposed for the protection of national treasures of artistic, historic or archaeological value; or (d) relating to the conservation of living or non-living exhaustible natural resources.[139]

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134. Lori Wallach, *Public Interest Takes a Hit Even When Phillip Morris' Investor-State Attack on Australia Is Dismissed*, HUFFINGTON POST (Jan. 5, 2016, 2:45 PM), http://www.huffingtonpost.com/lori-wallach/public-interest-takes-a-h_b_8918010.html.

135. *See* Free Trade Agreement, Austl.-China, June 17, 2015, http://dfat.gov.au/trade/agreements/chafta/official-documents/Pages/official-documents.aspx.

136. *Id.* at pmbl.

137. *Id.* art. 9.11(4).

138. *See id.* art. 9.17.

139. *Id.* art. 9.8(1).

Thus, the increase in public criticism arising from the Philip Morris suit has resulted in certain adjustments in Australia's trade policy that correspond to greater transparency of arbitration proceedings and further protection of host-state sovereignty.

D. AUSTRALIA, BRUNEI, CANADA, CHILE, JAPAN, MALAYSIA, MEXICO, NEW ZEALAND, PERU, SINGAPORE, U.S., VIETNAM: PUBLIC SCRUTINY CONCERNING ISDS AND ITS IMPLICATIONS ON THE TRANS-PACIFIC PARTNERSHIP (TPP)

On February 4, 2016, the Trans-Pacific Partnership, one of the world's largest multinational trade deals, was signed by twelve member nations in New Zealand.[140] The agreement is not currently in force, though the signing represents "an important step" toward implementation.[141] Throughout the negotiation process in the United States and other member nations the prospective deal has received increased scrutiny among citizens and policymakers. After intense scrutiny concerning a lack of transparency, the text was publicly released on November 5, 2015.[142] As a result of the recent signing, Congressional approval is subsequently required for the agreement to enter into force in the United States.[143] During a Senate floor debate, Senator Elizabeth Warren expressed her concerns on the signing of the agreement in the following statement:

> I urge my colleagues to reject the T.P.P. and stop an agreement that would tilt the playing field even more in favor of big multinational corporations and against working families . . . . Evidence of this tilt can be seen in

140. *See* Rebecca Howard, *Trans-Pacific Partnership Trade Deal Signed, but Years of Negotiations Still to Come*, REUTERS (Feb. 4, 2016), http://www.reuters.com/article/us-trade-tpp-idUSKCN0VD08S.

141. *See id.*

142. *TPP Debate Ramps Up Following Public Release of Trade Deal Text*, INT'L CTR FOR TRADE & SUSTAINABLE DEV. (Nov. 12, 2015), http://www.ictsd.org/bridges-news/bridges/news/tpp-debate-ramps-up-following-public-release-of-trade-deal-text; *see also* Lori Wallach, *Polls Show Americans Oppose Our Trade Policy but Like Trade*, WORLD POST (Mar. 11, 2015 10:26 AM), http://www.huffingtonpost.com/lori-wallach/polls-show-americans-oppo_b_6847006.html.

143. *See* Jackie Calmes, *Trans-Pacific Partnership Is Reached, but Faces Scrutiny in Congress*, N.Y. TIMES (Oct. 5, 2015), http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html?_r=0.

> a key T.P.P. provision, investor state dispute resolution, ISDS. With ISDS, big companies get the right to challenge laws they don't like—not in courts but if [sic] front of industry friendly arbitration panels that sit outside any court system. Those panels can force taxpayers to write huge checks to big corporations with no appeals.[144]

As illustrated, Senator Warren specifically criticized ISDS and its potential adverse implications on a host state's taxpayers when claims are initiated in "industry-friendly" arbitration panels.[145] With many other stakeholders sharing Senator Warren's consistent concerns on the TPP, negotiations have not completely rejected these considerations. Criticism concerning ISDS remained throughout the negotiating process. Even though ISDS is still incorporated in the negotiated agreement, the agreement includes some changes regarding its application.[146]

First, with respect to regulatory autonomy and host-state sovereignty, the agreement provides each country the ability to regulate in the public interest. Under most contemporary trade agreements, investors are protected against expropriation. In the TPP, an expropriation is present when a Party "interferes with a tangible or intangible property right or property interest in an investment."[147] A direct expropriation occurs when an investment is nationalized or "otherwise directly expropriated through formal transfer of title or outright seizure."[148] An indirect expropriation occurs when "an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[149] The

144. Statement of Sen. Warren, *Senate Session Part 2*, C-SPAN (Feb. 2, 2016), www.c-span.org/video/?c4579801/tpp.

145. *See id.*

146. *See generally* Peter K. Yu, *TPP Trade Pact Still Needs Improvements to Protect Governments From Foreign Suits*, ECONOTIMES, Feb. 15, 2016, http://www.econotimes.com/TPP-trade-pact-still-needs-improvements-to-protect-governments-from-foreign-suits-160947 ("To respond to these criticisms, the TPP has built some new substantive and procedural safeguards into its investment and related chapters.").

147. *The Trans-Pacific Partnership: Chapter 9–Investment*, MEDIUM BLOG OFFICE U.S. TRADE REPRESENTATIVE, Annex 9-B(1) (Nov 5, 2015), https://medium.com/the-trans-pacific-partnership/investment-c76dbd892f3a#.fbk9tznp4 [hereinafter *TPP Ch. 9*].

148. *Id.* at Annex 9-B(2).

149. *Id.* at Annex 9-B(3).

determination of an indirect expropriation requires a case-by-case inquiry considering several factors.[150] However, the text does provide protection for a host-state country's public policy objectives. The agreement reserves the right for each country to regulate in the public interest. In particular, the following language in the agreement counteracts complete investor protection and the application of indirect expropriation: "[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances."[151]

As shown in the above language, like CETA, the provision does not classify a host-state government's public welfare policies as an "indirect expropriation" except in "rare circumstances."[152] Thus, the language creates a presumption of legitimacy, in favor of host-state government's policies and regulations.

There are additional safeguards incorporated in the agreement concerning ISDS. In the Chapter Summary on Investment, the United States Trade Representative states that the chapter ensures American investors protection, "while reforming the investor-state dispute settlement [ ] system by providing for tools to dismiss frivolous claims and instituting a range of other procedural and substantive safeguards."[153] In particular, some procedural safeguards include prevention of an investor pursuing the same claim in parallel proceedings, amicus curiae submissions, and dismissal of frivolous claims.[154] Furthermore, under arbitration proceedings, the agreement also imposes investors the "burden of proving all elements of its claims."[155] Under the Chapter on Dispute Settlement, the agreement provides some improvements on the ISDS mechanism. Unlike the United States Model BIT, a binding code of conduct for arbitrators does exist. In the Model BIT, there is no explicit provision where an arbitrator is required to disclose

150. *Id.* at Annex 9-B(3)(a)(i–iii).
151. *Id.* at Annex 9-B(3)(b).
152. *See id.*; *see also Comprehensive Economic and Trade Agreement (CETA)*, *supra* note 87.
153. *TPP Ch. 9*, *supra* note 147, at Chapter Summary.
154. *See id.*
155. *Id.* art. 9.23.

any conflict of interest. In contrast, TPP countries will establish a code of conduct for all panelists of a proceeding.[156]

Regarding transparency, the agreement contains a specific chapter on "Transparency & Anti-Corruption."[157] According to the United States Trade Representative, the chapter requires TPP parties to ensure that "their laws, regulations, and administrative rulings related to any matters covered by the TPP Agreement are publicly available and that regulations are subject to notice and comment."[158] The public in each TPP country will thus be able to follow proceedings.[159] Thus, even though the TPP does not contain a specific appeals mechanism for arbitration proceedings as advocated by Senator Warren and others, the agreement signals an improvement on transparency to further safeguard against ISDS abuses.

Lastly, as illustrated in *Philip Morris*, the Australian plain packaging law had previously inspired criticism against the TPP for possibly allowing the deal to embed greater protection for the tobacco industry. Since 2013, many argued that the TPP would continue to provide a favorable position for the tobacco industry against host-countries and respective plain packaging laws.[160] Nevertheless, the growing criticism and public backlash have resulted in a loss for tobacco companies when the final TPP agreement contained language disallowing ISDS protection to

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156. *Compare The Trans-Pacific Partnership: Chapter 28–Dispute Settlement*, MEDIUM BLOG OFFICE U.S. TRADE REPRESENTATIVE (Nov 5, 2015), https://medium.com/the-trans-pacific-partnership/dispute-settlement-a5b4569a9a55#.sy0i2fakn [hereinafter *TPP Ch. 28*], *with 2012 U.S. Model Bilateral Investment Treaty*, BILATERALS (2012), http://www.bilaterals.org/IMG/pdf/BIT_text_for_ACIEP_Meeting.pdf.

157. *See The Trans-Pacific Partnership: Chapter 26–Transparency & Anti-Corruption*, MEDIUM BLOG OFFICE U.S. TRADE REPRESENTATIVE (Nov 5, 2015), https://medium.com/the-trans-pacific-partnership/transparency-and-anti-corruption-3d808cf86184#.gtn27zv3b [hereinafter *TPP Ch. 26*].

158. *Id.*

159. *See* Press Release, Office of the U.S. Trade Representative, Summary of the Trans-Pac. P'ship Agreement, at ¶ 28, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership ("The public in each TPP Party will be able to follow proceedings, since submissions made in disputes will be made available to the public, hearings will be open to the public unless the disputing Parties otherwise agree, and the final report presented by panels will also be made available to the public.").

160. *See generally* Jane Kelsey, *The Trans-Pacific Partnership Agreement: A Gold-Plated Gift to the Global Tobacco Industry?*, 39 AM. J.L. & MED. 237–64 (2013) (explaining that some of proposed Trans-Pacific Partnership Agreement rules, if accepted, could bring about favorable change to the U.S. tobacco industry by removing tariff barriers and regulatory restrictions).

apply to tobacco industries.[161] In particular, under Article 29.5 of the agreement, a host-state government can elect to deny the ability of a tobacco company to challenge a government's "tobacco control measure."[162] The text explicitly states:

> A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party . . . .For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.[163]

In the Chapter Summary, the United States Trade Representative explained that the provision reflects "the ability to regulate manufactured tobacco products and protect public health."[164] For the first time in any trade agreement, each TPP country is given the right to decide whether investors under ISDS can challenge its tobacco control measures.[165] In effect, prior criticism on the tobacco industry and the Australian plain packaging law dispute has resulted in considerable changes in the TPP to safeguard against ISDS abuse from tobacco companies.

In sum, although Senator Warren's criticism has not resulted in a complete abandonment of the ISDS mechanism or establishment of an appeals court, the TPP presents some improvements. Keep in mind, the TPP is a large multilateral agreement consisting of major countries including the United States, Canada, Japan, and Australia. Specifically, the agreement includes economies that represent nearly forty percent of global GDP.[166] Although the agreement is not

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161. *See* Willa Frej, *It's Been a Bad Year for Big Tobacco*, HUFFINGTON POST (Dec. 18, 2015, 11:53 AM), http://www.huffingtonpost.com/entry/big-tobacco-losses_us_5673f7e0e4b06fa6887cebe2.

162. *The Trans-Pacific Partnership: Chapter 29–Exceptions*, MEDIUM BLOG OFFICE U.S. TRADE REPRESENTATIVE, art. 29.5 (Nov 5, 2015), https://medium.com/the-trans-pacific-partnership/exceptions-1299fbf34b76#.mts1mnpxt.

163. *Id.*

164. *See id.* at Chapter Summary.

165. *See id.* ("[T]PP, for the first time in any trade agreement, builds on structures established in the agreement to give each Party the right to decide that its tobacco control measures for manufactured tobacco products cannot be challenged by private investors under Investor-State Dispute Settlement (ISDS).").

166. Press Release, *supra* note 159.

currently in force and prospects of implementation remain uncertain, it provides an illustration of how major countries are reassessing and rethinking their approach to ISDS. As a result, while the ISDS mechanism remains as a protection for investors in the TPP, substantive and procedural changes illustrate a shift to further safeguard against abuses and protect host-state sovereignty.

V. CONCLUSION: TRADE POLICY AMONG COUNTRIES ARE SHIFTING TOWARDS SAFEGUARDING AGAINST ISDS ABUSES AND PROTECTING HOST-STATE SOVEREIGNTY

As the number of ISDS claims has increased throughout the years, public criticism has been shared internationally in light of investors filing suits against host nations. In particular, investor suits challenging a host nation's ability to adopt public policy have largely received public scrutiny. In a more interconnected and open global marketplace, liberalizing rules to attract more trade and investment can impact a host-state's ability to effectuate policy objectives concerning public health, safety, and the environment.

In response to growing public dissent concerning ISDS proceedings and the exposure of suits compromising domestic policy, many countries have reassessed their policies in international trade treaties. As recent global trade policies and agreements suggest, changes to ISDS signal an emerging shift towards further safeguards against ISDS abuses and greater protections for host state sovereignty. India's new Model BIT, CAFTA, ChAFTA, and the TPP reflect a change to reform the ISDS mechanism and incorporate more substantive provisions that further protect a host state's regulatory autonomy. Moving forward, as countries rethink trade policy and enter into prospective trade agreements, substantive changes can provide further insight on the rules governing trade in the 21st century.