U.S. INVESTMENT PROTECTION POLICY:
FROM NAFTA TO RECENT FTAs AND BITs

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The United States has generally been determined to push the trade liberalization agenda forward, particularly with the renewal by the U.S. Congress in 2002 of the Trade Promotion authority, formerly known as fast track. Yet, developing countries have refused to include investment in the otherwise stalemated Doha Round of multilateral trade negotiations. In such a context, preferential free trade agreements (FTAs) and bilateral investment treaties (BITs) have become essential to secure the norms and provisions on the liberalization and protection of foreign investment that the United States is resolved to see adopted at the international level. As of May 2009, 10 FTAs are in force. The North American Free Trade Agreement (NAFTA) (grouping Canada and Mexico with the U.S., in place since 1994) and the recent Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) are “regional” accords. The bilateral FTAs involve Israel, Jordan, Chile, Singapore, Australia, Morocco, Bahrain, and Oman. Four concluded U.S. agreements await Congressional approval (Peru, Colombia, Panama, and South Korea), while four FTAs are under negotiation, with Malaysia, Thailand, the Southern African Customs Union (grouping Botswana, Lesotho, Namibia, South Africa, and Swaziland), and the United Arab Emirates. 1 The texts of the U.S. FTAs conform to a standard model and, thus, are pretty similar, except for the lists of exceptions and, at times, some precedent-setting.

The provisions on the protection of foreign investment contained in NAFTA’s Chapter 11 were, at the time of their adoption, the most extensive ever found in a FTA. These include a right for foreign investors to automatic international arbitration in case of alleged breaches of treaty provisions. Contrary to anticipations, most of the investor-state cases filed under NAFTA’s Chapter 11 have not involved Mexico’s treatment of foreign investment (Rubins, 2003: 866; Loppacher and Kerr, 2006: 47; Huiping, 2008: 480-481), but Canada’s and United States’ investors complaining against the other’s government. Indeed, all such NAFTA complaints against the American government have been filed by Canadian investors. Since, the United States has sought to restrict the scope of applicable provisions to avoid “frivolous” cases and address the danger of “over-litigation”.

This paper 1) reviews the evolution of U.S. policy on investment protection in the light of the implementation of NAFTA Chapter 11; 2) identifies, in the provisions of its post-NAFTA FTAs and BITs, how the United States has sought to contain the possible resort to investor-state dispute settlement mechanisms; and 3) discusses whether the safeguards, both substantive and procedural, included in the recent U.S. FTAs amount to a significant policy reorientation or rather some tinkering with the long-cherished U.S. objective of strong investment protection. In

1 From the website of the Office of the United States Trade Representative, http://www.ustr.gov/. Note that the Trade Promotion authority expired in 2007. When reconducted, one should expect more FTA negotiations being launched.
particular, this paper comments on the further safeguards in the post-2006 U.S. FTAs. I argue and explain why the changes from NAFTA’s provisions do not significantly question the fundamentals of U.S. policy on investment protection.

The first section of the paper discusses the recent evolution of U.S. investment protection policy. A second section centers on the investment provisions of the U.S. FTAs with Australia and South Korea, both developed economies. The third section considers, in the light of the absence of investor-state provisions in the U.S.-Australia FTA, some key explanatory factors for their inclusion in the U.S.-Korea FTA. It also points to the reasons why, in my view, the changes from NAFTA’s provisions are still compatible with the essential conditions for high investment protection. This is followed by a short conclusion.

1. The Evolution of U.S. Investment Protection Policy

The liberalization and protection of foreign investment has long been a central objective of many countries and of the United States in particular. In the field of international investment, the settlement of disputes used to be under the traditional paradigm of diplomatic protection or, otherwise stated, of state-to-state dispute resolution. While dispute settlement in the area of trade continues to lie on this paradigm, for investment this practice essentially shifted with direct investor claims being allowed under a series of BITs concluded by the United States in the 1980s and later in FTAs (see Choi, 2007; Dodge, 2006: 5-14). If the state retained final authority in dispute resolution until the 1980s’ BITs and NAFTA, through such treaties it has since often granted an explicit general consent to subject itself to compulsory binding commercial arbitration (Van Harten, 2005).

From the rise of neo-liberalism and the debt crisis in the 1980s, many developing countries have lessened their control over foreign investment and provided a regulatory environment to incite investors to locate or expand in their jurisdictions. This context was marked by the proliferation of BITs, especially between industrial and developing countries, followed, from the mid-1990s, by the conclusion of bilateral FTAs. One key element of this undertaking to attract foreign investors has been to entitle them to binding and enforceable international arbitration in case public measures contravened treaty obligations and adversely affected their returns. The first FTA to include such provisions combining investor-state arbitration with broad standards of investment protection was the NAFTA. Concluded in 1992 and in force since 1994, the latter has been known for representing the quintessence of strong investment protection.

The first investor-state cases adjudicated under the NAFTA sparked a plethora of articles and books, either pamphletary or scientific, on the merits and dangers of an automatic right to arbitration for foreign investors. This led many U.S. government agencies, at the central, state, and local levels, as well as non-governmental organizations, advocacy groups, and coalitions to complain about undue rights being extended to foreign investors. These U.S. institutions have been particularly worried about the danger of “over-litigation”, when investment agreements are concluded with other developed capital-exporting countries. The debate also extended well beyond the frontiers of NAFTA parties. Some, if not most, of the claims filed by foreign investors were also perceived as “frivolous” and NAFTA’s investment provisions came to be seen as too far-reaching and subject to abuse.
Traditionally, investor-state claims were meant to ensure “protection from harmful state interference in countries that otherwise have weak or corrupt judicial systems” (Krueger, 2003: 420), making developing states the typical respondents in such cases. However, nearly two-thirds of the NAFTA cases have been filed against the United States and Canada, i.e., rich capital-exporting nations with well-developed legal systems. Although the United States was one of the first countries to ratify the International Centre for Settlement of Investment Disputes (ICSID) Convention in 1966, the first investor-state claim against the United States, Loewen, was filed by a Canadian investor in October 1998. By February 2009, 51 notices of intent to file an investor claim under NAFTA Chapter 11 had been signified, the U.S. being subject to 15 of these (NAFTA Claims). More generally, a litigation trend is noticeable. While the ICSID had registered 21 arbitration cases up to 1996, this number had reached 182 by the end of 2007. With those brought under other arbitration forums, the total number of known investor-state cases was 290, with more than two-thirds of these having been filed since 2002 (UNCTAD, 2008: 1-2; see also Huiping, 2008: 469-476).

The ensuing controversy as well as some arbitral decisions under NAFTA led the U.S. administration to seek a better balance between the protection of investors from states’ egregious measures and the ability of governments to regulate in the public interest. Indeed, some safeguards, both substantive and procedural, have been included in the recent U.S. FTAs (e.g. U.S.-Singapore FTA, Chapter 15) and the 2004 model BIT (U.S., 2004). As regards substantive rules, the main modifications pertain to the notions of investment, minimum standard of treatment, and expropriation.

U.S. BITs have tended to provide a broad, descriptive approach to the scope of covered investment and an extremely general statement of coverage. Under the 1994 U.S. model BIT, the notion of investment is described as “every kind of investment owned or controlled directly or indirectly”, followed by a non-exhaustive list of asset categories falling within the definition of “investment”. Typical categories in U.S. investment treaties encompass real estate and other direct property rights, shareholdings and other forms of participation in local companies, claims to payment or performance, intellectual property and other intangibles, and concession agreements (U.S., 1994). The NAFTA adopts a somewhat different approach to defining investment, setting forth a broad but exhaustive list of covered activities. Investments include foreign direct investment (FDI), portfolio investment (equity securities), partnership and other interests giving the owner a right to share in profits or liquidated assets, and tangible and intangible property “acquired in the expectation [...] of economic benefit”. Loan financing is only protected if funds flow within a business group, or when debt is issued on a relatively long-term basis. Contracts are covered if they involve a “commitment of capital or other resources in the territory of a Party to economic activity in such territory”. NAFTA’s exhaustive list of investment categories ends with a negative definition, pointing to certain types of property not to be considered as investment, such as money claims arising solely from commercial contracts for the sale of goods or services (NAFTA, Article 1139; see also Rubins, 2003: 874).

The recent U.S. FTAs and the 2004 model BIT depart from the definitions of investment found in the 1994 U.S. model BIT and the NAFTA. The former define investment broadly, as “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment”, and include a non-exhaustive list of “forms” such investments may take, including enterprises, shares, and intellectual property rights. The recent U.S. FTAs and 2004 model BIT also have explanatory notes, designed to clarify and narrow the seemingly boundless definition. Thus, the “characteristics of an investment” include “the commitment of capital [...]


the expectation of gain or profit, or the assumption of risk”, while in case of debt instruments, these would normally have to be long term (e.g., U.S.-Australia FTA, Article 11.17.4). Even though the recent U.S. FTAs and 2004 model BIT provide for a non-exhaustive list of covered activities, retain flexibility, and refer to certain recent forms of economic activity, they nevertheless provide guidance to arbitrators, directing them to look beyond the “form” in favour of the economic essence of investment. In so doing, they are both less restrictive than NAFTA’s exhaustive definition of investment and more restrictive through their definition of investment in economic terms (Gagné and Morin, 2006: 367-369; see also Rubins, 2003: 873-876; UNCTAD, 2005: 4-5).

With respect to minimum standard of treatment and expropriation, while left undefined in NAFTA, the recent U.S. FTAs and the 2004 model BIT further clarify both obligations in order to limit their scope. On minimum standard of treatment, NAFTA’s Article 1105.1 stipulates “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”. The wording gave rise to two main issues: first, is the requirement to give fair and equitable treatment independent from the minimum protection required by international law?, second, what is the standard of treatment guaranteed by “international law”? (Van Duzer, 2002: 77).

Echoing the Notes of Interpretation on Article 1105 obligations adopted in July 2001 by the NAFTA Free Trade Commission (NAFTA, 2001), the recent U.S. FTAs and the 2004 model BIT provide that “Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security” (emphasis added). “Fair and equitable treatment” and “full protection and security” are part of customary international law (as against international law in general, as stipulated in NAFTA’s Article 1105) and do not entail additional rights. Obligations derived from the latter two concepts include, respectively, access to justice and police protection. It is also specified that a breach of another provision or of another international agreement does not amount to a violation of minimum treatment (e.g. U.S.-Australia FTA, Article 11.5). The article shall be interpreted in accordance with an annex in which “The Parties confirm their shared understanding that ‘customary international law’ [...] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to [the article on the minimum standard of treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens” (e.g. U.S.-Australia FTA, Annex 11-A).

NAFTA’s rules on expropriation read: “No Party may directly or indirectly nationalize or expropriate [...] or take a measure tantamount to nationalization or expropriation of [...] an investment”. Without further clarification in the NAFTA treaty, Article 1110.1 led to questions as to whether a measure tantamount to expropriation is redundant with indirect expropriation, if it relates to a subset of indirect expropriation, or if it represents a more lenient standard encompassing a wider range of public measures. In the recent U.S. FTAs and the 2004 model BIT, the corresponding article states that “Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization” (e.g. U.S.-Australia FTA, Article 11.7.1). The article shall be interpreted in the light of two annexes, one on customary international law, mentioned before, and another on expropriation. The latter stipulates that the provision on expropriation is intended to reflect customary international law and that a party’s action cannot constitute an expropriation unless it interferes with a property right. The determination of an indirect expropriation must consider,
inter alia, i) the economic impact of a government action, which, per se, does not amount to an indirect expropriation; ii) the extent to which a government action interferes with distinct, reasonable investment-backed expectations; and iii) the character of a government action. Except in rare circumstances, non-discriminatory regulatory actions designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not represent indirect expropriations (e.g. U.S.-Australia FTA, Annex 11-B; see also Gagné and Morin, 2006: 369-372).

In terms of procedural provisions, three elements stand out in the recent U.S. FTAs. The first, which also figures in the 2004 model BIT, relates to the improvement of investor-state procedures. This is provided through a) the addition of preliminary procedures on expedited decisions and the admissibility of claims, to deter the filing of frivolous cases and limit the number of claims; b) the enhancement of the transparency and openness of arbitral proceedings, notably by making the main documents and hearings accessible to the public and accepting amicus curiae briefs; c) the possible issuance of proposed awards for comments by disputing parties, and the anticipation of an appeals mechanism, notably that states parties should negotiate a bilateral appellate body in the years following the entry into force of their respective agreements. The second element pertains to the creation of new mechanisms for labour and environmental law enforcement, to address the U.S. fear of delocalization to jurisdictions with lower labour and environmental standards. The third and final element is the absence of an investor-state dispute settlement mechanism in the 2003 U.S.-Australia FTA (Gagné and Morin, 2006: 372-381). For many, the latter echoed the concerns expressed by many organizations and groups in the United States of over-litigation when FTAs are concluded with other rich capital-exporting countries.

2. The Investment Provisions of the U.S.-Australia and the U.S.-Korea FTAs

The exclusion of direct investor-state arbitration in the U.S.-Australia FTA is undoubtedly a most significant “procedural” modification. Despite the U.S. unease with the proliferation of investor-state cases in NAFTA, it never proposed doing away with direct binding dispute settlement. In the FTAs and BITs it concurrently and subsequently concluded with other countries, the United States unfailingly provided for secured investor-state arbitration, including in its FTA with Singapore, arguably a rich capital-exporting jurisdiction. In the course of the negotiations, Australia systematically resisted U.S. demands for investor-state dispute procedures, insisting that it has a functioning legal system capable of fairly handling private-sector claims. If the absence of such a mechanism is attributable to the Australian position (Loppacher and Kerr, 2006: 50), the U.S. seemingly acceded to Australia’s stance without much resistance (Inside U.S. Trade, 2004: 1, 16-17; see also Capling and Nossal, 2006).

The U.S.-Australia FTA essentially provides that investor claims are to be handled before national courts or through the possible resort to the agreement’s general state-to-state dispute settlement mechanism (Article 11.16.2; see Dodge, 2006: 22-26). Article 11.16.1 stipulates that in case of a “change in circumstances” the parties can enter into consultations with a view towards allowing an investor of a party to submit a dispute to arbitration. For Blackwood and McBride (2006: 58), as there exists an opening for creating an investor-state mechanism, its exclusion in the U.S.-Australia FTA may not be as significant as it appears. Yet, nowhere is such a “change in circumstances” elaborated upon, neither does there seem to be any obligation for
the parties other than to consult (see Capling and Nossal, 2006: 160-161; Huiping, 2008: 492-494).

This result led to the suggestion that the absence of direct investor-state procedures seemed acceptable to the United States only in the case of FTAs with industrial countries, i.e., with states having a legal system developed enough to comfort American investors (Gagné and Morin, 2006: 373). In addition, developed countries are major capital exporters to the U.S., with a corresponding threat of “over-litigation”, as had been revealed by the experience of the NAFTA claims against the United States all launched by Canadian investors (Gagné and Morin, 2006: 364; Dodge, 2006: 24). In this regard, the U.S. Intergovernmental Policy Advisory Committee (IGPAC)\(^2\) had opposed the inclusion of an investor-state dispute mechanism in the U.S.-Australia FTA, mentioning:

> IGPAC members’ objection to the investor-state provision [in the U.S.-Australia FTA] stems from concerns that investors from nations with well-developed legal systems have abused such FTA provisions to challenge the authority of state and local governments. The *Methanex* and *Loewen* cases [under NAFTA] in particular have reinforced concerns that the provision will be abused by investors who simply hope to circumvent established legislative and judicial procedures (IGPAC, 2004: 14-15).

This view, however, is not coherent with outward investment flows. Even though developing states may represent destinations more hazardous for American investment, the protection of investment in developed countries is as ever relevant, considering that they host over 80 per cent of U.S. FDI outflows. Illustrative of the mixed positions within the United States on investor-state provisions, the Industry Sector Advisory Committee on Capital Goods expressed, for its part, “extreme [disappointment] and concern that the [U.S.-Australia FTA] omits the principal protection for U.S. investors that has been included in the other FTA investment chapter(s)” (ISAC-2, 2004: 5).

The FTA with Australia was for the United States the most important preferential trade agreement since NAFTA’s conclusion in 1992. As for the U.S.-Korea FTA, it is only the fourth such agreement that the United States has concluded with another member of the Organization for Economic Cooperation and Development (OECD), after the 1988 U.S.-Canada FTA, the 1992 NAFTA (Mexico having joined the OECD in 1994), and the 2003 U.S.-Australia FTA. In view of its Gross National Product, South Korea is arguably an industrialized country. Although from 2006 to 2008 the U.S. negotiations on an FTA with Korea echoed much of the same concerns that had led to the non-inclusion of an automatic right for investors to binding international arbitration in the U.S.-Australia FTA, the agreement eventually reached provides for investor-state dispute settlement.

The U.S.-Korea FTA differs from other recent U.S. FTAs as its Annex 11-B on expropriation further elaborates on what could be considered for a determination of indirect expropriation when examining the extent to which a government action interferes with distinct, reasonable investment-backed expectations and the character of a government action. The former is now accompanied by a footnote which stipulates that “whether an investor’s investment-backed expectations are reasonable depends in part on the nature and extent of governmental regulation in the relevant sector. For example, an investor’s expectations that regulations will not

\(^2\) This committee belongs to a system of advisory committees put in place by the U.S. government to determine, in consultation with the American industry, the U.S. objectives and priorities in trade and investment negotiations.
change are less likely to be reasonable in a heavily regulated sector than in a less heavily regulated sector”. As for the character of a government action, it comprises its objectives and context. Relevant considerations could include whether a government action imposes a special sacrifice that exceeds what a particular investor or investment should be expected to endure for the public interest. In addition, the proviso on non-discriminatory regulations in the pursuit of legitimate public welfare objectives includes a reference to real estate price stabilization.

Both U.S. business and environmental groups objected to some of the new language, finding it confusing and with no precedent in U.S. or customary international law (Inside U.S. Trade, 2007b). The U.S. Trade Policy and Environment Committee (TEPAC) was essentially critical of the expropriation annex as modified in the U.S.-Korea FTA (TEPAC, 2007). On the other hand, the Industry Trade Advisory Committee on Services and Finance Industries (ITAC-10) was of the view that the examples now in the annex on expropriation in the U.S.-Korea FTA further elucidate the three-prong test of whether a government action constitutes an indirect expropriation without altering it (ITAC-10, 2007). The U.S.-Korea FTA also includes an annex on taxation and expropriation (Annex 11-F), meant to help protect Korean tax policies from the resort to the investor-state dispute provisions.

Although it apparently came up late in the negotiations, investor-state dispute settlement was a sensitive issue for Korea, especially as it was concerned about preserving its regulatory authority (Inside U.S. Trade, 2007a: 3-4). Many Koreans opposed investor-state dispute arbitration under the FTA, which, they thought, could undermine the government’s ability to adopt countercyclical macroeconomic policies and social policies necessary to address market failures (Huiping, 2008: 476; see also Lee, 2007: 1108). As a condition for the inclusion of an investor-state mechanism, the United States agreed to Korea’s demand that its real estate and tax policies be shielded from the purview of the investor-state dispute mechanism. Otherwise, Korea apparently requested that such a mechanism be ruled out from the FTA altogether, a demand that Korean authorities had made by pointing that there is no such mechanism in the U.S.-Australia FTA. For their part, U.S. business groups and their congressional allies not only insisted on the maintenance of investor-state arbitration, but also pressed for no policy exemptions, which, in their view, would weaken critical protections for U.S. investors in Korea and set a bad precedent for future agreements (Inside U.S. Trade, 2007a: 3-4; see also Lee, 2007: 1107-1109).


Capling and Nossal (2006) argue that the operation of NAFTA’s Chapter 11 had produced sufficient opposition within the United States that its government dropped its original negotiating objective of including an investor-state dispute mechanism in the U.S.-Australia FTA. They concluded that the abandonment of investor-state provisions in this agreement was to have wider and longer-term implications. This move was to effectively preclude the inclusion of such mechanism in future trade agreements between developed countries and make it more difficult for the United States to insist on its inclusion in FTAs with developing states.

The comments on the absence of investor-state arbitration in the U.S.-Australia FTA, as formulated by the Office of the United States Trade Representative (USTR), in charge of the negotiations for the U.S. side, would have warranted more cautious conclusions. Although the United States concurred with Australia in recognizing that both countries have legal systems “robust” enough to ensure sufficient protection for investors through domestic courts, Dodge
In recognition of the unique circumstances of this Agreement – including, for example, the longstanding economic ties between the United States and Australia, their shared legal traditions, and the confidence of their investors in operating in each others’ markets – the two countries agreed not to adopt procedures in the Agreement that would allow investors to arbitrate disputes with governments. This issue will be revisited if circumstances change. Government-to-government dispute settlement procedures remain available to resolve investment-related disputes (emphasis added) (USTR, 2004).

The insistence on the unique circumstances of the U.S.-Australia FTA seemed to have been both genuine and meant to appease the U.S. business’ concerns over the absence of an investor-state dispute settlement mechanism. The USTR comments also suggest that a shared common law tradition between the two western countries was a key element that made acceptable the lack of investor-state arbitration. In Korea’s case, the absence of shared legal traditions, a closer state-market relationship in that country, and a perceived protectionism resulting from this state’s somewhat pronounced regulatory role were certainly not to inspire confidence for the U.S. government and investors (see Lee, 2007: 1111-1112). Thus, although Korea has maintained close economic relations with the United States throughout the post-war period and is a major capital-exporting country, the U.S. insisted on including an investor-state dispute settlement mechanism in the FTA, as it had in its previous BIT with Korea concluded in 1998. For its part, the Korean government did not object to the inclusion of such a mechanism, as long as certain key concerns over its regulatory authority were addressed.

Huiping (2008: 490, 494) suggests that, owing to a fear of over-litigation, i.e., a high number of claims on the part of investors from two major capital-exporting countries, the United States was relieved by the absence of investor-state arbitration in the U.S.-Australia FTA. In reaching such a conclusion, she does not refer to the more recent U.S.-Korea FTA, which is curious as the latter is arguably a developed country and a major capital exporter. Bilateral trade between the United States and Korea amounted to nearly US$72 billion in 2008, making the U.S. Korea’s third largest trading partner and Korea the U.S.’ seventh largest trading partner, while Australia and Singapore do not figure among the United States’ first 15 trading partners. Investment figures, however, reveal a different picture. On a historical-cost basis, U.S. outward direct investment was valued, in 2007, at U.S.$ 82,623 million for Singapore; U.S.$ 79,027 million for Australia; and U.S.$ 27,151 million for Korea. In 2007, Singapore and Australia accounted, respectively, for 3 and 2.8 per cent of U.S. capital outflows. On the other hand, direct investment in the United States, for 2007, on a historical-cost basis, reached U.S.$49,100 million from Australia; U.S.$ 13,057 million from Korea; and U.S.$ 10,217 million from Singapore (BEA, 2008).

Thus, trade and investment data help explain the absence of an investor-state dispute settlement mechanism in the U.S.-Australia FTA. Australian flows of direct investment in the United States are more than twice as important as those of its other two Asia-Pacific partners. Such figures give credence to the view that the American government may not have been so dissatisfied with the absence of an investor-state dispute settlement mechanism in its FTA with Australia, as the danger of claims from that country’s investors was clearly greater. Yet, in terms of U.S. outward investment, Singapore accounts for more than Australia, and Korea is not a
marginal destination, which might explain why the United States keeps insisting on strong investment protection, notably investor-state arbitration, and why the latter’s absence in its FTA with Australia remained exceptional.

More fundamentally, Huiping argues that the safeguards included in the recent U.S. FTAs and BITs seriously erode protection for foreign investors and strengthen protection for host countries. She points notably to the adding of 1) procedures to deter frivolous claims, 2) the specification of a joint interpretation of treaty provisions by states parties as “governing law” and binding on arbitral tribunals, 3) provisions for interim review of proposed awards and the possibility of an appellate mechanism, and 4) the exclusion or restriction from the application of investment provisions for sensitive items, such as nondiscriminatory regulatory measures to protect public health, safety and the environment, financial services, and taxation measures. As the above requirements and modifications enable states to participate in and constrain arbitral proceedings, investor protection, thereby, would be seriously weakened (Huiping, 2008: 483-488). Although her comments are primarily made in reference to the 2004 U.S. model BIT, she overlooks that some of these elements already figured in NAFTA’s investment provisions, which she otherwise considers as ensuring high investor protection. This is the case for the interpretation of treaty provisions by parties, already placed under the title of governing law, the possibility of binding interpretation by states parties of the content and scope of existing and future non-conforming measures contained in the annexes to U.S. FTAs, and the restricted application of investor-state dispute settlement in the case of financial services and taxation measures (NAFTA, Articles 1131, 1132, 1415, 2103).

A little different from the one in NAFTA, the recent U.S. FTAs provide for an exception for “essential security”. The latter stipulates that nothing in these agreements shall be construed to preclude a state from applying measures that it considers necessary for the fulfillment of its obligations regarding the maintenance or restoration of international peace and security or the protection of its own essential security interests (e.g. U.S.-Singapore FTA, Article 21.2). In the most recent U.S. FTAs, concluded since 2006 with Peru, Colombia, Panama, and Korea, this provision is accompanied by a footnote. The latter reads: “For greater certainty, if a Party invokes [essential security] in an arbitral proceeding initiated under the [chapters on investment and general dispute settlement], the tribunal or panel hearing the matter shall find that the exception applies” (e.g. U.S.-Korea FTA, Article 23.2(b)).

This recently added element is perplexing. The notion of essential security pertains normally to war or other such exceptional circumstances, either at the state or international levels. The mention “for greater certainty” also suggests that the possible resort to such provision in case of investor claims already existed, notwithstanding such “clarification”. In its post-2006 FTAs, the United States apparently sought to prevent the possibility of a high number of investor claims arising from government measures taken in response to dramatic, unexpected circumstances. This seems to be a lesson learned from the Argentinian financial crisis of 2001-02, which led to nearly 40 investor-state disputes. However, to the extent that the key objective of investor-state arbitration is to attract and reassure investors, there is no reason why states parties to a U.S. FTA would contemplate resorting to such a safeguard in “normal” circumstances. As investor-state dispute settlement has also not been meant to challenge state measures in exceptional economic circumstances, it is then hard to find such a provision to seriously erode investment protection.

Besides, as Blackwood and McBride point out, there is no correlation between the scope of investment provisions and the ensuing jurisprudence. Arbitral decisions more favourable to
investors have been noticed in treaties that included narrower definitions of expropriation and related provisions (Blackwood and McBride, 2006: 59). Thus, conclusions to the effect that U.S. FTAs and BITs negotiated after the lessons learned from the NAFTA experience seriously undermine investor protection are untenable. Moreover, insofar as the changes in U.S. investment protection policy essentially serve to prevent cases, either frivolous or in matters of essential security, and, thereby, to allow the pursuit of non-discriminatory public policies without fear of compensatory claims, such an assessment is difficult to sustain. There is no evidence that the United States is willing to significantly reduce either the protection of its overseas investors or of foreign investors in its territory, as long as the latter do not enjoy greater substantive rights than national investors.

Conclusion

The U.S. strategy on the protection of foreign investment has evolved since the first years of the implementation of NAFTA’s Chapter 11 in the second half of the 1990s. This revised U.S. policy has manifested itself through clarifications to substantive provisions, such as those on the characteristics of an investment, the scope of the minimum standard of treatment, the meaning of the expression “measure equivalent to expropriation”, as well as through procedural specifications and safeguards, such as on expedited reviews and the admissibility of investor claims. Despite their significance, such modified provisions have not altered the fundamental core of strong investment protection.

Such a perception stems from the fact that substantive and procedural safeguards have almost automatically been associated with an erosion of investment protection. Yet such safeguards have essentially been meant to prevent or limit the abuse of investor-state provisions or, at most, to ensure that these be implemented in ways envisaged by their creators. As long as investor-state dispute settlement ensures foreign investors against arbitrary or discretionary government measures, the key criterion of high investment protection is met. The possibility for governments to be spared from investor claims in case of non-discriminatory application of measures in the public interest is compatible with high standards of investor protection. In fact, given the controversy sparked by many investor claims since NAFTA’s inception, one could even argue that it has become an essential condition for the maintenance of investor-state provisions. Otherwise, the backlash ensuing from the perceived abuse of these provisions would go beyond the anti-globalizers to include the advocates themselves of investor-state protection within governments.

A change of a potentially higher magnitude, though, was the absence of an investor-state dispute mechanism in the U.S.-Australia FTA. Even then, in light of the credentials of each party’s tribunals as developed countries sharing common legal traditions, it would be hard to conclude to an actual weakening of the protection afforded foreign investors. In any case, the provisions of the U.S.-Korea FTA have shown that this remained an isolated episode. Overall, the United States has shown consistency in its policy on the protection of foreign investment. Although critical of investor-state provisions and concerned about their perceived abuse, the United States continues to insist on high standards of investment protection, as illustrated notably by the inclusion in its FTAs and BITs of compulsory international arbitration mechanisms.
References


Industry Sector Advisory Committee on Capital Goods for Trade Policy Matters (ISAC-2) (2004), Advisory Committee Report to the President, the Congress and the United States Trade Representative on the U.S.-Australia Free Trade Agreement, 15 March.

Industry Trade Advisory Committee on Services and Finance Industries (ITAC-10) (2007), Advisory Committee Report to the President, the Congress and the United States Trade Representative on the U.S.-Korea FTA Agreement, 25 April [http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Reports/Section_Index.html].


Intergovernmental Policy Advisory Committee (IGPAC) (2004), *Advisory Committee Report to the President, the Congress and the United States Trade Representative on the U.S.-Australia Free Trade Agreement*, 12 March, [http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Reports/Section_Index.html].

Intergovernmental Policy Advisory Committee (IGPAC) (2007), *Advisory Committee Report to the President, the Congress and the United States Trade Representative on the U.S.-Korea Free Trade Agreement*, 24 April, [http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Reports/Section_Index.html].


NAFTA Claims [http://www.naftaclaims.com/].


*U.S.-Australia Free Trade Agreement* (2003), [http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html].

*U.S.-Colombia Free Trade Agreement* (2006), [http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html].


*U.S.-Panama Trade Promotion Agreement* (2007), [http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Final_Text/Section_Index.html].

*U.S.-Peru Trade Promotion Agreement* (2007), [http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html].

*U.S.-Singapore Free Trade Agreement* (2003), [http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Text/Section_Index.html].
