



HARRISON INSTITUTE FOR PUBLIC LAW
GEORGETOWN LAW

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Reform of Investor Protections

House Committee on Ways & Means, Subcommittee on Trade
Rep. Sander M. Levin, Chair
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Mr. Chairman, thank you for this oversight of investor protections in free trade agreements (FTAs) and bilateral investment treaties (BITs). These agreements have evolved in recent years in response to the bipartisan mandates of protecting American investors abroad while granting no greater substantive rights to foreign investors.¹

U.S. negotiators have been responsive to the “no greater rights” mandate, but they are short of achieving it. The reasons are clear enough. The negotiators at USTR are working under two competing objectives, each with its proponents. On the “offensive” side, much of corporate America asks for investment agreements that use the most robust international standards of investor protection.² On the “defensive” side are state and local governments,³ with which I work, and environmental and public interest advocates.⁴ They fear that investors will succeed in challenges that would fail in U.S. courts. Examples include environmental policies that could have significant business consequences such as mining reclamation, emergency financial measures or evolving climate policies.⁵ The defensive side seeks investor protections that align with U.S. constitutional protections for property rights, which are the strongest in the world.

This is an important time for oversight. During the campaign, candidate Obama pledged to meet the objective of “no greater rights” for foreign investors and to preserve the sovereignty of American courts.⁶ Recently, the Administration announced that it will review FTAs and BITs to ensure that they advance the public interest. As you know, the House would have no vote on proposed BITs with countries such as China or India unless this committee defines a need for implementing legislation.

The Congress should care about investor rights because:

- One size does not fit all countries;
- The FTAs and BITs outsource constitutional law; and
- Congress can do more to preserve America’s policy space.

Does one size fit all?

Your hearing notice asks the threshold question: Is it appropriate to give arbitration rights to investors from all the countries with which we are negotiating? For example, investor arbitration was not included in the U.S.-Australia FTA because (a) Australia has a well-developed legal system,⁷ and (b) Australian investors own substantial assets in the United States. Consider the very different positions of these three countries:

- *South Korea* – South Korea has significant U.S. investments, which are concentrated in wholesale distribution services. In the five years prior to the current recession, Korean investments grew by 77 percent.⁸ While U.S. firms raise concerns about regulatory

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transparency, economic reforms are underway (including finance and economic development zones), and South Korea has a developed legal system that is available to U.S. investors.⁹ In short, Korea looks more like Australia than the developing countries with which the United States has investment agreements.

- *Panama* – Panama has a small economy, but it wants to become the legal domicile of companies (over 350,000 as of 2006) that seek a tax or regulatory haven.¹⁰ For example, the “Panamalaw” web page advertises the virtues of doing business through a Panama corporation, with virtual anonymity, and without ever having to travel to Panama.¹¹ So long as any of these companies do “substantial” business in Panama – including U.S. companies – they would be able to use their Panama corporations or subsidiaries to challenge domestic regulations in the United States.¹²
- *China* – In about 35 years, the Chinese economy is projected to exceed the U.S. economy in size.¹³ China’s current ownership of U.S. investments grew by 62 percent over the five years prior to the recession.¹⁴ China has invested its global trade surplus primarily in foreign exchange reserves such as U.S. Treasury Notes.¹⁵ Some analysts expect China to follow Japan’s development path, which would shift from cash reserves to acquiring foreign firms that are part of its distribution chain.¹⁶ For example, China could be looking for a stake in companies like Wal-Mart, Target or Sears. So in the long run, is it wise to provide investor arbitration to Chinese-owned firms that are significant actors in the U.S. economy?

The China numbers underline the broader trend that the United States has begun to import more capital than it exports through foreign direct investment (FDI). In quantitative terms, the defensive interests of the United States clearly now matter.¹⁷

Outsourcing constitutional law

Investor protections in FTAs and BITs take questions about governing authority and move them from U.S. courts to international arbitrators. The literature on this sovereignty shift is voluminous. Much of it concerns indirect expropriation, or “regulatory takings.” The United States successfully defended an indirect expropriation claim in *Methanex v. United States*, and the ruling provides a model for reforming the language of indirect expropriation in U.S. agreements.

In my limited time, I will focus on the most open-ended investor protection, the duty to provide minimum treatment under international law. Lets look at two current situations.

Mining and reclamation – the Glamis Gold case

In the early 1990s, Glamis Gold Ltd. acquired dozens of mining claims on public lands in the Imperial Valley, a desert environment east of San Diego. Glamis proposed digging a large open-pit mine next to the Indian Pass trails, an area where the Quechen Indians practice their religion and venerate their ancestors. The site also abuts a wilderness habitat for desert wildlife.¹⁸ Glamis uses a “cyanide heap-leach” process, which extracts 422 tons of ore to produce an ounce of gold. As its name implies, heaps of contaminated ore would surround the pit. Glamis also proposed to extract 389 million gallons of water per year from the aquifer beneath the desert.

In January 2001, the U.S. Interior Department rejected the Glamis proposal.¹⁹ Within a few months of taking office in 2001, the Bush Administration reversed the Interior Department’s legal opinion. In 2002, the California State Mining and Geology Board, and then legislature in 2003, acted to protect Native American sacred sites and other sites of environmental or cultural value.²⁰ The

measure required mining companies to backfill and re-contoured open-pit mines after operations are completed. When he signed the legislation, Governor Gray Davis said its intent was to stop the Glamis Gold operation in Imperial County.²¹

In July 2003, Glamis filed a NAFTA claim seeking \$50 million from the United States government for expenses and expected profits.²² Glamis alleged violations of U.S. obligations under NAFTA chapter 11 to provide compensation for expropriation and to provide minimum treatment under international law.²³

When Glamis filed its NAFTA claim, its main office was in Reno, Nevada, and its assets were in Nevada, California, Mexico, Honduras and Guatemala.²⁴ Glamis applied for the mining permit as a U.S. company.²⁵ In 2006, Glamis merged with Goldcorp, Inc., a Canadian mining company with assets in Canada.²⁶ Throughout much of the NAFTA dispute, Glamis was arguably a dual-national. This illustrates the ease with which companies can establish a corporate domicile to take advantage of investor rights.

Of the two substantive claims, one being expropriation, I will focus on the minimum standard of treatment, which includes the right to “fair and equitable treatment.”²⁷ In 2001, the NAFTA Free Trade Commission issued an Interpretive Statement that the minimum standard entitles foreign investors to only the standard of treatment for aliens that is provided under customary international law. The two sides of this dispute show how open-ended investor protections produce fundamental ambiguity:

- ***Glamis Gold*** argues that the minimum standard requires governments to maintain stable and predictable regulations in order to protect investments’ expectations.²⁸ In other words, government should compensate investors if regulatory changes occur after their expectations are set. Glamis also argues that even after the 2001 Interpretive Statement, the customary international law standard continues to “evolve” and now includes a right to a “stable and predictable regulatory environment.” Glamis cites several NAFTA and BIT cases that support this view.²⁹
- ***The State Department*** argues that the minimum standard includes three elements: (1) compensation for expropriation (not relevant here), (2) “internal security,” and (3) “denial of justice” where domestic courts or agencies (not legislatures) treat foreign investors in a way that is “notoriously unjust” or “egregious” such as a denial of procedural due process.³⁰ Further, the burden should be on the investor, and the expectation of unchanging regulations is not part of customary international law.³¹ According to the State Department, the narrow language of the Interpretive Statement supersedes the cases on which Glamis relies.³²

The Panama FTA and the 2004 Model BIT both contain language similar to the 2001 Interpretive Statement, which links the minimum standard of treatment (including fair and equitable treatment) to the customary international law standard of treatment of aliens.³³ In theory, customary international law is based on the general and consistent practice of States that they follow from a sense of legal obligation. In practice, arbitral tribunals have applied an expanding, “evolving” approach of the minimum standard of treatment that is based on the decisions of other tribunals rather than the actual practice of States. Accordingly, the language linking the minimum standard to customary international law does little to constrain arbitrators who want to interpret the standard broadly, as advocated by Glamis, to include greater rights than those provided to U.S. citizens under the Constitution.³⁴

Financial services

The Emergency Economic Stabilization Act authorized \$700 billion for the U.S. government to purchase troubled assets (*e.g.*, mortgage-backed securities) and make capital contributions if financial institutions have “significant operations” in the United States.³⁵ However, the 300 banks to receive such assistance are all U.S. institutions, even though foreign institutions also purchased the toxic assets.³⁶ Other aspects of the bailout are explicitly limited to U.S.-based firms, such as the participation by hedge funds in the \$1 trillion public-private investment program, which matches private equity investments with government contributions.³⁷

Could foreign investors challenge economic stabilization measures of the United States? During the 1990s, the Czech Republic confronted a financial crisis as it broke from the orbit of communist state control. Non-performing loans of the “Big Four” banks had risen in the range of 16 to 34 percent of their portfolios.³⁸ In 1998, a new government came to power and eventually made selective bailouts to the Big Four, in which the government held a large equity stake.³⁹ A smaller bank owned by a Dutch subsidiary (of a Japanese bank) also sustained major losses but did not receive a comparable bailout. In an investor-state dispute, *Saluka v. Czech Republic*, arbitrators ruled that the Czech Republic violated investor rights to “fair and equitable treatment” when it withheld a bad-debt bailout from the small bank while providing a bailout to the big banks with a comparable problem. “Too big to fail” was not a reasonable basis for differential treatment of banks with comparable problems.⁴⁰

During his confirmation hearing, USTR Ron Kirk assured the Senate that the U.S. BITs and FTAs include an exception to safeguard prudential measures.⁴¹ However, as phrased in the pending Panama TPA and the Model BIT, the exception is only available for prudential measures *that do not avoid* U.S. obligations under the agreement.⁴² Looking at parallel language in other agreements, legal commentators make three possible interpretations of the exception:

- The most favorable meaning is that it requires a rational connection between the objective of stabilizing the banks and the way a measure is implemented.⁴³
- A less favorable meaning is that it creates a burden of proof that favors investors.⁴⁴
- The least favorable meaning is that it is circular, hortatory or self-cancelling.⁴⁵

Should the United States want a prudential exception that works, we need look no farther than NAFTA, which provides an unambiguous exception with no self-cancelling language.⁴⁶

Another important question for congressional oversight is, which agreements can foreign investors use to challenge U.S. financial measures? Starting with the FTAs and BITs, the Australia FTA is a notable exception because it omits investor arbitration. The Singapore FTA is of particular interest because its sovereign wealth fund, CIG, has lost billions of dollars in U.S. financial markets.⁴⁷ Another option could be the old Friendship, Commerce and Navigation (FCN) treaties that include most of the BIT investor protections.⁴⁸ In a 1924 dispute, the Supreme Court ruled that investors could enforce their treaty rights directly in U.S. courts.⁴⁹

If investors can persuade their home country to press their claim through state-to-state dispute settlement, they could invoke the WTO’s General Agreement on Trade in Services (GATS). Since its inception, the WTO’s Secretariat has maintained that Most Favored Nation treatment under GATS requires countries that have BITs to make investor protections available to investors from all WTO countries.⁵⁰ GATS may well provide an option for sovereign wealth funds like the Abu Dhabi Investment Authority and the China Investment Corporation, which have lost billions in U.S. banks without the benefit of BIT or FTA investor protections.⁵¹

Preserving America's policy space

To date, the U.S. defense team has successfully defended against NAFTA investor-state claims.⁵² Yet behind closed doors, there is significant concern that NAFTA panels will begin to rule against the United States.⁵³ For example, Abner Mikva, a former congressman and retired DC circuit court judge, was the U.S. government's appointed arbitrator in *Loewen v. United States*. Judge Mikva recounted a meeting with U.S. officials prior to the panel being constituted. "You know, judge," they said, "if we lose this case we could lose NAFTA." "Well, if you want to put pressure on me," Mikva replied, "then that does it."⁵⁴

As BITS and FTAs multiply, more investors have arbitration rights. The risk grows that arbitrators will start to interpret the ambiguity of investor protections in ways that are unfavorable to the United States. "No greater rights" is still the right mandate for negotiators. But the language in BITS and FTAs needs to be revised to ensure that it confirms to the conservative interpretation that the United States has used to defend against the investor claims.

The briefs of the U.S. defense team provide a balanced interpretation of "no greater substantive rights." There are also procedural reforms that would align investor arbitration more closely with U.S. law. I conclude with an overview these reforms. My colleague, William Wren at the Forum on Democracy and Trade, will submit a more detailed explanation of the options. Thank you for this opportunity.

Options for Reform of Investor Protections

1. Substantive investor protections

- a. *Minimum standard of treatment* – Narrow the minimum standard to the elements of customary international law as explained in the US brief in *Glamis*.
- b. *Indirect expropriation* – Narrow indirect expropriation so that it does not apply to nondiscriminatory regulations as explained in the *Methanex* award.
- c. *Protected investments* – Narrow the definition of investment, which extends beyond the kinds of property that are protected by the takings clause of the U.S. Constitution.
- d. *Denial of benefits* – Limit "denial of benefits" language so as to preclude claims by subsidiaries of U.S. corporations.
- e. *Prudential measures* – Use the NAFTA prudential exception as a model to safeguard emergency stabilization measures.
- f. *Transfers* – Allow countries to impose capital controls in response to a financial crisis.

2. Procedural reforms

- a. *Exhaustion of remedies* – Follow international law and require investors to exhaust domestic remedies before using investor-state arbitration.
- b. *Diplomatic review* – Enable a country to block a claim in sensitive sectors or to clarify the self-judging nature of key exceptions for security and prudential measures.
- c. *Objective arbitration* – Establish stronger conflict of interest standards for arbitrators and eventually replace private arbitrators with an investment court that uses independent judges with tenure.

3. Implementing legislation –

- a. *BITS* – Ensure that BITS do not create a private right of action for investors to enforcing their treaty rights in U.S. courts.
- b. *Impact on states* – Establish protections against federal preemption and unfunded federal mandates that BITS and FTAs can impose on states as a result of investment disputes.

Endnotes

- ¹ In 2002, Congress directed U.S. negotiators to seek to establish standards and compensation for expropriation consistent with U.S. legal principles and practice, and ensure that foreign investors would not be entitled to compensation for government regulation. Congress also directed the Executive to eliminate frivolous claims; deter the filing of frivolous claims; enhance opportunities for public input into the formulation of government positions; encourage transparency, open hearings and *amicus curae* submissions, and work to develop an appellate body or similar mechanism to provide coherence to the investor state decisions. Senate Report 107-139, Bipartisan Trade Promotion Authority Act of 2002, 107th Congress 2nd session, Calendar No. 319 (February 28, 2002) at 13. In the Bipartisan Trade Deal of May 2007, Congress and the Bush Administration restated the negotiating objective, that investment agreements should grant no greater substantive rights to foreign investors, and agreed that the preamble should reflect this policy. USTR, Bipartisan Trade Deal, Investment, at 3-4 (May 2007), available at http://www.ustr.gov/Benefits_of_Trade/Section_Index.html?ht= (viewed May 10, 2009).
- ² Business groups that want to expand investor rights:
U.S. Council for International Business. USCIB is the American affiliate of the International Chamber of Commerce (ICC), the Business and Industry Advisory Committee (BIAC) to the OECD, and the International Organisation of Employers (IOE). USCIB now supports expansion of investor-state arbitration to Brazil, India and China, and in the Korea FTA negotiations, urged U.S. negotiators to “return to the provisions of the model BIT,” rather than crafting exceptions to deal with sensitive sectors such as government services. USCIB, Recommendations on Objectives for the U.S.-Korea FTA (March 24, 2006) 9, available at <http://www.uscib.org/index.asp?documentID=829> (viewed May 10, 2009).
National Association of Manufacturers. NAM supports a multilateral agreement on investment under the OECD and expansion of BITs to include Russia, China, Brazil, India, the EU and Japan. NAM, 2.01 International Investment, available at <http://www.nam.org/policypositions/> (viewed May 10, 2009).
U.S. Chamber of Commerce. The Chamber also supports trans-Atlantic investment negotiations through the OECD. Its goals are to limit “increasingly burdensome” investment regulations and standards on technology, environment, health and safety. U.S. Chamber of Commerce, *Unleashing Our Economic Potential: A Primer on the Transatlantic Economic Council* (2008), Appendix II.E, available at http://www.uschamber.com/publications/reports/0804econ_potential.htm (viewed September 7, 2008); U.S. Chamber of Commerce, *Global Regulatory Cooperation Project*, available at <http://www.uschamber.com/grc/default> (viewed September 7, 2008).
Emergency Committee for American Trade. In principle, ECAT supports the negotiating objective of “no greater substantive rights” for foreign investors. However, it opposes interpretive notes or congressional action to clarify open-ended language on expropriation and the minimum standard of treatment, saying that these terms “should properly be an issue for the investor-state tribunal.” About ECAT, available at <http://www.ecatrade.com/about/> (viewed May 10, 2009); ECAT, Bulletin #15: Bipartisan TPA Act v. Kerry Amendment (2002).
- ³ State government groups that call for “no greater rights”:
Intergovernmental Policy Advisory Committee. IGPAC, the state and local advisory committee to USTR, filed its most recent comments on investment under the pending Colombia FTA. IGPAC urges U.S. negotiators to codify the holding of the Methanex panel to limit expropriation, limit the minimum standard of treatment to procedural due process and reject substantive due process, require investors to exhaust judicial remedies, and reimburse the states (CA, MA, MS, VA) that have been “heavily taxed” in defending investor-state disputes. IGPAC, *Advisory Committee Report to the President, the Congress and the United States Trade Representative on the US-Colombia Trade Promotion Agreement*, September 15, 2006, 3 and 20-22.
National Conference of State Legislatures. NCSL opposes investor-state arbitration: “Trade agreement implementing language must include provisions that deny any new private right of action in U.S. courts or before international dispute resolution panels based on international trade or investment agreements.” NCSL also calls for U.S. negotiators to: (1) “carve out” state laws that might be subject to challenge, (2) use a “positive list” approach to defining the scope of covered investments, and (3) enable states to “make adjustments” to limit coverage of state policies. NCSL, *Free Trade and Federalism, 2008 - 2009 Policies for the Jurisdiction of the Labor and Economic Development Committee*, available at http://www.ncsl.org/standcomm/sclaborecon/sclaborecon_Policies.htm#FreeTrade (viewed May 10, 2009).
Conference of Chief Justices. CCJ is concerned that investor-state arbitration “can undermine the enforcement and finality of state court judgments.” CCJ, Resolution 26, adopted as proposed by the International Agreements Committee at the 56th Annual Meeting on July 29, 2004.
Cities, mayors CSG. National League of Cities, U.S. Conference of Mayors, Council of State Governments and National Conference of State Legislatures, joint letter to Ambassador Robert Zoellick (September 23, 2003).
National Association of Attorneys General. NAAG asked Congress to “ensure that ... foreign investors shall receive no greater rights to foreign compensation than those afforded to our citizens.” NAAG, Resolution, Spring Meeting, March 20-22, 2002, Washington, DC.
Association of Towns and Townships. Tom Haliki, Executive Director, NATaT, letter to U.S. Senators (April 4, 2002).
- ⁴ Environmental and public interest groups that oppose investor-state arbitration or call for “no greater rights”:
Sierra Club. The club asserts that “The problem with NAFTA’s Chapter 11 investor suit rules has not been fixed in CAFTA.” Sierra Club, *NAFTA’s corporate investor rights and their threat to the environment*, and *The Problem with NAFTA’s Chapter 11 Investor Suit Rules Has Not Been Fixed in CAFTA*, 2004, both available at

http://www.sierraclub.org/trade/nafta/corporate_investor.asp (viewed May 10, 2009).

Earthjustice. Earthjustice lawyers have filed amicus briefs in NAFTA arbitrations that challenged California laws: "This is not what California was promised when NAFTA passed." Comments of Martin Wagner, Earthjustice, in release, "New Study Analyzes Seven Years of Corporate Investor Challenges to Democratic Governance and State Sovereignty Under NAFTA" (September 4, 2001), available at <http://www.commondreams.org/news2001/0904-08.htm> (viewed September 6, 2008); see, also Human Rights and the Environment, Case Study: Gold Mining on Native American Tribal Lands (September 9, 2005) available at http://www.earthjustice.org/our_work/issues/international/human_rights/case-studies/gold_mining_on_native_american_tribal_lands.html (viewed September 6, 2008).

Friends of the Earth – US. FOE, *Glamis Gold: A Case Study of Investing in Destruction* (2004), available at www.foe.org/camps/intl/greentrade/glamis.pdf (viewed September 6, 2008).

National Wildlife Federation. NWF, Testimony of Mark Van Putten, President and CEO, National Wildlife Federation, Before the Committee on Finance, United States Senate, On Trade Promotion Authority (June 20, 2001) at 2, available at www.senate.gov/~finance/062001mvtest.pdf (viewed September 6, 2008).

Public Citizen. Public Citizen's Global Trade Watch, *NAFTA Chapter 11: Corporate Cases*, available at http://www.citizen.org/trade/nafta/CH_11/ (viewed September 6, 2008).

- ⁵ See Kate Miles, *International Investment Law and Climate Change*, Society of International Economic Law, Working Paper No. 27/08 (2008), available at <http://www.ssrn.com/link/SIEL-Inaugural-Conference.html> (viewed August 24, 2008); Jacob Werksman, Kevin A. Baumert and Navroz K. Dubash, *Will International Investment Rules Obstruct Climate Protection Policies? An Examination of the Clean Development Mechanism*, 3 *International Environmental Agreements: Politics, Law and Economics* 59 (2003).
- ⁶ In 2008, Senator Obama pledged: "I will ensure that foreign investor rights are strictly limited and will fully exempt any law or regulation written to protect public safety or promote the public interest. And I will never agree to granting foreign investors any rights in the U.S. greater than those of Americans." Pennsylvania Fair Trade Coalition, 2008 Presidential Candidate Questionnaire, answer of Sen. Barack Obama, question 10, available at http://www.citizenstrade.org/pdf/QuestionnairePennsylvaniaFairTradeCoalition040108FINAL_SenatorObamaResponse.pdf (viewed August 24, 2008); reiterated in letters to Fair Trade Coalition in Texas, Iowa, Wisconsin, and Pennsylvania; see <http://www.citizenstrade.org/positions.php>. Senator Obama agreed to renegotiate these provisions in NAFTA but he did not agree to "renegotiate" these provisions in other more recent trade agreements.
- ⁷ See House Ways and Means Committee Report 108-597, United States-Australia Free Trade Agreement Implementation Act, 108th Congress 2nd session (July 12, 2004) 4 -5; Summary of the U.S.-Australia Free Trade Agreement, Important New Protections for U.S. Investors (February 8, 2004), available at http://www.ustr.gov/Document_Library/Fact_Sheets/2004/Summary_of_the_US-Australia_Free_Trade_Agreement.html?htf= (viewed May 10, 2009) ("In recognition of the unique circumstances of this Agreement – including, for example, the long-standing 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 this FTA that would allow investors to arbitrate disputes with governments.").
- ⁸ Between 2002 and 2007, Korean investments grew from \$3 to \$13 billion, with \$9 billion of that in wholesale distribution companies. U.S. Bureau of Economic Analysis, *Foreign Direct Investment in the U.S., Foreign Direct Investment Position in the United States on a Historical-Cost Basis, by Country and Industry: Korea*, available at <http://www.bea.gov/international/> (viewed May 10, 2009).
- ⁹ USTR, *National Trade Estimate, Korea, Investment Barriers*, 315-316.
- ¹⁰ Government Accountability Office, *Large U.S. Corporations and Federal Contractors with subsidiaries in Jurisdictions Listed as Tax Havens or Financial Privacy Jurisdictions*, GAO-09-157 (December 2008), available at <http://www.gao.gov/products/GAO-09-157> (viewed May 10, 2009); CRS, *Panama: Political and Economic Conditions and U.S. Relations*, (updated November 16, 2006), available at <http://fpc.state.gov/documents/organization/77706.pdf> (viewed May 10, 2009); U.S. Drug Enforcement Administration, "Panama: Country Brief," (May 2005) 12.
- ¹¹ Panama Legal, *Frequently Asked Questions*, available at <http://www.panamalaw.org/faq.html> (viewed May 10, 2009).
- ¹² Panama TPA, art. 10:12(2).
- ¹³ Albert Keidel, *China's Economic Rise – Fact and Fiction*, Carnegie Policy Brief 61 (July 2008), Table 2 at 6.
- ¹⁴ Between 2002 and 2007, Chinese investments grew from \$400 million to \$1.1 billion, with \$850 million of that in wholesale distribution companies. U.S. Bureau of Economic Analysis, *Foreign Direct Investment in the U.S., Foreign Direct Investment Position in the United States on a Historical-Cost Basis, by Country and Industry: China*, available at <http://www.bea.gov/international/> (viewed May 10, 2009).
- ¹⁵ CRS, *China's Holdings of U.S. Securities: Implications for the U.S. Economy* (January 9, 2008) 3.

- ¹⁶ See Curtis J. Milhaupt, *Is the U.S. Ready for FDI from China? Lessons from Japan's Experience in the 1980s*, Investing in the United States, A reference series for Chinese investors, Volume 1, Deloitte and the Vale Columbia Center on Sustainable International Investment (2008).
- ¹⁷ U.S. Bureau of Economic Analysis, U.S. Net International Investment Position at Yearend 2007, available at <http://www.bea.gov/newsreleases/international/intinv/intinvnewsrelease.htm> (viewed May 10, 2009).
- ¹⁸ Counter-Memorial of United States of America, 11-12 and 35-37 (September 19, 2006); Mary Bottari and Lori Wallach, NAFTA's Threat to Sovereignty and Democracy: the Record of NAFTA Chapter 11 Investor-State Cases 1994-2005, Public Citizen, 52-55 (February 2005); Friends of the Earth, "Glamis Gold: A Case Study of Investing in Destruction," Briefing Paper, 2 (August 2003).
- ¹⁹ Glamis Gold, Notice of Arbitration, December 9, 2003, <http://www.state.gov/s/1/c10986.htm> (viewed May 9, 2009).
- ²⁰ Counter-Memorial, at 19-22; FOE at 3.
- ²¹ Office of the Governor, Press Release, "Governor Davis Signs Legislation to Stop Proposed Gold Mine Near "Trail of Dreams" Sacred Site," (April 7, 2003), available at http://www.governor.ca.gov/state/newgov/govsite/gov_htmlprint.jsp?BV_sessionID=@ (viewed May 10, 2009).
- ²² Transcripts, submissions, and tribunal orders in *Glamis Gold v. United States* may be found at <http://www.state.gov/s/1/c10986.htm> (viewed May 9, 2009).
- ²³ Counter-Memorial, at 19-22. FOE at 3.
- ²⁴ Glamis Gold, Ltd., Company history, available at <http://www.fundinguniverse.com/company-histories/Glamis-Gold-Ltd-Company-History.html> (viewed May 10, 2009).
- ²⁵ "In the late 1990s, however, the use of the land as a sacred site was even further threatened. Glamis Gold Ltd., a Canadian gold mining company, established an American subsidiary, Glamis Imperial, in order to claim the right to petition the US Government for permission to develop the federal land. Under the General Mining Law of 1872, United States citizens (or corporations) are allowed to perform open mining operations on federally owned land with a permit from the BLM." The Pluralism Project, Research Report: Indian Pass, CA (Quechan), Harvard University (2004), available at <http://pluralism.org/research/profiles/display.php?profile=73418> (viewed May 10, 2009).
- ²⁶ News release, "Glamis Shareholders Overwhelmingly Approve Combination with Goldcorp," (October 26, 2006), available at <http://www.goldcorp.com/news/glamis/2006/> (viewed May 10, 2009).
- ²⁷ NAFTA art. 1105:1.
- ²⁸ Memorial of Claimant Glamis Gold Ltd., ¶ 534, p. 298-299, available at <http://www.state.gov/s/1/c10986.htm> (viewed May 9, 2009). Glamis also argues that "fair and equitable treatment includes a good faith obligation to protect legitimate expectations of an investor through establishment of a transparent and predictable framework," and that "the fair and equitable treatment standard has also been recognized as requiring the protection of legitimate investment-backed expectations." Memorial at ¶ 532, p. 297.
- ²⁹ *CMS Gas Transmission Co. v. Argentine Republic*, 44 International Legal Materials 91, ¶¶ 274, 269, 281; *Tecmed v. United Mexican States*, ICSID CASE No. ARB(AF)/00/02 (May 29, 2003) ¶153; *Metalclad v. Mexico*, ICSID Case No. ARB(AB)91/1, ¶7; *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7(award)(Jan.25,2000) ¶ 83; *Waste Management v. United Mexican States*, ICSID Case No. ARB (AF)/00/03(Award) (August 30, 2000) ¶ 98; *Loewen Group v. United States*, NAFTA/ICSID(AF) Tribunal, Case No. ARB(AF)98/3, Final Award, 26 June 2003, ¶ 135.
- ³⁰ Counter-Memorial of Respondent United States of America, in *Glamis Gold v. USA* (September 19, 2006) 221.
- ³¹ *Id.* at 226, 232.
- ³² *Id.* at 231.
- ³³ See Panama FTA, art. 10.5; 2004 Model BIT, art. 5 and Annex A.
- ³⁴ See generally Matthew C. Porterfield, *An International Common Law of Investor Rights?* 27 U. Pa. J. Int'l Econ. L. 79 (2009).
- ³⁵ The operative phrase is: "... having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government." " Emergency Economic Stabilization Act of 2008, 12 U.S.C. § 5202(5).
- ³⁶ Todd Tucker, The Trade-Policy Blindspot in the U.S. Financial Crisis Response, Paper for IDEAS Conference on Re-Regulating Global Finance in the Light of the Global Crisis, Tsinghua University, Beijing (April 10, 2009), 15, Pew Charitable Trusts, Subsidy Scope, available at <http://www.SubsidyScope.org/> (viewed May 10, 2009); U.S. Public-Private Investment Program, Memorandum from Cleary Gottlieb Steen & Hamilton LLP to clients and other friends of Cleary Gottlieb (March 26, 2009), available at <http://www.cgsh.com/files/News/f1440266-4e85-40a6-836c->

[5681541ef3be/Presentation/NewsAttachment/7954a2e7-d6b9-45c8-8703-5758c364369a/Alert%20Memo_%20Public-Private%20Investment%20Program.pdf](http://www.cgsh.com/files/News/f1440266-4e85-40a6-836e-5681541ef3be/Presentation/NewsAttachment/7954a2e7-d6b9-45c8-8703-5758c364369a/Alert%20Memo_%20Public-Private%20Investment%20Program.pdf) (viewed May 10, 2009); see also U.S. Public-Private Investment Program, Memorandum from Cleary Gottlieb Steen & Hamilton LLP to clients and other friends of Cleary Gottlieb (March 26, 2009), available at http://www.cgsh.com/files/News/f1440266-4e85-40a6-836e-5681541ef3be/Presentation/NewsAttachment/7954a2e7-d6b9-45c8-8703-5758c364369a/Alert%20Memo_%20Public-Private%20Investment%20Program.pdf (viewed May 10, 2009).

³⁷ Tucker, *supra*, at 16; Cleary Gottlieb, *supra*, at 3.

³⁸ *Saluka Investments BV v. Czech Republic*, UNCITRAL, Permanent Court of Arbitration, Award (Mar. 17, 2006), ¶ 39, available at <http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf> (viewed May 11, 2009).

³⁹ *Id.* at ¶ 83.

⁴⁰ *Id.* at ¶ 498.

⁴¹ *Hearing on Confirmation of Mr. Ronald Kirk to be United States Trade Representative*, 111th Cong. 70 (2009) (Question 18 from Sen. Stabenow, answer from Mr. Kirk).

⁴² The operative phrase is: “. . . a Party shall not be prevented from adopting or maintaining measures for prudential reasons Where such measures do not conform with the provisions of this Agreement . . . , they shall not be used as a means of avoiding the Party’s commitments or obligations” Model BIT 2004, art. 20:1; U.S.-Peru TPA, art. 12:10(1); U.S.-Singapore TPA, art. 10:10(1). The same language is used for the prudential exception in GATS. GATS Annex on Financial Services 2(a).

⁴³ Several commentators analyzed the parallel prudential exception in the GATS Understanding on Financial Services: Bart De Meester, Testing European Prudential Conditions for Banking Mergers in the Light of Most Favoured Nation in the GATS, 11 J. INT’L. ECON. L. 609, 644 (2008); Joel P. Trachtman, Transatlantic Regulatory Cooperation from a Trade Perspective: A Case Study in Accounting Standards, in TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 223, 237 (George A. Bermann et al. eds., 2000).

⁴⁴ Several commentators analyzed the parallel prudential exception in the GATS Understanding on Financial Services: See De Meester, *supra*, at 644 (burden on claimant). *But see* Trachtman, *supra* note 31, at 237 (silent on who bears burden). Given that the main concern of the WTO is to eliminate perceived burdens to trade liberalization, and the fact that it is usually the respondent who bears the burden of proof under GATT, it seems unlikely that the burden should be shifted under GATS. See Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, AM. U. J. INT’L L. & POL’Y 751, 778 n.169 (1994).

⁴⁵ Several commentators analyze NAFTA art. 1114, which says that countries may adopt “any measure otherwise consistent” with the agreement: David A. Gantz, Some Comments on NAFTA’s Chapter 11, 42 S. TEX. L. REV. 1285, 1296-97 (2001); Robert K. Paterson, A New Pandora’s Box? Private Remedies for Foreign Investors Under the North American Free Trade Agreement, 8 WILLIAMETTE J. INT’L L. & DISP. RESOL. 77, 105 (2000); Todd Weiler, A First Look at the Interim Merits Award in *S.D. Myers, Inc. v. Canada: It Is Possible to Balance Legitimate Environmental Concerns with Investment Protection*, 24 HASTINGS INT’L. & COMP. L. REV. 173, 181-82 (2001); see Chris Tollefson, Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime, 27 YALE J. INT’L L. 141, 152 (2002).

⁴⁶ NAFTA art. 1410(1).

⁴⁷ Costas Paris, “Singapore GIC Said to Favor Keeping Citi Preferred Shares,” Wall Street Journal (February 27, 2009); Costas Paris, “GIC Weighing Its Options on Citigroup Investment,” Wall Street Journal (March 6, 2009).

⁴⁸ See, e.g., Equitable Treatment: “Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party.” Treaty of Friendship, Commerce and Navigation, Dec. 12, 1956, U.S.-Den., Art. I, 12 U.S.T. 908. The United States has FCNs with the following OECD countries: Denmark, Greece, Germany, Ireland, Italy, Japan, Korea, Netherlands, available at http://tec.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp (viewed May 10, 2009). See also Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT’L L. 775, 780 (2008); Won-Mog Choi, *The Present and Future of the Investor-State Dispute Settlement Paradigm*, 10 J. INT’L ECON. L. 725, 731 (2007); Kenneth J. Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT’L L. J. 201, 207 (1988).

⁴⁹ The Court stated that a FCN treaty “stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.” *Asakura v. City of Seattle*, 265 US 332, 341 (1924).

⁵⁰ GATS art. II; See Rudolf Adlung and Martin Molinuevo, *Bilateralism in Services Trade: Is there Fire Behind the (BIT)-Smoke?* WTO Staff Working Paper ERSD-2008-01, 18-19 (January 2008).

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- ⁵¹ Richard Wray, "Revealed: how sovereign wealth funds were left nursing multibillion losses," *The Guardian*, (March 22, 2008) 44, available at <http://www.guardian.co.uk/business/2008/mar/22/banking.investmentfunds> (viewed May 10, 2009).
- ⁵² USTR stated in a fact sheet, "Nothing in NAFTA's investment provisions prevents a country from adopting or maintaining non-discriminatory laws or regulations that protect the environment, worker rights, health and safety, or other public interest. The United States has never lost a challenge in the cases decided to date under NAFTA, nor paid a penny in damages to resolve any investment dispute. Even if the United States were to lose a case, it could be directed to pay compensation but it could not be required to change the laws or regulations at issue."
- ⁵³ There is considerable speculation about why the United States has not lost any NAFTA cases, including open discussion by arbitrators about the pressures of deciding claims against the United States. *See, e.g.*, David Schneiderman. "Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes" *ExpressO*, (2009), available at: http://works.bepress.com/david_schneiderman/1 (viewed May 10, 2009) ("Not so easily explained are conflicting tribunal awards drawing on virtually identical facts, invoking the same treaty text, where arbitrators seemingly change their mind from one case to the next without any explanation.")
- ⁵⁴ Remarks of Judge Abner Mikva, Symposium: The Judiciary and Environmental Law, Panel on Trade, the Environment and Provincial/State Courts, Pace University School of Law, White Plains, New York, (December 7, 2004) (transcript on file with author).